

Submission to the Child Maintenance Review Group

1. Introduction

The Mediators Institute of Ireland welcomes the opportunity to make its submission to the Child Maintenance Review Group.

As defined by the Mediation Act 2017

"Mediation is a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute."

The Mediators Institute of Ireland was established in 1992 to pursue excellence in the practice of Mediation in Ireland. It sets the standards of training and practice for its mediator members and is the leading representative body of mediators in Ireland.

The Mediators Institute of Ireland represents 772 members, of whom 354 practise family mediation. Family mediators practise in the private and public sectors. This has provided a broad-spectrum delivery of services to families who live in Ireland, some of whom will use the State services and others who will use private services, in order to find resolution to their conflicts. The delivery of mediation services from public and private mediators have supported and assisted families with a variety of conflict issues. The Mediators institute of Ireland sets the standards of qualification of its members. Separating Couples' mediators are required to be certified and have undertaken specialised training. The Family (Separating Couples) training provides training in working with separating couples, parents, domestic violence, child focused mediation, child protection, family law, family finance, including child maintenance.

2. Family Mediation & Child Maintenance

The care and support of children is central to family life, its aim to ensure that the child has the greatest opportunity to live a fulfilling life. Parents take seriously their responsibility to rear their children and financially support them. Difficulties can arise when parents are no longer cohabiting and there is a need to agree how their children will be supported.

Since family mediation was established in Ireland in 1986, mediators have worked with parents, helping them reach agreements on a myriad of family issues, including maintenance. When parents work in mediation to consider the financial maintenance of their children, they work together, facilitated by a qualified mediator, to consider child maintenance in the wider context of the family circumstances. In mediation, the decisions on parenting of children are clearly distinguished from the discussions on financial support of children.

In such mediations, parents prepare a statement of means on the family finance, consider the financial support of their children and reach agreements on how such financial support is made. This joint working is important, as often a parent may have a concept that their entitlements to a desired sum of money is higher than the family circumstances can afford. Through mediation, as both parents are the decision makers, making such decisions based on the financial reality of their lives, they are more likely to reach agreement that reflects the circumstances of their family life.

The distinctive process of mediation facilitates parents working together, rather than apart. An underlying principle of child maintenance is the responsibility of each parent, according to their circumstances to support their children. In reaching agreement, some parents rather than paying a cash maintenance payment, prefer to take responsibility for different aspects of the financial support required, e.g., household expense vs education expense vs recreational expense vs clothing expense, etc. It is important that when these decisions are made by families, they are recognised in any mediation settlement, in order that the full contribution of each parent for each child is recognised.

3. State Assistance and Child Maintenance

Where one parent is applying for State assistance they are required to prove that they have sought maintenance and specific rules apply and vary between payments and eligibility. This can cause conflict between the parents, often witnessed by children and have a negative impact on their security and development.

The obligation to make "efforts to seek maintenance" has meant that a parent who wishes to claim the One Family Payment must make an application to the District Court, and where that does not result in maintenance being paid, the Dept will then pay that parent and pursue the other parent as the liable relative. The parent who goes to court can show the Department the Court paperwork and evidence their efforts to try and secure maintenance from the other parent. The current approach encourages litigation, it can take a long time, and court orders can be breached, which results in further time in court - at significant cost to the State, in terms of Legal Aid and Court Resources.

A maintenance payment from one parent to another is a traditional approach to child maintenance which may be agreed voluntarily between the parties or may be imposed by the court. When the maintenance being paid to a partner is combined with the maintenance being paid for child/ren with no clarity of how much is for each person, this can cause conflict and misunderstanding. Any means test for child support should take into account the needs of the child/ren in addition to the means of the maintenance providers.

An assessment of the means of the party receiving the assistance should take into account all means available in order to make a fair and appropriate assessment. A disregard for housing costs is an example of an appropriate assessment of the means of the receiver as well as the maintenance payer in the circumstances.

While recognising the rights of individuals to seek redress through the court system, it is clearly of benefit to families that matters relating to future family living and parenting responsibilities are dealt with through non-adversarial proceedings such as family mediation, where the Settlements are recognised by the Court.

