# Mediation in contentious probate and Inheritance Act disputes

# How to maximise the potential

## Anna Metcalfe – NCPG Webinar 26.01.21

**The 5 P's**

1. "Proper preparation prevents poor performance". The effectiveness of a mediation often lies in the preparation. Make sure that you have the key information to enable a compromise.

2. In estate claims this is most obviously up to date estate accounts. These need to include at least an estimate of the costs of administration to date, and should clearly set out the current Inheritance Tax position. Consider whether you have or need any valuations of key assets. In Inheritance Act cases, you often need an idea of how much it is going to cost your client to obtain alternative accommodation. Alternatively, as Defendant, consider obtaining some valuations of properties you think may be suitable for the Claimant. Having these up your sleeve is far preferable to plucking figures from the air on the day itself.

3. Consider your current costs position, what your costs are including the mediation and how much of these costs have already been settled by your client. This makes it easy to explain any offers at mediation in terms of what the client will actually walk away with in their pocket.

4. Review whether there are any items of outstanding disclosure. Think carefully about whether or not these will have a real impact on the possibility of settlement, and chase those that do. For example, a party's outline financial position in an IHA claim is key and reflects directly on merits. Yet 100's of pages of bank statements are in reality unlikely to be trawled through or make a difference to the outcome at this stage. A mediation can still be effective even if a full disclosure exercise has not been undertaken.

5. Consider having a pre-mediation meeting with your client. At a mediation you are effectively paying for perhaps 4 (potentially a lot more) different lawyers to attend, as well as a mediator. Any time you spend with your client getting up to speed, is expensive time. If counsel has not previously been instructed, consider obtaining an opinion on merits before the mediation together with suggested settlement parameters. A short meeting can also highlight some pre-mediation issues that need dealing with (such as valuations/disclosure). Consider discussing whether there are likely to be any sticking points at mediation. Often there are things which are very important to clients which bear little relation to merits, and can stay hidden until late in the day at a mediation and potentially derail it. Is there a particular weight attributed to Grandma's wedding ring? Does one of the parties simply want recognition for significant care provided to the Deceased? Does one party want control of the memorial? Identifying these sticking points in advance means they can be discussed in a less pressurised environment and addressed early in a mediation or used as concessions. Ask your client directly exactly what it is they want to achieve – you may be surprised that money isn't always their top priority.

**The parties**

6. It almost goes without saying that all the parties who need to sign an agreement need to be in attendance. However this is not always quite so clear cut in probate cases. As already mentioned, mediation is an expensive process so if any costs can be saved by a party not having to attend then this is worth thought in advance.

7. Often there are defendants who have filed an acknowledgment of service stating they do not intend to defend the claim. However, unless their entitlement remains completely unchanged by a compromise, they do need to sign. They can be approached in advance seeking an agreement that if they are not made liable for any costs, they agree to relinquish/reduce their entitlement for the purposes of mediation. Or they can give authority to an executor to compromise the matter on their behalf (with appropriate indemnities).

8. Similarly, sometimes there are a list of beneficiaries in a will all with a relatively minor entitlement (a common case is grandchildren, receiving, for example, £5000 each), who may not necessarily yet be Defendants. Depending on the size of the estate it may be that it can be agreed in advance to

ringfence these entitlements. Alternatively, instead of everyone attending, a representative could be appointed.

9. Another consideration is a neutral executor who is not also a beneficiary. It may be possible for them to avoid attending if they are able to consent to any form of compromise in advance, however it is useful to have them at the end of a telephone line in the event of any missing information on the day. If you are acting for an executor or trustee, be wary of compromising claims on behalf of beneficiaries (even though technically within your powers – s.15 Trustee Act 1925) without the appropriate authority and indemnities. The true defendants to a claim are always the beneficiaries.

10. If you are doing a remote mediation, consider discussing with your opposing party in advance what form of signature will be acceptable on the day.

**What might a settlement might look like?**

11. There is nothing worse than getting to 7pm on the day of mediation and having to draft a settlement agreement cold. It is always a good idea to consider in advance, including a preliminary draft, the most likely structure of a settlement. In probate matters it isn't always the case that a simple contract will do once the validity of a will has been brought into question. Thought needs to be given to the following matters:

    a. Do you need a common form or solemn form grant? Which will do you want admitting to probate? The answer to these questions is crucial and will instruct which type of compromise you need – whether that be a bog standard settlement agreement, a Tomlin order on terms etc.;
    b. Will you be including a will variation in your schedule to your Tomlin order?
    c. Will you need to ensure any variation qualifies for retrospective tax treatment?
    d. Is it likely that there is going to be a trust? This is often the case with minor or protected parties. What will the trust look like? Who are going to be the likely trustees? Is it going to be purely discretionary or perhaps an 18-25 trust?
    e. In an IHA claim compromised before issue, do you need to issue a claim in order that s.146(8) IHTA can be utilised?
    f. Is your compromise contingent on approval under Part 21? Who is going to make the necessary application and who is going to pay for it. Will you need any timescales?
    g. Are there any representative beneficiaries necessitating court approval (CPR 19.7(5) & (6))?

h. Are any properties likely to be sold – what are the selling terms likely to be? When will possession be given?
i. Do you need to deal with the removal of any outstanding caveats? You might need an order for discontinuance and this needs to be sought by consent.
j. Who is going to apply for a grant?
k. Are there any further steps in the administration that you wish to deal with explicitly?

