Respect for Mt. Litigation

A review of process options: the “DR” slot for Bloomsbury
15/9/21
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Cleverer than frogs?

What we will consider:

- Climate change in family law
- It points to staying away from routine issuing of applications
- What are our options
- How can we work harder to stay talking longer?

P2: When we need court …

We need court for

- Protection
- Enforcement
- Failure to negotiate in the zone

As regards

- Personal safety
- Children
- Assets
- information

Why it may not work so well

1. Slow
2. Expensive
3. Hard work and toxic (for us)
4. Hard work and toxic (for clients)

and at the end of the journey

5. A cursory consideration?
6. An unwelcoming denouement
7. Risk of costs orders/ vilification
8. The court's not getting it right
9. This playing out in public

P3: Who really decides who issues?

- Is it that we lack a tolerance to keep negotiating – that we run out of ideas?

- Do we have to get to the FDR for *everyone* to see that we can't make this right – that all that will happen as we struggle uphill will be more spend in costs than we can gain in an award … or that a better future for our children can't be achieved by pressing on …

Robert Macfarlane
"Those who travel to mountain-tops are half in love with themselves, and half in love with oblivion."

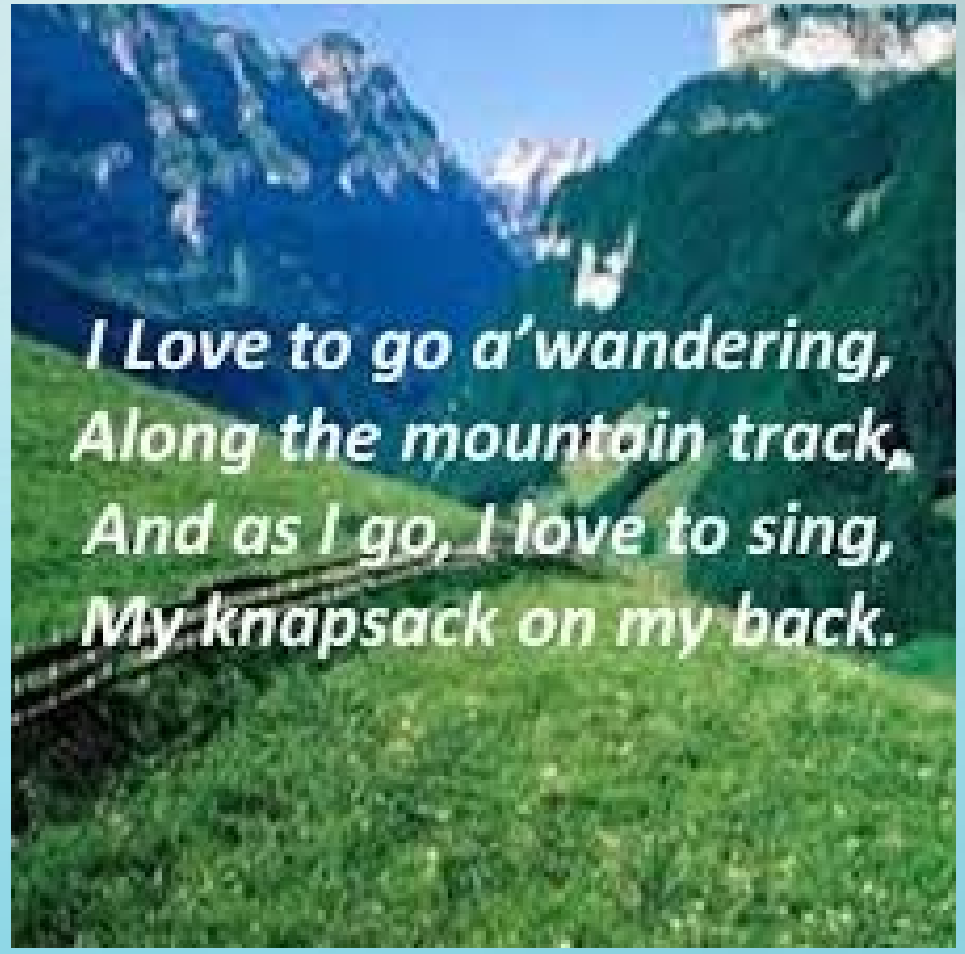
if so, given that we are good at this job, why aren't we able to have this aha moment with our client at an earlier stage before all of those losses of time, money, relational goodwill, sleep have taken place.