The Mediators Institute Ireland propose that the Dept accept evidence of "efforts to seek maintenance" as endeavouring to engage in mediation, with a copy of the Agreement to Mediate, showing that steps were taken to try and agree child maintenance.

Even the "effort to seek maintenance" condition appears predicated to assume a negative outcome. While it may not deter the successful receipt of the OFP, it can result in potentially conflictual discussions having to take place between the parties before a payment is made. This can be challenging, unhelpful and potentially harmful to any ongoing agreement between parents on other issues involved in their separation.

4. The Establishment of a State Child Maintenance Agency

Efforts to seek maintenance should be reframed as efforts to ensure an assumption that child/ren are appropriately maintained by their parents/liable relatives in most cases. The decision making could be taken on by an independent organisation where all required information is used in making child maintenance decisions which parents can agree to. This would also allow for pre-emptive choices around future maintenance payment and planning for same.

The legislative requirements around maintenance payments for children are based on social welfare legislation and family law. The current situation regarding the process adopted by the Department of Social Protection seems somewhat unwieldy with different decision-making processes in operation in relation to the determination of entitlement to an OFP and assessment of the liable relative to determine the amount due and what way the department can best recoup this. The limits to the Department's responsibilities, in relation to ongoing payments where the OFP ceases, is also open to challenge. Also, the question arises again why other Department financial provisions are not taken into account.

As previously stated the onus on the Applicant for OFP or JST can lead to conflict between parents which can be detrimental to other aspects of their separation Agreement. The current situation regarding liable relative provisions contributes to the choice of court to settle maintenance issues in many cases.

The Mediators Institute of Ireland are supportive of an independent organisation such as a Child Maintenance Agency. Any such agency should interact with the social welfare system in terms of requirement for assessment of means and the availability of payments appropriate to need.

It should interact with the court system in terms of any settlements made as a result of discussions with parties, which could be attached to any Separation, Divorce or Parenting Agreement drawn up between solicitors, or through the use of Mediation.

The value of having an independent agency with a potential role in maintenance collection would remove the personal involvement of the parties. Once the agency decides on the amount required and the methodology of enforcing payment – possible by attachment of earnings if appropriate in certain cases, the contract lies between the maintenance payer and the agency and any failure is not tied in with the couple negotiation. Where parties agree a maintenance settlement between themselves, or with the help of a third party in mediation, this outcome should remain as part of the overall separation settlement when approved in court.

The Child Maintenance Agency should have powers but should not be compulsory. It could be there for cases referred through the courts, enabling mediation on other matters to continue if appropriate, or indeed parties could be referred from the mediation process in the event that the issue of maintenance cannot be agreed. This is preferable to what currently can happen, where in some cases, the issue of maintenance is omitted from the Separation Agreement, in order to be finalised by the parties' solicitors, with the potential of ending up as a legal dispute, with the danger of upending other areas of the settlement.

A Child Maintenance Agency could develop guidelines or formulas for how child maintenance would be calculated, which would create consistency and certainty and greatly reduce the need for child maintenance to be litigated. Where formulas/guidelines are available the parties they are more likely to go to mediation and agree child maintenance based on the guidelines and then work on the other issues that need to be agreed.

Private agreements agreed in mediation could be voluntarily registered with the Agency, which could take over the collection and payment of the maintenance agreed. Having Guidelines put in place by a State Agency would also separate parenting from financial matters and would reduce the number of cases before the courts.

Families often want information on how to calculate payments. Guidelines could be provided to the public through maintenance guidelines provided on the website of the Child Maintenance Agency. In addition, the provision of an on-line maintenance calculator could have immeasurable benefits to parents. This can provide certainty and security, for parents. This clarity has the potential of significantly reducing parents need to access professionals or engage in protracted maintenance negotiations.

Where a parent (prospective payer) who is in receipt of welfare payments, a nominal amount of maintenance could be assessed as being due. A nominal payment maintains a recognition of a financial responsibility being due.

In addition, guidelines issued by the Agency can be beneficial for professionals and other agencies working with families.

A number of jurisdictions already have a Child Maintenance Agency and there are opportunities to learn from the experience of such agencies.

This concludes the Mediators Institute Ireland's submission to the Child Maintenance Review Group.