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How can you best settle clients' differences away from court, including mediation, hybrid mediation, collaborative law or arbitration?

White Paper conference

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Preamble

You don't have to go to court to sort out your clients' family law disputes.

There are usually better ways of dealing with these problems, even if your clients think they need to have their day in court. These other methods are cheaper, swifter and cause less emotional damage.

So in this talk I will discuss the pros and cons of different ways of avoiding the expense and distress of a contested court hearing.

There are 4 different possibilities for ADR – Alternative Dispute Resolution:

1. Mediation
2. Hybrid mediation
3. Collaborative law
4. Arbitration

I'm talking to you from the glorious premises of the Caledonian Club in London, but what I say here about the law and the ways of avoiding a contested court hearing relates to England and Wales only.

Mediation:

This is a process by which parties negotiate with the assistance of a neutral & professionally qualified third party. The parties have to sign up to a mediation agreement in advance and agree to pay the costs of the mediation, usually equally. It is also possible, where one of the parties cannot face the other, to conduct shuttle mediation where each party stays in their own room and the mediator shuttles between the two of them, relaying the last message and feeding back the response to the offeror. This is not an ideal way to mediate but it can work.

Who shouldn't mediate?

1. Mediation probably won't be suitable if one party has perpetrated domestic abuse on the other, even if the victim believes that the former partner no longer poses a risk.

2. Those who suffer from mental health issues are similarly generally deemed unsuitable for mediation unless they are in therapy, on a medication programme and are accepted by their former partners not to pose a current risk. That's quite a big ask, although I have done a successful mediation involving a high-functioning autistic CFO. In such a case, the mediator would be wise to require medical evidence before agreeing to undertake such a mediation, so that the mediation outcome can bind both parties.

The key benefits of mediation:

- The parties can choose their mediator;

- They set the agenda, which means they can prioritise the things that matter to them e.g., with whom a child will live; there has to be full and frank disclosure of their finances to each other and the mediator (this is because an agreement based on non-disclosure can be set aside subsequently by a court order);

- Privacy: mediation is a private process and each party and the mediator are bound by confidentiality *save for* two exceptions: (a) & (b) if an issue of risk of harm to a child arises, the mediator must take that to the appropriate authorities.

- The parties choose the pace (with the assistance of the mediator) at which the mediation will progress, to ensure there is no 'drift';

- Speedy resolution: the timetable in mediation goes much faster than it does in court proceedings. In financial proceedings in court it is not unusual for an adjourned FDR to take a further 6 months to come on for hearing. The backlog of financial cases is much greater in the aftermath of Covid because the court has to prioritise children matters, particularly public law ones;

- Flexibility: an agreement arrived at in mediation can always be reviewed at a later date in a subsequent mediation if circumstances have changed, for example if one party has lost their job. The mediation process is far more responsive than a court-driven hearing for variation of spousal periodical payments, which has to go through at least through 2 stages (i.e. FDA, FDR) before it gets to a final hearing. In most courts FDA and FDR can be months apart;

- The parties share the cost of the mediation equally unless they agree otherwise. The costs of mediation are a small fraction of in-court litigation costs;

- A mediated solution means both parties can part company on good terms, because they will have worked together on resolving the issues and will not have had an outcome imposed upon them by a judge. It will also encourage both parties to discuss future arrangements more amicably.

The downsides to mediation:

- A mediated agreement is not legally binding until it is converted into an order of the court. This can be drafted quite quickly (often at the end of the mediation itself) but it may take some time to get an approved order from the court. Even if the mediated agreement is not approved by the court, it can still be persuasive evidence of what the parties were prepared to agree at one stage.

- One party may be a less willing participant in mediation than the other. The mediator will be sensitive to this issue and will ensure there is a level playing field.

- Mediation sessions are time-limited to normally 1.5 hours each or, in some rare cases, 2 hrs. The justification for this is that parties are more focussed if they know the clock is ticking. It may however mean that the parties need 2-3 sessions.

- If after mediation the parties don't agree, they will have to go to court and this will add to their costs. However in my experience, even if parties do go to court after mediation, the issues have usually been narrowed, so the court arguments are more focussed.

Hybrid mediation:

This is a similar process to mediation but one in which the parties are supported by their lawyers through the mediation and have the opportunity to have break-out sessions to discuss any shifts they need to make in their negotiating stance. It is particularly appropriate in high conflict cases &/or complex matters because the lawyers are beside their clients during and outside the mediation. Thus decisions can be taken promptly.

The benefits of hybrid mediation:

- Parties feel reassured & protected by having their lawyers there;

- Legal advice on various proposals is available immediately.

