



Family Dispute
SOLUTIONS

A PRESENTATION ON NON-COURT DISPUTE RESOLUTION

By

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What's wrong with Court?

- ▶ Everything!!!!
- ▶ Couples in dispute (and their children) need helpful solutions – court isn't one of them!!!





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So what exactly is wrong with Court?

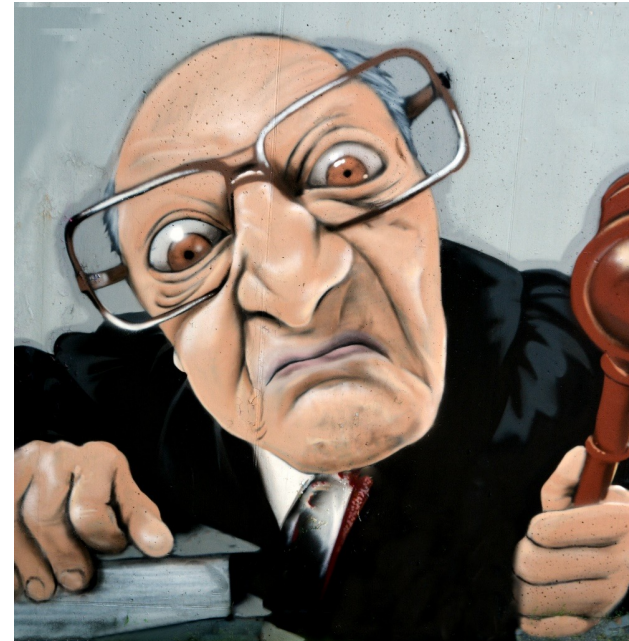
- Parties can attend court with no guarantee their case will be heard
- Lack of time to deal with the case – depends on length of list
- Urgent public law cases push other cases down the list
- In most courts, Judges better versed in children cases do finance and vice versa - may not get an 'expert' judge
- Cannot choose your judge – get who you are given
- Pandemic has made all the above worse and system slower





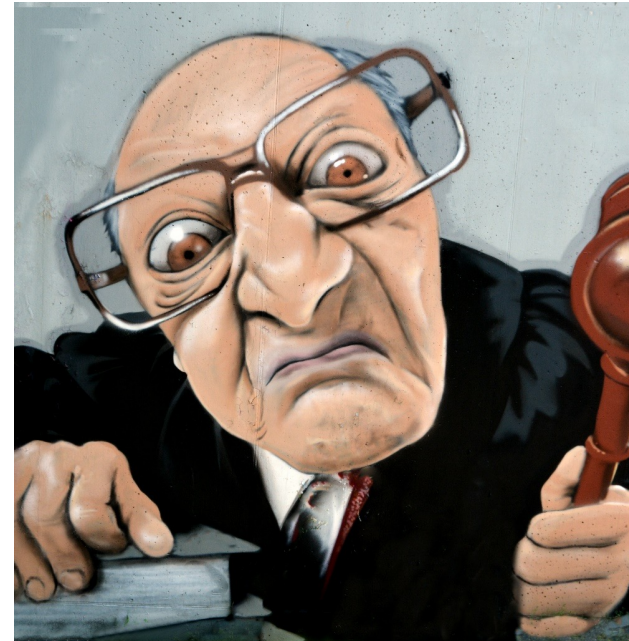
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- And another thing.....
- The court system isn't working
- Those working in it are disaffected
- Reports of bad tempered, overworked and under resourced judges
- Bullying judges
- Too many litigants in person
- Cases taking longer because of LIPs
- Too many FDRs in lists.....



And if you're still not convinced that court is a bad idea.....

- Cases overrun
- Cases take longer than expected
- Cases go part heard
- Court files get lost
- FDR experience depends on mood of judge – the Romford Experience
- The O'Dwyer Experience
- The If you don't settle this today Experience (Judicial pressure) you're on the road to a Final Hearing....





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▶ The Court Controlled Timetable

- Parties are stuck with it until they either settle at FDR/DRA and perhaps regret it in the morning; or
- Go to Final Hearing to have a solution imposed on them by a complete stranger and with which neither spouse/parent is happy

▶ **COURT IS TOXIC**



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What are the alternatives to Court?

- (Hybrid) Mediation
- Child Inclusive Mediation
- ENE
- Arbitration



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MEDIATION THE ROLE FOR LAWYERS

Rebekah Gershuny
Accredited Family Mediator
Evolve Family Mediation
Freemans Solicitors



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Solution Focused

- ▶ Family practitioners play a key role in providing information about options to keep clients out of court;
- ▶ Part 3 FPR: Court's duty to consider non-court options: at *every* stage in proceedings: WL v HL EWFC B10 5 March 2021
- ▶ Responsibility of practitioners to inform clients and to consider non-court options at all stages;
- ▶ Failure to do so may result in increased costs for client.