“The mountains are calling, and I must go.” John Muir

It seems to be an iron law of ancillary relief proceedings that the final difference between the parties is approximately equal to the costs that they have spent.
[Mostyn J NvF [2011] EWHC 586 Fam @5]

Yet time and again don’t we find ourselves leading our clients into a process that logically must be self-defeating

Do we lack the skills to diagnose the bind that exists in a particular case or the creativity to find a way forward? If so then we need to raise our game in wisdom, skills and options because the number of good weather days out on the mountain are reducing. We may be lucky for a while but over time the business model of issue and hand-off to counsel at FDR really is not a viable one.



P5 Re-calibrate our expectations in the court process

The weather up on Mount Litigation is worsening.

So
- Given that the system can't be perfect
- Given its costs
- Putting to one side the safety cases,
- If we go there, shouldn't it usually be with a case so overwhelming that we are always going to have a costs order - unless we are unlucky?

- Otherwise surely way earlier, we would have been able to have one of those conversations with our clients that starts … *"This just isn't settling anywhere sensible and I am sorry – and it is not just – and it is not how things are supposed to work – but this offer is not so bad that it is going to be worth the candle of pressing on …"*

P7 Weather warning (1): the court will not examine every comma

- if parties wish to have a trial with numerous bundles then it is open to them to enter into an arbitration agreement which specifically allows for that. Mostyn J J v J [2014] EWHC 3654

- Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary
  The View from the President's Chambers Jun 2020 and repeated July 2021

- FPR 9.20 "(1) *If the court is able to determine the application at the first hearing, it must do so unless it considers that there are good reasons not to do so."*

P8: Weather warning (2): "we really don't want to see you"

- HHJ Wildblood QC re B [2020] EWFC B44
- '[6] Judges at this court have an unprecedented amount of work.

  [9] …Do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you.

Weather warning (3): "don't come unless you have looked at DR options"

Discussion re Ungley orders in Mann v Mann [2014] EWHC 537

Surrey initiative , now Family Solutions initiative

- … practitioners are encouraged to ensure that non-court based resolution processes are actively considered at all stages of the process from initial enquiry until, if relevant, the conclusion of the proceedings.
- Alternatively, …clients and practitioners will be required to explain the reasoning behind their non-engagement with non-court based processes which have been reasonably proposed.
- If invited to engage in a non-court process, consider the various process options with your client and reply in open correspondence to all invitations within 14 days
- At hearings the court may be invited to consider a copy of the Part 3 Communications. Parties and their lawyers must expect therefore to explain why a non-court process is not being used.

Weather warning (4)
“we will expect exemplary adherence to the rules”

53 Let me spell it out. An order that something is to be done by 4 pm on Friday, is an order to do that thing by 4 pm on Friday, not by 4.21 pm on Friday let alone by 3.01 pm the following Monday or sometime later the following week. A person who finds himself unable to comply timeously with his obligations under an order should apply for an extension of time *before the time for compliance has expired*.
Munby P In re W [2013] EWCA Civ 1177

Weather warning (5) Funding is going to become more challenging

Stitch together

- Re F 2016
- X v Y re Z no 1 (2020)
- X v Y re Z no 2 (2021)
- Mostyn J v J [2014] EWHC 3654 at paras 12-14 > > >

Now the new form H: FPR 9.27

- 1 day before 1st appointment / FDR
- Form H setting out costs incurred and estimated costs to the next stage
- it must be served and must have been discussed with the client
- It is then front and central on the order and
- Failures are a) recorded and b) must be promptly rectified

- 13. … a litigant should be able to demand a fixed price for each of the three phases of an ancillary relief case namely (1) Form A to First Appointment, (2) First Appointment to FDR and (3) FDR to trial.

  14. The second measure that needs to be taken is for the court in ancillary relief proceedings to be able to impose at the very beginning of the case a costs cap on what may be charged by the lawyers to their client for each of the three phases of the case.