- It's more responsive to the pace of negotiation. Because each side has their own lawyer present there is no need for lengthy attendance notes or post-mediation correspondence. The only document that requires exchange after the end of a successful hybrid mediation is the draft order, and even if the mediation has not brought about complete agreement then at least the issues will have been narrowed and the subsequent correspondence can focus on the outstanding matters;

- The mediator can employ shuttle mediation more effectively;

- The mediator can decide to keep some matters confidential if it seems that a piece of information might de-rail the process.

- The emotions which can proliferate in mediation are contained by the parties' lawyers in their breakout sessions, making settlement more likely;

- The mediation process can be more focussed because the lawyers know what the key issues are.

- Some mediators can conduct multi-party mediation in cases of, say, Inheritance Act disputes or where there are charging orders over the former matrimonial home where the charge holder can be legally represented in the mediation.

The downside of hybrid mediation:

- It costs more because the parties have to pay for their lawyers to be there too. ;
- Each session is slower because of the need for breakout time. That is why a hybrid mediation can last 1- 2 days, but that will usually conclude matters in one session;
- It doesn't work where only one party has their lawyer there: the unrepresented party will suspect the other side's lawyer and the mediator of conspiring together to pull the wool over their eyes. Further if only one party is represented, there can be no confidential withholding of information by the mediator.

Collaborative law:

This is a form of ADR for divorcing or separating couples who need legal representation, but want to avoid going to court. This is high stakes because the clients must agree in advance not to take the matter to court and they sign an agreement to that effect before the process begins. The collaborative exercise is one where both parties and their collaborative lawyers (who are specially trained in the role) sit together in a foursome in one room, agree what they will discuss, do so and hammer out a deal. This needs to be properly structured for it to work. The parties have to trust their respective collaborative lawyers to get a fair deal. Unlike mediators, however, collaborative lawyers function as active legal advisors and negotiators, sitting alongside their clients at the centre of the dispute resolution process, rather than working on the sidelines or by way of referral.

The benefits of the collaborative law approach:

- Parties who can genuinely work together in a respectful and fair way can achieve a mutually satisfactory outcome, assuming there is trust on both sides;
- Even with the instruction of a lawyer on each side, this can still be more economical than proceeding through court;
- Clients who adopt a collaborative law approach find it less hurtful for themselves and their former partner;
- If the outcome is successful, this can provide a way ahead for any future dispute;
- Clients can be reassured that if they have a valid legal point to make, then their collaborative lawyer will have ventilated it in the process.

The downside of the collaborative law approach:

- It can be expensive: the parties have to accept that if they instruct a collaborative lawyer and fail to reach agreement, then that lawyer has to leave the case and another lawyer has to be instructed to take the matter to court;

- It leaves opportunities for non-disclosure by an obdurate party. That party's collaborative lawyer has to follow his or her client's instructions which can lead to the breakdown of negotiations, where there is a lack of trust;

- Clients become invested in their collaborative lawyer such that they might want to do a deal at all costs, even if their lawyer might think that that is not in their overall interests. The need to find and fund a second lawyer in the event the case continues to court puts pressure on a client. That might lead to an unsatisfactory consent order whereby one party feels aggrieved;

- Some people feel the collaborative law approach to be too constraining in that they are compelled to agree at the outset that they will not go to court.

Arbitration:

Arbitration in civil proceedings has been in operation for many years but the procedure was adopted by family lawyers relatively recently as a result of a joint project by several bodies culminating in the creation of the Institute of Family Law Arbitrators ('IFLA'). This recommended that family law arbitrations should be conducted in accordance with the Arbitration Act 1996 and its own rules.

Family arbitration has been available for financial remedy cases since 2012 and was extended in 2016 to children matters and has been further extended to 'leave to remove' cases both internally and externally. It can cover any justiciable aspect of family life.

An Arbitrator is jointly appointed by the parties and will hear whatever aspects of the case upon which the parties seek an adjudication. The Arbitrator will hear the arguments of the parties, review the evidence filed and then hand down a written decision ('the arbitral award') which is a final award and is binding on the parties.

The benefits of arbitration:

- It costs less than going to court;

- It is speedier, in the sense that the parties can agree their own timetable and are not tied to court listings. Arbitrators are usually available more readily than court dates;

- The parties can stipulate what they wish to have arbitrated. This is set out in their referral to the Arbitrator, using Form ARB1 FS form. The Arbitrator must deal with every issue raised by the parties, if relevant. The scope of the arbitration will be discussed in advance and agreed. If there is a potentially linked issue which the parties have not considered the Arbitrator can draw that to their attention and have that matter included by agreement;

- Informality: arbitration is more informal than a court hearing. An arbitration can take place anywhere the parties and the Arbitrator agree, so it could be in counsel's chambers or at a solicitor's office. Procedural rules are more relaxed which allows the parties more control over the process;

- Privacy: arbitrations are held in private and the parties can agree to keep the issues and the outcome confidential. This is particularly attractive if either party is a person in public life.

