

## **'Mediation Works' Symposium**

*Royal Hospital, Kilmainham  
Tuesday, 27 May 2008*

### ***Panel Discussion 2: Mediation Works – in Civil Communities***

#### **Dr. Carol Coulter, The Irish Times**

Thank you, Aine. And first I want to completely endorse one thing she [Aine Lawlor] said, which is that people come to journalists when things go wrong. And while I think I always knew this my time in the family law courts brought home to me very sharply how difficult it is to form an accurate view of what happens in family law on the basis of stories which are published in newspapers by individual journalists for two reasons. First, the very obvious one, that the people relatively satisfied with the outcome of their family law dispute are not going to speak to a journalist about it. And secondly, and I think that this is even more dangerous. The fact that people who do then go to a journalist claiming they have been badly done by in the courts are representing just their side of the story. And it will be virtually impossible to obtain the other side, both because it is in breach of the in camera rule, of course, and also it is highly unlikely that two participants in a family law dispute are going to want to speak to the same journalist. So that's by way of a health warning in terms of the reports that people might read and a lot of what I have described as anecdotal discussion about family law which has taken place in our media, giving I think quite a misleading impression as to what actually happens, which is not to say that some people end up very unhappy. And some of them justifiably unhappy in my view with the outcomes of their disputes for reasons which we can perhaps discuss later. I want to quote briefly from a very good book on mediation, Family Mediation in Ireland by Sinead Kennealy, when she said, "Substantial evidence testifies to high rates of user satisfaction across all forms of family mediation and across jurisdictions. Mediation also seems to be associated with higher rates of compliance than adjudication, with high rates of settlement and compromise. And it may be more appealing to the divorcing population in terms of cost. Although the jury is still out on that question." This seems to be a compelling argument indeed for the use of mediation. However, I had a look at the figures that are involved both in mediation. Now this is the publicly funded mediation obviously, the only one for which figures were available, and the courts, in the course of the project. And the figures for 2006 were as follows: 1,494 couples sought the assistance of the family mediation service, of whom 875 went on to participate in the mediation process. Of these, I will give you percentages rather than loads of figures which in any case, you know, are just indicative. 56% reached agreement. 6% returned to their marriages. And 38% did not complete the mediation process. However, in the course of an interview with Mary Lloyd of the MF...the Family Mediation Service, she told me that in follow up interviews many of these couples said the mediation process, although it didn't lead to a successful conclusion, it did help them clarify the issues they needed to resolve by seeking the legal route. Now

mediation is available for use in relation to legal separation or divorce. If an agreement is negotiated in relation to divorce it can be finalised in the Circuit Court or indeed the High Court. And the terms of a separation agreement can subsequently be imported into a consent divorce and made a rule of court. Mediation can also be used in cases involving custody of and access to children and to maintenance. These are matters which go to the District Court. So across all those three court jurisdictions in relation to family law there are a large number of areas which are amenable to mediation. Therefore the 300...sorry 875 couples who sought the services of the Family Mediation Service in 2006, I think, needs to be seen in the context of 20,900 family law applications in the District Court. Almost 6,000 in the Circuit Court, and then 90 in the High Court. A total of 26,826 applications in the areas of family law in 2006. Even if we accept that a number of these applications, especially in the District Court, relate to the same dispute where parties are looking for custody of children, maintenance, perhaps access. On the other side there might even be a domestic violence application. So the same actually the same family and the same dispute can generate a number of applications. Even allowing for that the number who use the mediation service is only a drop in the ocean, about 3% of all the applications that went to the courts. There are no figures available for the use of private mediators in family law. However, I would be very surprised if that affected those overall proportions because a lot of them would be used in coming to mediated separation agreements which don't end up in the courts anyway. Now the limited use of mediation is something we...we might I think usefully consider. And it could be for a number of reasons. There is no obligation to undergo any mediation before having recourse to the courts in this jurisdiction. Although for example in Scotland there is particularly in relation to children. It is not possible for a couple to ask the courts to decide on issues relating to children without first having gone through a process with a child specialist which allows people to ...assists people to come to an agreement about the welfare of children. It is also true that some legal practitioners have concerns about the quality of the mediation available in certain areas and fear that their clients' rights might not be upheld during the mediation process. And I think that's why the whole issue of the standardisation of standards, the ...ensuring that everybody is properly qualified and that there is regulation of the mediator's profession is so important. And I think we shouldn't ignore the fact that a client opting for mediation is a client lost to a solicitor, or potentially lost to a solicitor. And that may have a bearing on the extent to which solicitors encourage their clients to seek a mediated settlement. However, unpublished research carried out by researchers linked to the Family Mediation Service found that the public and the legal professions lacked information about mediation and what it can do. And that in itself contributed to it not being used more. There is also a resource issue. The Family Mediation service was offered rooms in Phoenix House and Dolphin House. They are the two Family Law Centres for the Circuit Court and the District Court respectively in Dublin, but didn't have the resources to be able to take up these offers. And I think them being physically in the same place could be crucially important in terms of access to such a service. If there was a greater demand for the service there would, of course, be a stronger case for greater resources. So

