

Methods of resolving Family Cases using Alternative Dispute Resolution “ADR”

Whilst we members of City of London Collaborative lawyers came together about 13 years ago, with the aim of promoting collaborative law, we all work independently through our respective firms and have many years of collective family experience between us. Some of our members are mediators and advise on private client matters as well. We all aim to resolve matters in the best way possible for our clients and have considerable experience with the different types of ADR, not just collaborative law and are well able to help you find the best process for you. We are frequently working for our clients on the same case, whether with a prenuptial agreement, a collaborative case or where one of our members is acting as a mediator.

With Coronavirus (COVID 19) creating chaos with life generally and the family court in particular, now is a good time to look at alternative methods of resolving cases by ADR. The family courts which were under huge pressure before the virus arrived, are now having to work remotely, with insufficient electronic equipment and, largely, untried processes. The result has been a court direction prioritising urgent cases, particularly urgent child applications and where there are issues of domestic violence.

With immediate problems arising over child and spousal maintenance and child contact arrangements caused by the pandemic, there are sometimes issues that need to be resolved quickly and where there is no quick recourse to the court.

In respect of financial claims the court is imposing a duty to try and settle cases by any means, and that if the court has to be used, then there is an expectation that hearings will take place remotely and that the directions the court may make in order to progress your case, such as those for the first hearing, should be agreed between the parties, with no hearing taking place. Indeed, if there is a hearing the court can adjourn the matter until some form of ADR has been tried.

This has resulted in the need to use ADR and to think creatively over what processes can be used or adapted to deal with these strange times in a remote world, in addition to using the established approaches of mediation, collaborative law and arbitration. Given the expected delays there will be when the court's open up again, there is an even greater incentive to try and resolve cases with ADR.

The most important factor is to use the process which you are most comfortable with and which will reach a fair resolution, with due speed and at a reasonable cost. It should be noted, however, that in view of the financial fallout from the pandemic and the uncertainties in the housing market, there may be a good reason to delay resolving the substantive matters at this point and only deal with immediate matters such as child and spouse maintenance and interim arrangements for child contact.

Below is a brief resume of the current approaches available and more processes and approaches are being developed all the time.

ARBITRATION

The decision of the arbitrator is binding so that even if you do not like it, it will be converted into a court order and unless there has been some grave irregularity, the court will apply the decision. This, therefore, makes the choice of arbitrator important and there are a number of senior family barristers trained as arbitrators, as well as some solicitors. There is a code of practice which family arbitrators have to comply with.

Arbitration can deal with the arrangements for the child or financial matters and is being introduced to deal with applications to where one parent wants to relocate with a child permanently abroad.

The arbitrator charges for their time, according to their seniority. The process is flexible. You can agree what documents and valuations you would like to provide to the arbitrator. The arbitrator sets the procedure and can give directions on paper as to how to proceed next. A hearing can be done with written submissions i.e. the points you want the arbitrator to consider in order to decide your matter or there can be a remote video hearing using zoom, skype or a similar method when you can make your submissions orally as well. Hearings have taken place remotely for some time in international cases, where everyone is not physically available to attend a hearing, so this is not new in arbitration..

Arbitration can be used to determine the whole case or where there is a single issue, such as a point of law. It is now being used to decide the directions the court needs to progress a case, where the court requires an agreed directions order. It can be used in conjunction with other methods of ADR to determine a sticking point in a negotiation.

PRIVATE FINANCIAL DISPUTE RESOLUTION “FDR”

Under the financial relief procedures, the second court hearing is a ‘without prejudice hearing’ where the court gives broad indications over what a judge is likely to order at a final hearing, with the intention of helping the couple reach agreement. The judge does not have the power to make an order, unless the parties agree the settlement. If there is no agreement, then the matter proceeds to a final hearing which cannot be heard before the judge who conducted the FDR. Historically, about 80% of cases settle at the FDR stage or shortly afterwards. Ideally the couple have legal representatives who can help negotiate a settlement.

A private FDR is when a barrister is instructed jointly by the parties to conduct the FDR instead of having an FDR at court. This process has been used where there was a desire to speed up a FDR

(a delay of 6 months was not uncommon in the court process), to choose the barrister who is to be appointed (as not all court judges have the necessary experience of financial cases), or because confidentiality was sought. Now in the Covid 19 world, where court delays are expected to be much longer, it becomes a much more attractive option.

