

ELDER MEDIATION AND LEGAL ISSUES

1. Personal introduction of legal, mediation and personal experience, the emphasis being on legal experience for this talk.
2. The intention is to look at what Mediators need to know about the law and why. Why? To make the outcomes Mediators reach more secure. After mediators and parties work hard to find agreement, the last thing needed or wanted is for the agreement to founder on a later legal challenge.

The venue of last resort to resolve disputes will be the COURTS, hence mediators should have:

- a. a broad understanding of the concept of “legal capacity” in their jurisdiction.
&
- b. an appreciation of how lawyers may approach the issues mediators are dealing with, should they become involved.

This approach is not to suggest that a DEFENSIVE practise should be adopted. On the contrary it would be hoped that with such understanding mediators may practice with more confidence and secure more durable settlements. To anticipate the areas which may be most controversial from a legal point of view, will allow those areas to be handled with particular care.

Mediation must operate within the law. Whilst the mediation process presently occurs outside the legal structures of courts, the law prevailing in the relevant jurisdiction applies to the outcome. An outcome which is apparently outside the law, and therefore challengeable is obviously vulnerable.

CONCEPTS

1. CAPACITY

The starting point for adult decision making in the jurisdictions of the Republic of Ireland and the British Isles is the presumption of capacity. However a civilised society must make provision for those who CANNOT make their own decisions otherwise such people would be vulnerable to abuse or neglect.

Societies look for a credible way to assess capacity, but in reality this is a very difficult task to get right. If the balance is wrong:

capable people able to make decisions are denied the opportunity to do so, which is abusive and a breach of human rights

or

incapacitated people who should be protected are not, and consequently left vulnerable.

There is no universally applied test of “capacity” because Capacity should depend on the nature of the decision being taken. The prevailing law on the islands of Britain and Ireland has at best been paternalistic and at worst, crude.

Perspectives:-

It is important to realise that each profession will have a different perspective from which to assess capacity.

The medical profession tends to be primarily concerned with diagnosis and prognosis, rather than the implications of incapacity.

Social workers and care workers tend to focus on independence and levels of competence in performing skills such as dressing eating and communicating.

Lawyers wish to establish if an individual is capable of making a reasoned and informed decision.

All these approaches are perfectly valid for the professional involved, but it must be remembered at the end of the day in the event of dispute, a legal decision as to capacity will predominate. A legal judgement on capacity would normally be informed by medical opinion, particularly if there has been a diagnosis of a condition known to affect one’s ability to reason, such as dementia, but is not solely based on it.

A good lawyer aware of a dementia diagnosis for a person taking a significant legal decision should not only get a medical opinion but should also indicate to the specialist what “act” the particular person is contemplating. The answer to the question whether a patient has capacity will often be “yes” to some things and “no” to others.

How does this translate to Mediation?

Mediators will need to consider:

- a. whether everyone round the table is capable of making decisions
- b. would any agreement or signed settlement be enforceable – not so if a person did not have adequate legal capacity to enter into a contract.

In my opinion it is not the call of the mediator, but it is relevant to you, and you should be aware that it should be addressed.

2. UNDUE INFLUENCE

“Undue influence” is a concept which may be known under a different label in our various jurisdictions, but it will be identifiable. Once aware of it, mediators should watch for its presence, and be alert to its implications.

On this island, whilst the law will not protect people from their own foolishness, it will seek to protect them from being victims of other peoples influence, if this is self serving or disadvantageous to the influenced person.

Often people who are frail or have borderline mental capacity, prefer to have decisions made by others , even though this amounts to influence. It happens in the most honest and open family situations. However where such influence is corrupted , and a transaction is disadvantageous to the influenced person, either financially or in any other way, the courts CAN SET ASIDE a transaction where undue influence has prevailed.

Questions of undue influence rarely arise over innocuous transactions, but it is not at all uncommon for it to arise in respect of a transfer of property or a significant financial transaction, where there is family contention around a person with diminished capacity.

If the outcome of a mediation involves a transaction of significant financial worth, I consider a mediator should consider if he /she is comfortable that undue influence has not been brought to bear?

If you have concerns, the best protection you can encourage, is that that the parties in a mediation who stand to be significantly affected by the outcome, be independently legally advised. Take a break in the mediation process until this can be considered, or indeed, achieved.

Undue influence is a murky, and difficult area. Proving its presence is often very difficult, as a person subject to it, may either be unaware of manipulation, or too frightened to “rock the boat” for a variety of reasons. Allegations of undue influence often arise when one element of a family blames another, whereas the reality is that BOTH are seeking to exert influence .

We are presently experiencing an economic downturn which may well lead to more vulnerable adults being taken advantage of, by impecunious children!!! BEWARE

SPECIFIC LEGAL KNOWLEDGE.

In addition to an awareness of relevant legal concepts, I consider a mediator working in the area of vulnerable adults should have specific knowledge of relevant aspects of the law prevailing in their jurisdiction which affects decision making, just as a family mediator should have a grasp of relevant family law issues.

Delegated decision making is possible in many jurisdictions, but the extent of what can be delegated varies significantly.

In legal terms we tend to group decisions within the following categories.

1. Financial and Property decisions
2. Social and welfare decisions
3. Health decisions.

The delegation of decision making can only happen when a person has the capacity to understand the nature of what he or she is delegating. On this island, North and South, the person delegating is the DONOR and the person to whom the ability to make decisions is delegated, is called an ATTORNEY. There are however significant differences between the Republic of Ireland, Northern Ireland, England and Wales as to WHAT can be delegated.

1. In N. Ireland, only property and financial affairs can be delegated.
2. In the Republic of Ireland, property and financial affairs, AND social and welfare decisions can be delegated.
3. In England and Wales, property and financial, social and welfare, AND health care decisions can be delegated.

Many attorneys themselves may not be not clear on the extent of their power, and can unwittingly, or intentionally hold themselves out to have the ability to participate in a decision which in fact they are not authorised to make. Hence a mediator engaging with an Attorney needs to be satisfied as to the extent of the Attorney's power. This will be set out in the document appointing the attorney (typically and Enduring Power of Attorney or a Lasting Power of Attorney). It would be useful to ask that this be checked to ensure only appropriate representations are made on behalf of a Donor.

In CERTAIN jurisdictions, the document reflecting the delegated power MUST be registered with the registration authority before it is effective. The lesson is to know the law on delegated decision making in the area in which you practise.

LAWYERS AND MEDIATION

Many, indeed the majority of mediations in this area may well be "lawyer free zones". My emphasis on legal issues is not to suggest that their presence is necessary. It is however important to the protection of all parties to a mediation that the person in control of the mediation can recognise when legal input would be valuable or possibly necessary. The quality and the durability of the outcome could depend on it.

In my view, some but not enough lawyers specialise in the area of capacity. I would recommend to mediators that they seek out lawyers in their area who do have this speciality, and develop relationships. Typically a lawyer practicing this area of law is

likely to appreciate the value of a facilitated process to resolve conflicts which are not suited to litigation. The sharing of experience may well have a mutual benefit.

Do remember that mediators have a lot more tools in their box than judges have !

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