His Lordship had already touched in the difference between civil and family and to me the point seems unanswerable:

- 12. Yet the Jackson reforms in the civil sphere limit merely the costs recoverable by the winner from the losing party by confining them to a pre-approved costs budget. They do not seek to limit the amount of costs that a lawyer may charge his own client, even though this had been mooted during the process of the review. I suppose that to do so was regarded as an impermissible interference with the right to form whatever commercial contracts you want and to spend your money on whatever you like. Yet that argument simply does not wash when those very costs come out of a finite pot over which the other party has a valid claim.

P10-13: Weather warning (6): "you risk costs if you can't justify your journey"

- FPR 28.3(6) & (7) engages conduct as a reason to order costs
- PD 28A 4.4 clarifies that disproportionate costs and an unreasonable refusal to negotiate openly is conduct
- Follow the rise of the judicial habit of making orders in AA v AB [2021]EWFC B16

And how do we most clearly show that we are negotiating reasonably? It is through making open proposals.

Moor J had already given these the boost by encouraging litigants to make open proposals safe in the knowledge that they were not capping their case by doing so … from March 2015:

- "Now that we no longer have *Calderbank* offers, litigants must be encouraged to make open proposals as early as possible that are designed to encourage settlement. If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case entirely on the merits. I will have no hesitation in a suitable case in awarding an applicant more than an open offer he or she has made if that is justified.

  - **MAP v MFP [2015] EWHC 627 (Fam) @ 87**

- And from the July in the same year:

- 64. At trial, she argued for an equal division of the entire assets as I find them to be. She is perfectly entitled to do this. Now that Calderbank offers no longer feature in most financial remedy applications, the only way to be fair to litigants, whilst encouraging them to settle their litigation, is to be prepared to make awards in excess of a party's open offer where it is right and appropriate to do so.

  - **FB v PS [2015] EWHC 2797 (Fam)**

P13: Weather warning (6): you risk costs if you can't justify your journey (cont)

- And then also from 6th July 2020, we had the requirement for open proposals
- ***"Duty to make open proposals after FDR appointment or where no FDR appointment***
- ***9.27A.***—*(1) Where at a FDR appointment the court does not make an appropriate consent order or direct a further FDR appointment, each party must file with the court and serve on each other party an open proposal for settlement* -

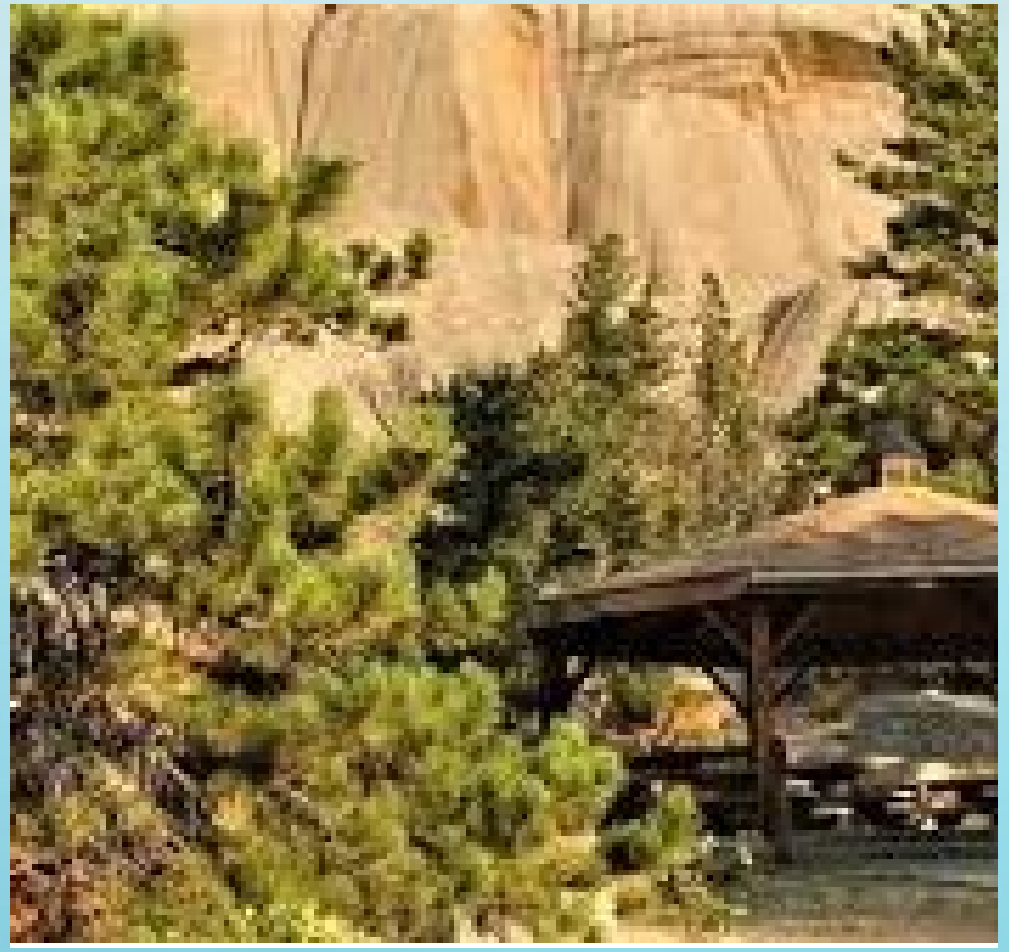
So now the Judge is given the tools to address the situation that has gone wrong

