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ADR in Inheritance Act Disputes

Introduction

There has in recent years been a growing emphasis on the role of ADR, with the court being increasingly willing to make costs orders based on failures to mediate and more recently in the wake of the Coronavirus Pandemic.

There are no special rules which apply to Inheritance Act disputes however these claims remain eminently suitable to be resolved via ADR given they are often multi party disputes, involving fraught family relationships, and often finite resources which will be greatly affected by legal costs

Accordingly every practitioner will need to familiarise themselves with the following documents:

1. The *Jackson ADR Handbook*
2. The Chancery Guide
3. The Practice Direction- Pre-Action Conduct and Protocols

From these documents it is clear that judges and parties must consider ADR at all stages of litigation with a view to achieving the new Overriding Objective of enabling the court to deal with cases justly and at proportionate cost.

Para. 8 of the Practice Direction on Pre-Action Conduct provides: "*Starting proceedings should usually be a step of last resort... Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR*."

ADR options – Practice Direction paragraph 8.2

The Practice Direction goes on to summarise some of the options for resolving disputes without litigation:

- Discussion and Negotiation
- **Mediation** (a form of negotiation with the help of an independent person);
- **Early Neutral Evaluation** (where an independent person**,** for example a lawyer or an expert on the subject, gives an opinion on the merits of the dispute and now sometimes confusingly used judicially to refer to a quasi- FDR hearing); or
- Arbitration

Mediation does not just mean formal mediation and can include round table meetings whether either only lawyers are present or lawyers and their clients are present and can be set up with varying degrees of formality, remotely or in person.

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THE DIFFERENT FORMS OF ADR

Mediation v Arbitration

Mediation of most inheritance disputes necessitates attendance by parties and their advisors at a mediation for which a day is allowed. Costs will still be modest compared with full-scale litigation (and see particularly guidance below). In very modest and simple cases, perhaps consider time limited mediation.

An alternative to mediation is for the parties to enter a binding agreement to **arbitrate** whereby they nominate an arbitrator of their choice to finally determine the case and avoid court proceedings altogether. The parties are free to design a process that is proportionate and appropriate to their case; they can choose the arbitrator, the timetable, the venue (which can be in comfortable environment such as chambers or a hotel), the level of disclosure and the nature of the hearing and procedure (for example you could decide to dispense with oral evidence if the factual matrix is clear or conduct a joint meeting with an accountant if there are tax issues). An arbitration award is binding and like a court order and is only appealable in certain circumstances and thus it brings finality which is not guaranteed with mediation. Like mediation the parties can decide at any time that they wish to stay court proceedings to arbitrate.

Both mediation and arbitration are voluntary processes however an arbitration is open and binding whilst a mediation is confidential and non-binding.

Early Neutral Evaluation v Financial Dispute Resolution

Early Neutral Evaluation ("ENE") is an alternative approach that is particularly well suited to multiparty family provision claims and cases where there is little or no dispute as to the facts. It is where an independent and impartial evaluator is appointed to give the parties an assessment of the merits of their case. The evaluator was commonly a retired judge or senior counsel. The ENE is non-binding and is entirely without prejudice. ENE can be used as a standalone dispute resolution method or together with mediation. An ENE offers the same advantages as an arbitration. The evaluator will be chosen by the parties and will be a specialist in the area concerned thereby giving confidence to the parties. He or she will be able to dedicate significant preparation time and as much hearing time as is necessary unlike a court FDR where preparation is constrained by other court matters. An ENE will be held in an environment which is more conducive to settlement as opposed to a busy court room. Finally the ENE can be arranged at relatively short notice thereby saving considerable costs.

Whilst an ENE can be voluntary the court has power to order an ENE as part of its case management. This power stems from CPR r3.1(2)(m) which came into effect on 1st October 2015. It states that the court may *"take any other step or make any other order for the purpose of managing the case and furthering the overriding objective , including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case"*.

The CA confirmed in ***Lomax v Lomax [2019] EWCA Civ 1467*** that it might be ordered as part of the case management process as the CPR did not contain an express requirement for the parties to consent and thus consent was not thus required.

A further type of hearing is a **FDR** which is a without prejudice court hearing conducted by a judge who will give an indication to the parties as to the merits of their case. The Judge who conducts the FDR will have no further involvement in the case.