12. You may feel that the answer to some or all of these questions is obvious, and that you are used to drafting terms that deal with these points. However this doesn't come quite so easily at the end of a long tiring day, and I always think it better to approach them in advance with a fresh head. It is much better to leave a mediation with a binding agreement embodying all terms, rather than leaving the drafting of, say, a trust, to another day.

13. It is also worth considering whether there is likely to be any 'buy out' involved in a compromise. It is much better for your client to consider the possibility and cost of finance in advance of the mediation, rather than making panicked telephone calls on the day. It is also persuasive to be able to present your opponents with clear, realistic and approved finance particulars to show that you are in a position to effect any compromise.

14. Considering and comparing the taxation treatment of various forms of compromise is also important and this is addressed by Sarah Harrison in her presentation. Make sure you have thought about this in advance and have sought specialist advice if necessary,

15. Finally, consider in advance which claims are going to be compromised. Draft "a full and final settlement" clause in advance. Are there claims in the administration that you wish to tie in to a compromise? Don't forget to compromise potential IHA claims as well as validity claims. Are there any estoppel claims that you also want to nip in the bud? In *Pinnock v Rochester* [2011] EWHC 4049 (Ch) it was held that a party who made a claim under the Inheritance Act and accepted payment by way of compromise was not precluded from subsequently challenging the validity of the will.

**Position statements**

16. Try not to simply repeat your statement of case in the position statement and remember that a position statement is not a skeleton argument aimed at a judge. This is an opportunity to appeal directly to the lay party on the opposing side, as they will almost certainly read this document immediately before

or during the mediation, and it may be more accessible to them than pleadings. Remember that it is that person, not the lawyer, who will be making the decisions about settlement.

17. Use this opportunity to persuade your opposing lay client why they should seek to resolve the case. By all means highlight the strengths in your case, with applicable case law if appropriate, however don't forget to address any weaknesses and minimise their impact. If you can, try to help your opponent see the dispute in a different way (or at least understand that there are different ways of viewing the issues). Make it clear what you perceive their risks to be. Be prepared to answer their best points.

18. As a bare minimum, a position statement should always include a statement reflecting a party's willingness to engage with the mediation process and resolve the matter. This goes a long way to setting the tone for the mediation.

**During the mediation**

19. Use the first hour to discuss with your client their parameters for settlement, and importantly explain to them what their worst and best case scenarios are. This can be quite extreme in many probate matters, as validity disputes are "all or nothing" cases. It is also useful to let your client 'get things off their chest' and give them a chance to speak about emotional issues. This can be a cathartic exercise and paves the way later for a more focused and commercially minded approach.

20. Opening sessions with all parties present have become more rare, particularly with the predominance of remote mediations. When counsel are involved there is a tendency for the sessions to turn into an exchange of submissions in order that lay clients feel 'justified' in expending money on counsel. This usually takes the mediation no father and is a waste of time. Advocate only joint sessions can be useful where there is a disagreement of applicable law, or where one party is perceived to have representation who are perhaps not specialists in probate work. They can also be useful in the drafting stage.

21. The first offer can be a critical point in mediations. It is important not to view the first offer in isolation, you need to think several moves ahead and what your destination is. It is tempting to start very strong and make a high (or if Defendant) low offer. However the personalities of the parties involved need to be considered carefully. If your offer is too far outside a realistic 'settlement zone' then it can halt momentum and cause further entrenchment. It can also give your own client an unrealistic view of what they are likely to achieve at mediation. If you find that your own client is the one who is

entrenched and is struggling to make any moves, make use of the mediator who can assist you in formulating an offer.

22. If your client is reluctant to make the first offer, explain that this is an opportunity to take control of the mediation and frame the settlement in the structure that suits you best. Try to think outside the box, and perhaps suggest a new way of settling the matter that has not been explored in correspondence. Have you considered the potential for a life interest, splitting a larger property into lots, using an overage, payment in instalments?

23. It is also important to consider what things you are going to concede and when. There may be matters which are important to the other side and not to you. This can be who administers the estate, or who chooses the wording for a memorial, for example. You may be aware that the other side needs/wants cash fast, and will accept a lower sum if you are able to provide it in a short timeframe. If you have identified something like this, it is often wise not to concede this issue straight away. Conceding it in the second or third offer may prove a better tactic and save you money.

24. Don't forget to attribute value to the non-financial aspects of a settlement, especially when appealing to your client to move a little farther than they are comfortable. The time it takes to get to trial, the potential to salvage damaged family relationships and not having to air your financial position/your family's dirty secrets in public are the consequences of settlement which have a real, albeit not financial, value to a client.

25. Try to use the mediator to your advantage. Be open with them about your litigation risks, and get them to play devil's advocate in the other room.

26. My final piece of advice is don't call an offer your "best and final offer" unless you really mean it.

**Documenting an agreement**

27. My preference is to have a binding agreement covering all terms, and this is more likely to happen if the correct preparation has been undertaken. A mediation is unique in that you have all parties in attendance and dealing with just one case on the same day. If you only agree some terms, leaving gaps to fill at a later date, time and expense can add up trying to finalise the compromise. There is also always a risk of "buyer's regret" and the whole thing may fall through. If you do have to leave matters outstanding, make sure everyone is clear as to whether or not the heads of terms agreed are binding (beware the cautionary tale of *Abberley v Abberley* [2019] EWHC 1564 (Ch) where heads of terms were held to be a binding contract). It can also be helpful to set timescales

to finalise the outstanding matters. Scheduling a 2 hour meeting/telephone call between the representatives in a week's time might be more cost efficient than 40 emails back and forth trying to finalise wording.

28. If the mediation does not result in a compromise, consider re-stating your final offer as a part 36 offer shortly afterwards.

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