- whether an offer was made at all –
- whether it was at a realistic level –
- how it was responded to –
- why it wasn't made earlier.

There may still be places for litigants to hide but it is way harder to hide.

Sheltered picnic sites:

8. *interlocutory steps out to arbitration*



- March 2019, Moor J in CM v CM [2019] EWFC 16
- Specific issue arbitration is perfectly proper and appropriate even in cases that are proceeding through the court system.

9. Promotion of and support for the private FDR

- April 2021, Mostyn J in AS v CS [2021] EWFC 34
- 14. Private FDRs are to be strongly encouraged. They seem to have a higher success rate than in-court FDRs.

10. Promote agreement through FPR part 3 adjournments

- JB v DB [2020] EWHC 2301 Mostyn J:
- 28. I referred to the issue about the collapsibility of the trust in paras.1, 2 and 4 of my directions ruling. At para.11 I directed this:
  - "The parties are directed in the meantime to use their best endeavours to resolve the issues, if necessary through mediation or another form of non-court dispute resolution. The court will require at the hearing a full explanation of what efforts have been made to resolve the issues and will want to know why, without breaching privilege, the case has not been capable of settlement."

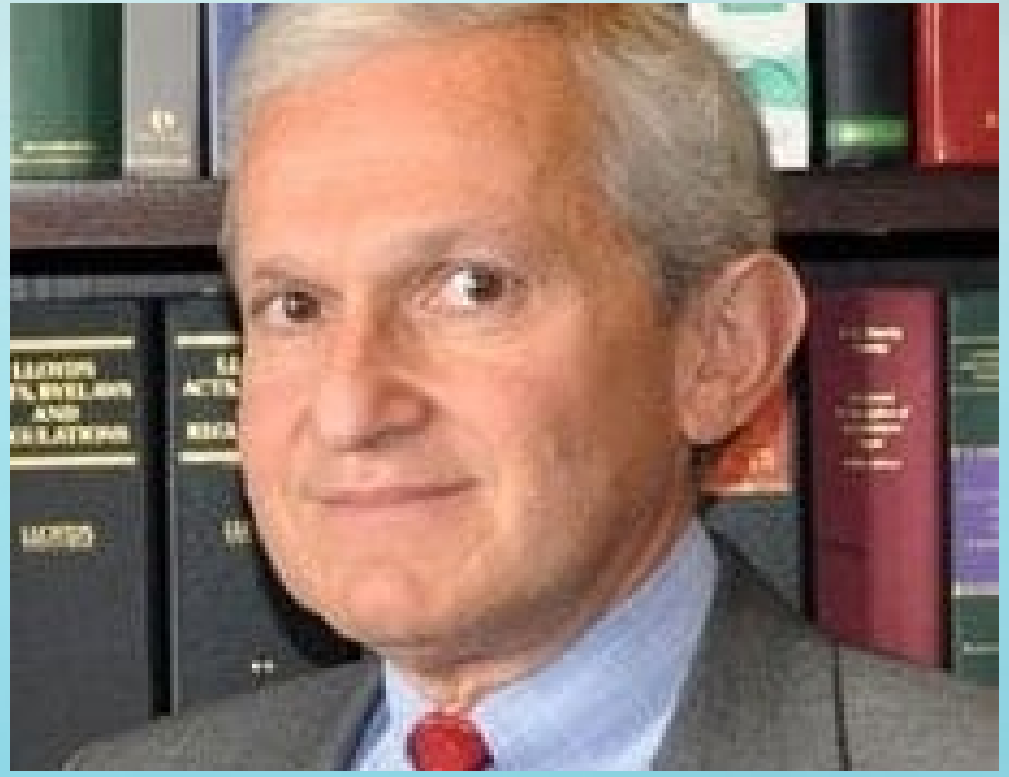
- WL v HL [2021] EWFC B10: Mr Recorder Allen QC:
  25. I believe that my use of the court's FPR Part 3 powers in this case to encourage the parties to consider and enter non-court dispute resolution and my request for fortnightly updates assisted them in reaching settlement
- 28. Reference to FPR Part 3 was made in the Report of the Family Solutions Group (a subgroup of The Private Law Working Group chaired by Mr. Justice Cobb) dated 12th November 2020.
  - … Concern has been expressed within our discussions and the wider PrLWG that the courts are not actively case managing in accordance with Part 3 of the FPR, and opportunities to resolve cases out of court are thus lost.
- 29. I therefore raised my use of the FPR Part 3 powers in this case with Mr. Justice Mostyn in his role as National Lead Judge of the Financial Remedies Courts. He asked that I record the same by way of a written judgment and that it be published on Bailii.