The drawbacks of arbitration:

- Conventionally it used to be the case that an arbitrator's award was certain and binding and was therefore unappealable. However that certainty has now been overturned by the decision in Haley v Haley [2020] EWCA Civ 1369, of which I say more in a minute.

- There is no formal discovery process. This means that one party to the arbitration process might not be in possession of all the relevant facts, which would have been revealed had a formal discovery process taken place, such as Replies to Questionnaires, Production appointments against third parties (e.g. banks, routinely done in court proceedings). The absence of such formal steps relies on both parties being scrupulously honest with each other and the arbitrator.

- Lack of transparency: the arbitrator has total discretion over his or her award and, providing it deals with all the points raised in the Arbitration Agreement, the arbitrator does not have to provide any justification for their award, although it would probably be wise to do so.

- Costs: although arbitration costs are generally lower than the costs involved in going to court, it is a matter for the individual arbitrator as to how much to charge. Further this does not have to be calculated on a one-off fee 'for the day basis' as there may be separate fees for each element of the arbitration, including e.g. a fee for writing up the award. As this is an entirely private process, no-one knows exactly what those fees will be, but all the charges should be itemised in the Arbitration Agreement.

One of the great attractions of arbitration was that the arbitral award was binding and therefore unappealable but, as Haley shows, this is no longer so. Further one of the original selling points of arbitration was that it was a much speedier process than going to court. In June 2020, the President writing in *'The Family Court and Covid 19: the road ahead'* emphasised that the need for ADR in family proceedings (including arbitration) was now greater than ever, in light of Covid-driven delays. The history of Haley might suggest otherwise.

Haley v Haley [2020] EWCA Civ 1369

Mr & Mrs Haley decided to go to arbitration in September 2019 because their case had come out of the court list at Chelmsford at short notice and they were not given another fixed date for the adjourned hearing. As a result they faced many months of uncertainty at a point where they were ready for trial. This situation may well arise again as the effects of Covid 19 work their way through the family justice system. The court's focus has to be on public law care cases and private law children matters, so financial remedy cases go to the back of the queue. In fact the Haleys' arbitration took place only about a week after the adjourned court date.

The arbitrator conducted the arbitration and circulated a draft award which Mr Haley believed was unfair. He asked for clarification of certain aspects of the award, but the arbitrator declined to provide any. About a month later, the arbitrator circulated his final award, which differed in some material respects from his draft award.

Mr Haley then applied to the High Court for either permission to appeal the award (on the grounds of serious irregularity under the Arbitration Act 1996) or to invite that court to decline to approve the arbitral award, to substitute its own discretion and make an order under the MCA 1973. The Deputy High Court Master refused to interfere with the arbitral award and made a court order in the same terms as the final award.

So Mr Haley appealed again, this time to the Court of Appeal. Moylan LJ gave him permission to appeal, on a point of principle, as follows: '*The proper approach which the family court should take to arbitral awards when making a financial remedy order'.* The appeal came before King, Moylan & Popplewell LJJ on 23 October 2020.

The court asked itself what is the appropriate test to be applied by the court in those cases where the parties have agreed to arbitration but are dissatisfied with the result, namely:

- Is it limited to those matters in the Arbitration Act 1996, save where there has been a supervening event or mistake (as discussed by Mostyn J in J v B (Family Law Arbitration; Award); [2016] EWHC 324)?; or
- Is it the appeals test under the MCA 1973?; and
- If the latter is the proper approach, then where does the fact that the parties signed a contractual agreement fit in?

King LJ notes that the test has become increasingly strict and the basis for challenge correspondingly narrower. She considered whether the test employed by Sir James Munby in S v S (Arbitral Award: Approval) [2014] EWHC 7 (Fam) i.e. that the error had to *'leap off the page'* was still the right one. She went on to say and the court considered that the logical approach was to adopt the procedure set out in the FPR 2010. The court finally concluded that it would only substitute its own order for that of the arbitrator's: *'If the judge decides that the arbitrator's award was wrong, not seriously or obviously wrong or so wrong that it leaps off the page but just wrong.'* [see para 74]. The Court of Appeal came down in favour of the appeals test, therefore.

However King LJ (at para 75) strikes a note of warning about the now incorrect rubric at the end of the bold passage in Form ARB1 FS, which reads: *'There are very limited bases for raising a challenge or appeal, and it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the award'.* In the court's view this rubric ought to be removed although it is not clear what, if anything, should replace it.

Conclusion: In my view, what works best is hybrid mediation because parties can have the comforting presence of their solicitors, negotiate freely and not allow themselves to fall into a trap of agreeing to the terms of a consent order that they don't really want to make. Having a lawyer is a safeguard against that happening and it is also cost-effective way of ensuring a fair outcome.

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