you have had a cyclical lack of information, lack of enthusiasm about mediation amongst solicitors, and then lack of resources feeding off each other to keep the numbers small. It was clear, however, that when our Family Law Legislation, our most recent legislation came into being, it was the intention of the legislature that mediation should play a role in the resolution of family disputes. Because Section 6.2 of the Family Law Divorce Act specifies that a solicitor should draw the attention of a client to mediation as an option in relation to the resolution of the dispute. However, I think it is an open secret that this particular section receives only perfunctory attention in the vast majority of cases. And in...certainly a number of the judges that I spoke to were extremely sceptical again about the enthusiasm with which this section was drawn to the attention of clients in...in family law situations. Despite the absence of mediation it is also a fact that 91% of cases...I took a block of about 10% of all the family law in 2006 which is a very large sample. I went through all of the files in the Circuit Courts for October 2006 and came...and found that 91% of those cases had actually settled without going to a hearing. So it is possible to achieve settlements. And the question therefore is, how many of those might perhaps be mediated. That was just in the Circuit Court. The District Court hears the bulk of family law applications, almost 21,000. And in the District Court as well there are a lot of issues that I think would benefit from mediation. However, there is a challenge to consider how mediation can be combined with the work of the courts. Any mediator, there is loads of mediators in this room, and I think they probably all agree on the fact that you can't compel people to mediate. Because if people are forced to attempt to mediate then it just doesn't work. However I don't think that finishes the question. I think you can certainly compel people to inform themselves about mediation. You could have a compulsory information session before any application would be accepted by the courts. And you could also have compulsory mediation sessions on specific topics, for example, in relation to the welfare of children, without ...obviously you can't enforce an agreement or an agreed outcome. But could...you could at least force people to participate in a process where certain things were explained to them, even the basic issues of law that children have access...have the right of access to both parents for example, which is not accepted by a lot of people until the judge actually points it out. Quite a lot could be done in terms of ensuring that people at least are informed about the extent to which they can...they can negotiate and how they may do so. Then there is the question of the courts referring people to mediation. The legislation actually does provide for a judge to adjourn a case, a family law case, and ask people to seek the services of a mediator. I have never seen it happen, in all the cases I attended in the...in that year, not once. What I have seen ....there is one particular Circuit Court judge who I think is...is particularly enthusiastic about family law and I...I think myself was quite skilled. He would often adjourn cases, and he would say, what I have in mind here is to do x, y and z. Now maybe you would like to go and think about that and talk about it. So more or less he was acting as a mediator. And perhaps at a certain point judges could indicate what their thinking is, what will not be acceptable, what they will certainly...what requests they will not accede to. And then allow people to adjourn either for negotiations or for negotiations within the framework of