Master of the rolls, Sir Geoffrey Vos:

I want to see ADR integrated into every stage of what we call the dispute resolution process

My thesis today is that it can only be achieved if we adopt a much broader view of what constitutes alternative dispute resolution, how it is undertaken, and how it is delivered."

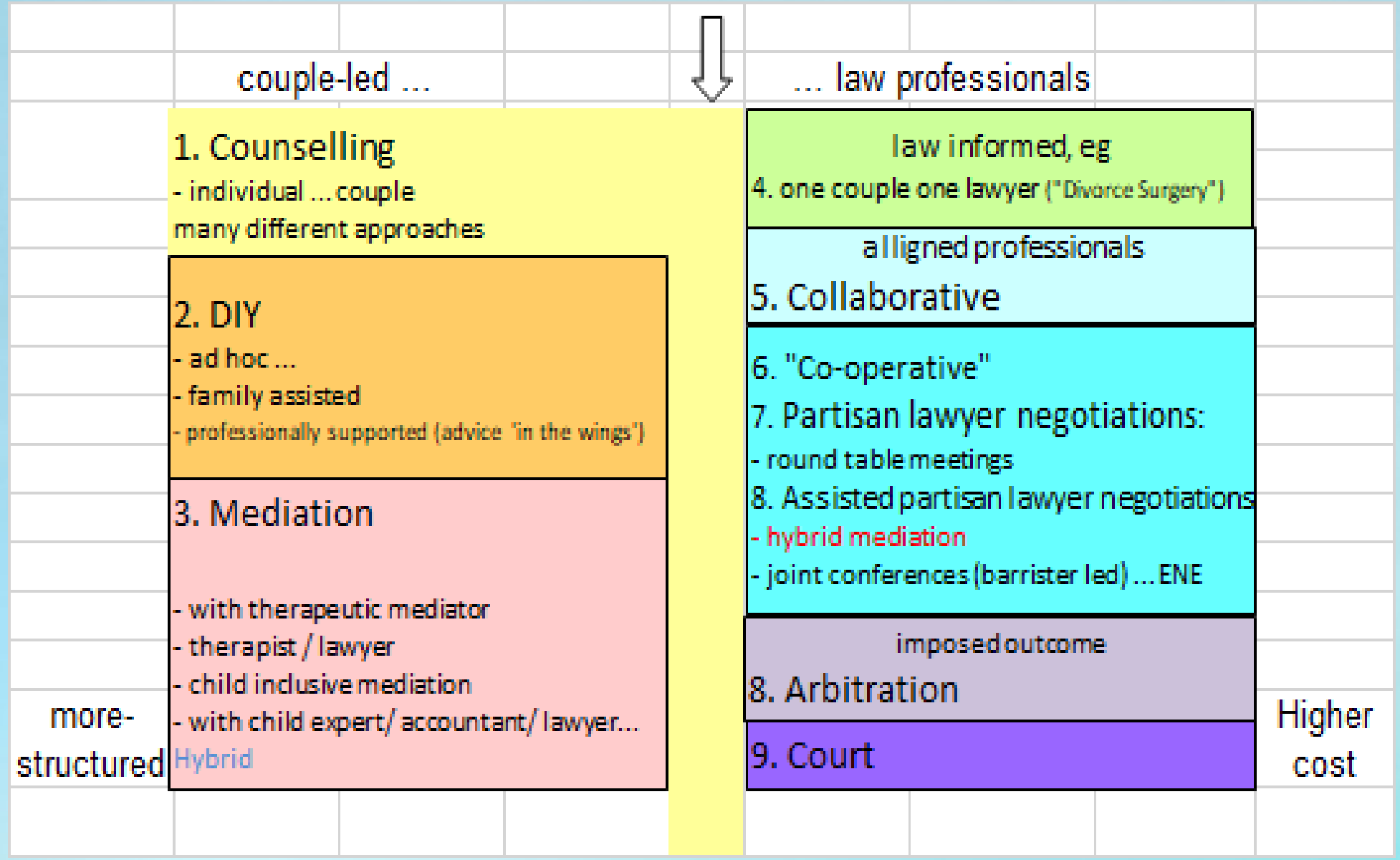
That is why I am so much in favour of online dispute resolution processes that allow mediated interventions to be suggested frequently at almost every stage of the resolution process."