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Good Practice

- ▶ Family practitioners to look at developing processes that best support clients and their children focused on

Solutions

- ▶ Better outcomes for children;
- ▶ Rebuilding parental communication;
- ▶ Helping clients to find the right support: legal, emotional and financial;

The closer a client is to the door of court, the further away they are from reaching solutions for themselves



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Mediation: Working Together

- ▶ Importance of the MIAM/initial meeting;
- ▶ What is the emotional landscape?
- ▶ Can mediation be in the same space physical or online?
- ▶ Mediation in separate spaces: separate rooms; separate times; breakout rooms;
- ▶ Support of an accredited Family Consultant;
- ▶ Need for Hybrid Mediation, Early Neutral Evaluation or Arbitration



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What is Hybrid Mediation?

- ▶ Hybrid mediation: Clients are supported by their lawyers
- ▶ Combination of the family and civil mediation models
- ▶ When the issues in the case are complex
- ▶ Where separate meetings (which can be supported by lawyers) would be beneficial



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In what situations is Hybrid Mediation likely to work best?

- ▶ When either of the clients feels unable to sit in the same room with the other person
- ▶ Where there is an imbalance of power between the participants to the mediation
- ▶ Where there are high levels of conflict
- ▶ Where there is a concern about domestic abuse, an imbalanced power dynamic, or another reason why either person finds it hard to have a voice
- ▶ Where an element of confidentiality is needed



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How does it work?

- ▶ Mediator meets with the participants in initial separate and confidential meetings
- ▶ Mediator then has joint meeting with the participants' solicitors to discuss their role
- ▶ Matter then proceeds to mediation meetings which are
 - Flexible to suit the clients - in financial mediations lawyers, if instructed, can prepare the financial disclosure to assist the parties and the mediator
- ▶ If the participants are able to reach proposals for settlement, then the lawyers prepare the outcome documents
- ▶ Hybrid mediation can be combined with other non-court dispute resolution processes including arbitration, early neutral evaluation, private FDR, collaborative law, etc.



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What are the benefits of Hybrid Mediation

- ▶ Quicker
- ▶ Cost effective
- ▶ Conflict reduction
- ▶ Participants are supported and empowered
- ▶ Increases certainty of outcome
- ▶ Confidential
- ▶ Suitable for resolution of children and financial issues
- ▶ Provides participants with skills for effective communication long after process ends



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CHILD INCLUSIVE MEDIATION AND SAFEGUARDING

Elizabeth Sulkin
Solicitor and Mediator
LMK Law

Every child has the right to express their views, feelings, and wishes, in all matters affecting them, and to have their views considered and taken seriously

United Nations Convention on the Rights of the Child

Article 12



The voice of the child



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What is Child Inclusive Mediation?

- Child inclusive mediation is when a family mediator, trained in this area, talks with a child or children as part of a mediation in which arrangements are being made for children.
- The Government has suggested that children aged 10 or more should have access to a Mediator when questions about their future are being discussed in Mediation.



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When to consider Child Inclusive Mediation?

- ▶ The parents-
 - are stuck in their decision making
 - appear caught up in their own agenda
 - seem unable to focus on the children's needs



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What does CIM involve?

- A mediator meets directly with the child in a separate meeting without the parents, providing a safe space for a child to express their views.
- The mediator then takes back to a subsequent meeting with the parents whatever it is that the child wishes them to share, and only that.



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What does CIM not involve?

- It does **NOT** ask the children to make the decisions
- It does **NOT** produce a report for the parents
- It does **NOT** contain recommendations from the mediator

How does CIM work?

- Both parents are invited to agree to a mediator meeting with the children
- The Mediator writes directly to the children to invite them to a meeting
- The Mediator assures the children the meeting is confidential
- The meeting usually lasts around 45 minutes
- Siblings may be seen separately or together, or a combination of both
- The Mediator talks to the children and together they decide what the children would like the Mediator to feedback to the parents



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Preparation is key!

► **Parents need to be aware that**

- One or other of them might hear something they weren't expecting
- They need to be prepared for bad news
- The child may have talked for a long time but still have no message for them
- They need to be able to respect what the child has shared, without recriminations if they, the parents, didn't get what they expected/wanted



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Confidentiality and Safeguarding

- The meeting with the children is completely confidential, unless there is a disclosure of harm, when that duty of confidentiality is overridden.
- Children will be familiar with this from school
- Parents will be reminded of this too
- This is our responsibility, whether we are the parents' lawyers or acting as Mediators.



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Be Aware!

- Listen to what is really being said
- Watch body language
- Make careful clear notes, but don't interrogate
- Consider the added risks if the sessions are taking place online – who else might be in the room ?
 - what unseen pressure might be being put on a child ?
 - could you meet with the child face to face at a neutral place like a school ?
- Are you ready if a safeguarding disclosure is made ?



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If a safeguarding disclosure is made, don't panic



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Be prepared



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The test : can you sleep at night knowing you had done nothing ?