mediation. And then finally I think there is a need and I think the courts are taking this up, because I was very pleased with the response of the Court Service Board to the report. They want to take up as many recommendations as possible. And that is greater use of case management. Where instead of a statement of claim and pleadings being sort of flung into the process with the very extreme language in which they are couched, which I think in itself is an inflammatory aspect of family law proceedings at the moment. And then a defence is flung in with equally extreme language denying everything in the first thing and...and counterclaiming to the maximum. And people then sit around and wait for their hearing date, generally speaking. And quite often if they do negotiate at all they do so on the steps of the court and you will have people with...arriving for cases meant to go on at 10 o'clock. There are a few adjournments of...or there are a couple of motions. Their...their name is called and they will say we are talking My Lord. So they go off and they come back at 2 o'clock...we are still talking. And in fact one of my experiences in the project was that of drinking gallons of tea with the poor judges who were endlessly adjourning cases, wasting their time and the court's time and court resources, while people were carrying out negotiations and discussions that should have taken place months and months and months earlier. And I think, you know, it is a terrible indictment of the system that that was the way things were...were happening. With proper case management first a minimum number of mediation sessions could perhaps be incorporated at a very early stage, and secondly, the County Registrar or whoever is responsible for doing that case management, I think there is a linguistic trick where it is called case progression of a...if a County Manager does it. Because only judges are permitted to case manage. But the County Registrar proceeds with their case progression which has been happening on a pilot basis in a couple of counties. It so happens that the County Registrar who has gone furthest with this pilot project, and I think done it very effectively, the Limerick County Registrar, Pat Meegan, is himself a trained mediator. And I sat in on some of his case progression sessions. And in fact one of the...you know, it was clear that the skills of mediation is one of those that he brought to bear on seeking to isolate the issues that would eventually go for trial, where it was obvious that a number of the issues could in fact be settled without going to court at all. So essentially I think, you know, a bit more joined up thinking in this area as in so many others in our overall public administration system is what is needed. So that there is a holistic view of the process. And there will always be cases where ...there will be cases and there will be issues which cannot be mediated away. I mean there is no doubt there are going to be always difficult and intractable questions which can and should go to the courts. But the way it is happening at the moment with so much discussion and negotiation on the steps of the court at the very last minute. A case is part heard and then it is adjourned, and then there are talks, and then there is an agreement. It is an enormous waste of resources. And it ...settlements are still coming out about 91...91% of the time. But it perhaps could be more. And if it isn't more it could certainly be done much much more efficiently and effectively by interventions at a much earlier stage, by information being made available to people, both what their expect...about realistic expectations and about the mechanisms that can exist to produce a negotiated ...a negotiated

solution. So I think I have run out of time. Thanks.

### **Aine Lalor**

Yes, thank you, Carol. [applause] Just before I go to Ken Murphy, does...does anyone have any questions for Carol at this particular stage, just on...on foot of anything she just said there? No, you will wait...when...when you say there needs to be greater use of ...of case management, how would that come about?

### **Carol Coulter**

Well there is...in...in fact that is....that has begun again. The rules of court had to be changed. And this has, I understand, now taken place. There had to be even a small change in the legislation because...for just technical reasons I won't dwell on really. The County Managers have...sorry, the County Registrars, their role is very defined in legislation and they couldn't do anything outside their own county boundaries, which meant ....one of the big hold ups for the whole thing is that the Dublin County Registrar, as you can imagine, is enormously busy running the courts, and couldn't take on extra jobs. There are County Registrars elsewhere who are not nearly so busy. And the law had to be changed to allow them to do some family law case management or case progression in and around Dublin. That has now been done. And I am not quite sure where the process is at. But the ...you would have the parties...or will have the parties who...first attend one or two or even more sessions with the County Registrar who has got power under the legislation, also to make a number of orders. For example, they can make certain property related orders. They can ...you can have an agreement on things like one auctioneer to value a property, rather than everyone turning up kitted out with their auctioneers for both sides who disagree by about, you know, €10,000 on what the value of the house might be. And by...through a process either in an informal process in the County Registrar's rooms or in a court where the County Registrar then does make a certain number of orders relating to discovery if it is necessary, relating to certainly property matters. You get to a stage so that when you come before the judge the judge is just hearing the arguments on one or two issues. Other things...or...and or is not having to deal with endless adjournments to go off and get documents and so on. I mean that...to cut out an awful lot of that preliminary stuff. And I think that that is something which can and should synchronise with issues on mediation. Because we are looking at...I think we have to look at a...a holistic picture of the whole thing, starting with mediation, weeding out as many as possible of cases by mediation, by collaborative law, through isolating issues. And then perhaps once the issues are isolated there can be negotiation between people's legal representatives on the very difficult issues. Those which can't be resolved can then go to a judge. And it was...it would be a far more

efficient use of the court resources as well.