What do we conclude?

- The court is there to manage
  - protection
  - the outlandish
  - enforcement
- It relies upon the routine case being settled to have capacity to do this work
- It provides assistance to that aim through its respect for the open offer and the punishment it can deliver where one side gets it wrong: the Admiral Byng moment 'pour encourager les autres'?
- And we must applaud that – and we must also suck it up when it is us on the poop deck. Courts are human and fallible, and we should have factored that into our guidance to our client and if it all goes wrong for them, they will have known the risk they were taking.

- And yet Irwin Mitchell's research in July 2021, involving 1,000 respondents:
  - "39% of respondents were not aware of ADR at the time of their divorce and 35% were not offered it as an alternative way. A quarter wished they had gone into mediation or arbitration."
- And it is not even what clients want:
  - "Three in 10 respondents thought their divorce might have cost less if they had been friendlier. Two-thirds of respondents had lots or some arguments during their divorce."


couple-led ...
... law professionals
1. Counselling
- individual ... couple
many different approaches
2. DIY
- ad hoc ...
- family assisted
- professionally supported (advice 'in the wings')
3. Mediation
- with therapeutic mediator
- therapist / lawyer
- child inclusive mediation
- with child expert/ accountant/ lawyer...
Hybrid
law informed, eg
4. one couple one lawyer ("Divorce Surgery")
alligned professionals
5. Collaborative
6. "Co-operative"
7. Partisan lawyer negotiations:
- round table meetings
8. Assisted partisan lawyer negotiations
- hybrid mediation
- joint conferences (barrister led) ... ENE
imposed outcome
8. Arbitration
9. Court
more-structured
Higher cost

Rethinking process

P24: Process: the early stages

1. Settle the client
2. Manage our response to the client
3. How we connect with other party …
4. The first conversation
5. If it is going wrong … too quick/ too slow …
6. Insufficiently curious
7. or creative
8. Re-Audit / protect / issue

P26: Where is the problem?

WHO?	Has a problem with			
	me	My client	Their ex	Their lawyer
Me	Too busy/ Out of my depth/ Always litigate	Feel bullied by them Can't manage them	Fearful of them Distrusting them	Feel outgunned by them No common cause
My client	Don't trust you .. Or understand you	Chaotic Hurt Payback	Feel terrified of them Trying to break them Take it to the wire Same old record Lying	Too powerful/ upsetting / intimidating
Their ex				
Their lawyer				

P30: New kit for a new epoch

1. Therapeutic support for client …
2. Supervision support for you
3. Flexible access of expertise
4. Reach out earlier and longer
5. Collaborative?
6. Mediation
7. Private FDR
8. Open offers re
    1. Process
    2. Substance