See Chancery Guide on ENE/FDR at 18.7 *et. seq* (2020 ed. P76) particularly:

18.10 There is no one case type which is suitable for ENE. In many cases mediation will remain the preferred form of ADR. Although ENE may be unsuitable for multi-faceted complex claims, if a particular issue lies at the heart of the claim an opinion could help unlock the dispute in a way which a mediator cannot. It is particularly suitable where the claim turns on an issue of construction, an issue of law where there are conflicting authorities or where the case involves the court forming an impression about infringement of intellectual property ("IP") rights.

18.11 The Chancery Division does not have set procedures for ENE. The judge who is to conduct the ENE will give such directions for its preparation and conduct as he considers appropriate. The parties may consider that the judge will be in a position to provide an opinion about the claim or an issue based solely upon written position papers provided by the parties and a bundle of core documents. In many cases, however, it will be preferable for there to be, in addition, a short hearing of up to half a day. The opinion of the judge will be delivered informally.

18.12 Two important points which need to be addressed are as follows:

> *(a) The norm is that the ENE procedure and the documents, submissions or evidence produced in relation to the ENE are to be without prejudice. However the parties can agree that the whole or part of those items are not without prejudice and can be referred to at any subsequent trial or hearing.*
>
> *(b) The norm is that the judge's evaluation after the ENE process will not be binding on the parties. However the parties can agree that it will be binding in certain circumstances (e.g. if not disputed within a period) or temporarily binding subject to a final decision in arbitration, litigation or final agreement*.

Contrast 18:17

18.17 Broadly the key elements of Ch FDR are:

> *a) It is consensual. The court will not direct Ch FDR unless all the parties agree to it.*
>
> *b) There will be a Ch FDR 'hearing', although it is quite unlike any other type of hearing. It is better described as a meeting in which the judge plays the role of both facilitator and evaluator.*

c) Ch FDR is non-binding and without-prejudice. The court will try to lead the parties to agree terms but cannot make a determination.

d) It is essential for the parties, or senior representatives in the case of corporate parties, to be present.

e) The court will carefully set up the Ch FDR meeting by giving directions which will help it be a success. This may include directing the parties to exchange and file without prejudice position papers (and direct what is to be addressed) and to lodge a bundle. If there is an issue which can only be resolved with expert evidence a way may be found to obtain that evidence without commissioning CPR compliant reports.

f) When the meeting takes place the parties are directed to attend before the meeting starts so they may hold initial discussions. The parties are then called in before the judge. The Ch FDR meeting is a dynamic process which has some similarities with an initial mediation meeting. If the parties request it the judge may express an opinion about the issue or the claim as a whole.

g) The court will not retain any papers produced for the meeting or any notes of it.

h) The judge who conducts the Ch FDR meeting has no further involvement with the case if an agreement is not reached.

The advantages of an FDR/ ENE over mediation are:

1. The parties are likely to give the view of a judge or senior barrister more weight than a mediator who is limited as to what he or she can say as to the merits of the case.

2. A FDR/ ENE is particularly useful on cases involving questions of law such as construction of Wills than those involving questions of fact.

3. FDR is particularly helpful for cases where the parties have divergent views and need to hear an indication on the merits.

SANCTIONS

The courts have made clear their willingness to impose costs sanctions whenever a party has acted unreasonably in failing to take part in ADR.

Sanctions are dealt with at para. 16:

16. The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—

(a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;

(b) an order that the party at fault pay those costs on an indemnity basis;

(c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;

(d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.

Unreasonably refusing or ignoring an offer to mediate is expressly included in the list of possibly non-compliant behaviour (see para. 14).

THE DEVELOPING CASELAW

Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002 the court laid down non-exclusive guidelines for deciding the extent to which the court could use its powers to encourage parties to civil litigation to settle their matters other than by trial.

"(i) The court should not compel parties to mediate even were it within its power to do so. This would risk contravening article 6 of the Human Rights Convention, and would conflict with a perception that the voluntary nature of most ADR procedures is a key to their effectiveness.

(ii) Nonetheless the court may need to encourage the parties to embark upon ADR in appropriate cases, and that encouragement may be robust.