Again the purpose is to get an indication of what a court is likely to order and to help the couple resolve the case, before the costs of a contested hearing are incurred. It can be useful to have an indication where there is a specific issue to determine, which is blocking a settlement.

The decision is not binding and if agreement is not reached, then another process must be used to resolve the matter- whether through the court, Arbitration, or further negotiation. Many of the barristers we use to conduct a private FDR are already sitting as judges and they are used to the type of orders the court would make at a final hearing.

The cost of the barrister is paid by the couple, usually equally and is an additional cost in the process. Whereas before Covid 19 times, if the private FDR failed and a court application was then made, there would usually be a court based FDR. Now in Covid 19 times, the court requires an alternative method be tried and if need be it should be possible to jump to a final hearing,

EARLY NEUTRAL EVALUATION

This is similar to a private FDR in that an independent barrister is jointly appointed to review the case and to give an early assessment of what a court is likely to order. Again it is not binding.

The purpose is for an early view of the case to be given when there has been an exchange of financial disclosure and to avoid the costs of a detailed financial enquiry.

Again it can be done on paper or with a meeting, but it is intended to be a simpler process than a Private FDR as you’re not expected to negotiate beforehand.

THE COLLABORATIVE APPROACH

Collaborative law started in the USA and has been in England for almost 20 years. Its purpose is to achieve a fair settlement with each party having a collaboratively trained lawyer, instructed from the beginning, whose aim is to work constructively to help the parties resolve matters. To avoid the contention that can arise with solicitor correspondence, matters are dealt with in a series of meetings in which discussions take place and in financial cases, disclosure is given. If there are particular issues such as child issues, a child mediator can be brought in to assist on that aspect. If there are complex financial issues, suitably qualified collaboratively trained experts, such as accountants or financial planners, can be brought into the process to advise jointly and find a way through.

One advantage is that the lawyers lead the process and are present throughout and can give advice throughout.

Like mediation, any agreement needs to be converted into a court order.

MEDIATION

Mediation is not binding and is usually used early in the process to try to resolve the case or a specific issue. A mediator is appointed jointly and their purpose is to assist the couple reach a settlement.

The mediator can direct the process and how disclosure is to be given and can set the time table. It can be dealt with in a series of meetings, if need be.

The choice of mediator is important and they can be legally qualified or from a therapeutic background. Some mediators like co-couple mediation where two mediators are appointed, often one from a legal background and one from a therapeutic background. The choice of a mediator is important and different mediators may be better suited to deal with child issues or financial issues.

Under the court rules, before a child or financial application is issued a MIAM (a mediation information and assessment meeting) is necessary before the application can be filed. Many mediators are also qualified MIAM mediators, so if the mediation is unsuccessful, the MIAM certificate can be given.

Mediation can take a number of forms and can be with the solicitors present in the room (but not saying anything), or on hand to advise in the background during the mediation. It can be done with the parties in separate rooms or all together, with breakouts as necessary.

It is recognised that for mediation to be successful, legal advice is needed by both parties during the process.

If agreement is reached the mediator prepares a summary of the agreement, which must then be converted into a court order and lodged with the court so it can become binding.

HYBRID MEDIATION

This is more akin to commercial mediation where the lawyers are present throughout the mediation and can contribute throughout. The mediator can discuss with the parties separately what the aims are and can hold confidences of either party. The parties can be in separate rooms so that the mediator carries out what is described as shuttle mediation- as they go between the rooms of parties.

Again the choice of mediator is important and it can be successful if a mediator from a therapeutic background acts as the mediator, with whom the parties have trust, and for the solicitors to be present throughout and participate.

Again any agreement will need to be converted to a court order so it can become binding.

MED/ARB

This is a new hybrid process. It is mediation but with the agreement at the beginning of the process, that if agreement is not reached that then there is to be arbitration to resolve matters, rather than to have to start the court process.

If you would like to discuss your options, do please contact any of our members. We are all available, albeit working remotely, at this difficult time.

Stay safe.

City of London Collaborative Lawyers