- If in doubt, call the NSPCC who can tell you whether your concern needs to be addressed
- Make sure the clients are already aware of your safeguarding responsibilities at the outset
- Have available and familiarise yourself with your firm's safeguarding policy
- Know whom to contact and how – local children's services or NSPCC
- Be prepared to explain to a parent what will happen following a referral
- Assess whether it is appropriate for the parent or you to make a referral



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CAUTION!!

- Remember - it is not our responsibility as lawyers and mediators to investigate.
- Our responsibility is to make a referral to those who are trained in investigating.

ALWAYS ASK YOURSELF

- How would I feel if the allegations had been well founded and I did nothing?
- If the answer to that causes you concern, then make the referral



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ENE AND ARBITRATION

Elissa Da Costa-Waldman

**Barrister, Mediator, Collaborative Lawyer
and Family Law Arbitrator (Finance)**



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What is ENE?

- ▶ A private and non-binding technique in which a third party (sometimes a retired judge or other senior, experienced and legally qualified person) provides an opinion on the likely outcome of a dispute.
- ▶ The speedy and non-binding nature of ENE makes it useful as a springboard to settlement, either on its own or following an impasse in negotiation or family mediation or simply for an indication of likely outcome.



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Why ENE?

- ENE evaluates chances of success in the legal process.
- Encourages clients to consider their best/worst alternative to a negotiated agreement and encourages resolution away from the straightjacket of the formal legal arena.
- ENE enables Clients to rehearse the arguments they might use in court and to test their effectiveness with both each other and before an independent person qualified to give an informed and expert view as to the likely court decision.



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Why ENE?

- ▶ ENE has the following advantages-
 - Each Client is provided with a view of their likelihood of success in court
 - Each Client is able to assess their respective positions and decide whether it is more cost/benefits efficient to continue to litigate
 - Clients have the opportunity to evaluate whether a mediation or continuing mediation could be workable
 - Less complex disputes can be assessed on paper rather than in person
 - A paper 'hearing' could be helpful in cases where clients find it difficult to face each other and prefer not to be in the same room together.
 - ENE is similar to an informal Financial Dispute Resolution Appointment
 - The evaluator is dedicated to one case for the whole day



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What's good about Arbitration?

- ▶ Consensus
- ▶ Parties have to agree-
 - To arbitrate
 - The identity of the arbitrator
 - And to be bound by the decision



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So the parties have agreed - what happens next?

- Lodge appropriate forms
- Arbitrator will send out terms and conditions
- Parties and Arbitrator regulate their own procedure (to a large extent)



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Why use Arbitration?

- Tailor made to the individual case
- Suitable for many individuals



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- High Profile clients who don't want to be bombarded by the paparazzi every time they attend court can have their dispute dealt with confidentially
- Other Clients who are not high profile but have an interest in keeping substance of their dispute confidential
- Clients who cannot reach their own decisions
- Clients who have attempted mediation or some other method of dispute resolution but who have reached impasse
- Clients who need to resolve a discrete issue, eg the basis upon which pensions should be shared
- Clients who have signed a pre-nuptial agreement and want a more efficient means of resolving any outstanding financial issues
- Clients whose case contains nebulous points of law



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Arbitration is suitable for which of my clients?

- Clients who want a speedy outcome
- Clients who want to choose their tribunal
- Body of arbitrators contains a range of experience, expertise, seniority and price
- Arbitrators comprise retired judges, silks, juniors, solicitors



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“Arbitration is not tried and tested - I’ve heard there’s not much take up.....”

- Lack of awareness
- Lay public don’t understand it
- Solicitors don’t sell it at options meetings
- Solicitors fear of loss of work



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➤ Identify the target consumers



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Children's Arbitration

- Private Law Children's court system also in crisis
- Issuing applications done reluctantly
- Vagaries of a lay bench and the direction of the case
- Uncertainties of outcome and approach



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Procedure

- Choice made as to identity of Arbitrator
- Forms completed and sent to IFLA/Resolution
- Case suitable for hearing or decided on paper?



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Arbitration is flexible

- Case may be suitable for determination on paper
- Your arbitrator will consider the best method
- Case may be better suited to full hearing
- Directions often dealt with by telephone



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Arbitrations can be cheaper because
it is quicker

Parties have hearings when and where
convenient to them

and new development with *Haley v Haley*
[2020] EWCA Civ 1369



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Haley v Haley [2020] EWCA Civ 1369

On appeal from the decision of Deputy High Court Judge Clare Ambrose in R v K EWHC 841 (Fam), Court of Appeal (King, Moylan, Popplewell LJJ) ruled unanimously that:

by virtue of its inquisitorial role, the court can decline to make an order reflecting an arbitration award where there are good and substantial reasons for concluding that an injustice would be done were an order to be so made.



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Conclusions

- There are many options for our clients
- Avoiding court has many advantages
- Solicitors can still retain clients and help in ALL the non-court dispute resolution processes



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Contact us for further information

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