(iii) The court's power to have regard to the parties' conduct when deciding whether to depart from the general rule that the unsuccessful party should pay the successful party's costs includes power to deprive the successful party of some or all of its costs on the grounds of its unreasonable refusal to agree to ADR.

(iv) For that purpose the burden is on the unsuccessful party to show that the successful party's refusal is unreasonable. There is no presumption in favour of ADR."

Supplementing those statements of principle, the Court of Appeal adopted and explained a non-exclusive list of factors likely to be relevant to the question whether a party had unreasonably refused ADR proffered by the Law Society (which had intervened)

(a) The nature of the dispute;

(b) The merits of the case;

(c) The extent to which other settlement methods have been attempted;

(d) Whether the costs of the ADR would be disproportionately high;

(e) Whether any delay in setting up and attending the ADR would have been prejudicial;

(f) Whether the ADR had any reasonable prospect of success.

PGF II SA v OMFS Co. Ltd [2014] 1 WLR 1386

In the case of **PGF II SA v OMFS Co. Ltd [2014] 1 WLR 1386** the CA upheld the decision of a judge to disallow a successful defendant the costs he would have been entitled to when the claimant accepted the defendants Part 36 offer dated 11/4/11 on 10/1/12, the day before trial.

The court relied on the *Jackson ADR Handbook* (supra) and (at para.34):

"*firmly endorsed the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified, by the identification of reasonable grounds*."

The Court of Appeal also (at para.30) expressly commended the advice in the *Handbook* at 11.56 as to how a party who believes he has reasonable grounds for refusing to participate at a given stage and wishes to avoid a costs sanction should behave in response to a request to engage in ADR.

a) do not ignore the request;

b) respond promptly in writing giving clear and full reasons why ADR is not appropriate at the stage based if possible on the *Halsey* guidelines;

c) raise any shortage of information/evidence with proposals as to how that shortage might be overcome;

d) do not close off ADR of any kind and for all time.

The CA further stated: "*as recognised by the weight placed on the judge's decision in the ADR Handbook ... this case sends out AN IMPORTANT MESSAGE to civil litigants, requiring them to engage with a serious invitation to participate in ADR*."

Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No.2) [2014] EWHC 3148 (TCC)

Ramsey J decided that although a refusal to mediate was prima facie unreasonable, it should not result in a costs sanction because of other relevant conduct by the refusing party who made a without prejudice save as to costs proposal. Contrast this with **Lakehouse Contracts Ltd v UPR Services Ltd [2014] EWHC 1223 (Ch)** where again there were conduct issues on both sides.

Laporte v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)

The defendant, who was successful on every substantive issue, was awarded only two thirds of his costs. This was the consequence of the court's finding that the defendant had failed, without adequate justification, to fully and adequately engage in the ADR process, notwithstanding that the outcome of such process was not certain.

Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)

The court found that the defendant had, in all the circumstances, unreasonably failed to engage with ADR. His Honour Judge McKenna added: I am not impressed by their arguments that simply because liability was still in issue and because there was not sufficient information as to the quantification of the loss of profits claim, still less that disclosure had not taken place, an attempt at alternative dispute resolution should not have taken place.

OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195

As Sir Geoffrey Vos, Chancellor of the High Court, stated at para 29 "The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process" and a "blank refusal to engage in any negotiating or mediation process, ... to seek to frustrate a claimant's attempts to reach a compromise solution should be marked by the use of the court's powers to discourage such conduct."

Thakkar v Patel [2017] EWCA Civ 117

The Court of Appeal developed PGF. Here the defendants did not ignore or refuse an offer to mediate, "but they dragged their feet and delayed until eventually the claimants lost confidence in the whole ADR process". Jackson LJ stated: "The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction." The court enumerated the factors that suggested there were good prospects of a successful mediation in this case and ordered the Defendants to pay 75% of the Claimant's costs of the claim and ordered the claimants to pay the defendants costs of the counterclaim.

Simon Kelly v Raymond Kelly (2020)

The parties (father and son) had attempted to resolve their case by mediation on two occasions. Each time the Claimant had failed to honour the mediation agreements and so the Defendant refused a third attempt at mediation. The court found that the Defendant's refusal was understandable and reasonable given the risk of further broken promises and awarded him his costs on the indemnity basis as claimed.

DSN v Blackpool Football Club Limited (2020)

The Claimant said that they were unwilling to engage in ADR maintaining its defence and denying liability. The Claimant had made 3 part 36 offers one of which he beat. The trial judge awarded costs against the defendant on the indemnity basis not just from the date of the part 36 offer but the previous two months because of the Defendant's unreasonable refusal to engage in negotiations.

The most recent decision in the case of **Christopher Burgess v Jennifer Penny & anr [2019] EWHC 2034 (Ch)** serves as a useful reminder that the principles applicable to costs in the context of probate litigation are different from the costs of other litigation and the importance of mediation.

The substantive judgment concerned the much publicised dispute between three siblings in relation to the distribution of the estate of their late mother, Freda Burgess. The two sisters, Jennifer Penny and Catherine Kennard alleged that their mother did not have knowledge and approval of the contents of a Will executed in January 2013 bequeathing her circa £1.5 million estate equally between her three children. At the time, the press made much of the fact that during the proceedings significant emphasis was placed by the sisters on the fact that their brother, Christopher Burgess, was richer than they were. The court found the will to be valid and consequently that the estate should be split equally in accordance with Freda's wishes.

The judge went on to highlight the unreasonableness of the sisters complete refusal to mediate on the basis that they wanted an admission from their brother that what he had done was wrong and did not consider that objective would be achieved at mediation. Mrs Catherine Newman QC emphasised that "mediation is not just about one side getting what they want. That is a misconception of the purpose of mediation. Mediation should be about attempting to reach a solution which both parties can live with as better alternative to litigation".

Cases in the other direction:

Briggs v First Choice Holidays and Flights Ltd [2017] EWHC 2012 (QB)

Gore v Naheed [2017] EWCA Civ 369

Interestingly, both cases were decided before the Civil Justice Council ADR Working Group published its interim report in October 2017 on its review of existing forms of encouragement for mediation within the civil justice system in England & Wales. The Working Group was critical of the suggestion that Gore was an unsuitable case for mediation noting:

"Gore was ultimately about whether a van could park to unload in a particular place...a type of dispute ideally suited to ADR. Mediators resolve 'complex cases in which both parties feel strongly' all the time."

General Points on Mediation and ADR Choosing the mediator/ENE/FDR facilitator.

The value of specific expertise.

Remote and Hybrid Hearings and ADR.

In the wake of the Coronavirus pandemic, there is still a backlog for court hearings. Further there are still clients who are reticent about attending in person. Representatives should consider remote ADR. This can be an extremely effective way of resolving disputes. In the authors' view remote mediation can be just as effective as "in person" mediation, if not better, because they might conducted from the comfort of the litigant's own home thus reducing the burden of stress and anxiety which can itself act as a barrier to settlement. It is however important to make sure that this suits the client's needs and technological abilities. They can, of course, be accompanied with "face to face" conferences between advisors and their clients or between representatives using video conferencing facilities.

At the start of the mediation

Don't hesitate to tell the mediator of any concerns. He is not a judge – he is a facilitator. Try to have a joint open session – it is an opportunity for the mediator to make clear to both parties at once his role, to explain that he will inevitably spend time with the other party and will inevitably be testing each party's case.

It is also your chance to set out your case – so your client has the satisfaction of knowing he or she has been heard and each party hears (and has the opportunity of listening to!) the other's case. The opening statement at its best succinctly sets out the case in a constructive manner which shows respect for the opposition and a desire to resolve the dispute.

During the mediation

Don't hesitate to ask for information if you need it. It is often helpful to write down the questions while the mediator is with the other party. Endeavour to provide information reasonably requested. Offers should be realistic – but be willing to think outside the box. The great advantage of mediation is that the parties are not confined to relief sought in the proceedings or orders that a judge can make – they can agree anything!

Drawing up the agreement

This almost always takes twice as long as you expect – the devil is in the detail. Better not to let the mediator go until all parties have signed and not to tell anyone "back at the ranch" that you will be home in half an hour. Sometimes it is not possible to draw up a binding agreement – e.g. where a party is under a disability or an unrepresented party wants to consult an advisor.

Note **Frost v Wake Smith & Tofields Solicitors [2013] EWCA Civ 1960**: the solicitor's duty is to advise his client as to the mediation process and the status of any agreement reached but not to "conjure finality from a provisional agreement".

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