RESPECT FOR MOUNT LITIGATION

Cleverer than frogs?

Apparently there never has been a frog gently introduced into a Le Creuset pan and warmed until it boils. Apocryphal story. But climate change isn't. That's the one where we built the hob and the pan, filled it with water and then got in and we still seem to be sitting there with the temperature rising … and we think that we are cleverer than frogs?

Family lawyers of course are … and I like to think that I am … but in writing this presentation, bringing together the obvious quotes that we have all seen, I discovered just how far the weather has changed on Mount Litigation, without my realising and I wonder whether like me, others are too often doing what we have always done:

- venturing out onto Mount Litigation when we should staying home and talking things through; and
- when we do go, we are still going in shorts and flip-flops.

My aim in the next 35 minutes is to

- share that overview
- then provide some thoughts about how we might talk better back in the lodge, nestling in the valley below
- and finally look at how - if we are going to go – we can go properly equipped.

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FLiP Family Law in Partnership

When we need court …
And why sometimes we REALLY don't.

There is a raft of cases that need court –

- largely around protection & enforcement powers – of self/ children/ assets/ information
- and secondly where you are faced with an outlandish position and a refusal to negotiate in the zone that speaks authentically to where settlement should lie, applying legal principles…

But there is a whole lot more going to court than this and I wanted to talk about those cases – the medium money & routine parental disagreement cases that fill our days
And specifically gather our thoughts about

- why these cases are going to court
- and see if we want to do anything about them

Court is

1. slow
2. expensive
3. *for us*, it is usually:
    a. hard work
    b. and also now a lot of talk around the toxicity of doing the litigation work.
4. It is the same *for your clients: hard work and toxic* …
    a. So often our clients don't really get as they step out on the path towards the peak of Mount Litigation that this is a process that will command days and nights of work pouring time and effort into what in retrospect may come to look like a bit of a black hole; and
    b. Litigation spawns litigation – we all know the repeat s8CA'89 case the enforcement/ variation cases that go on and on …

and when you finally get there … at the top of Mount Litigation

5. You will usually find someone of profound brilliance but increasingly, we are warned, *the assessment risks being cursory*. We know now that our Judges are not in a position to turn over every pebble on the beach – not surprising really: the beach is a long way away.
6. It is *unwelcoming*: the judge doesn't want you there -
7. It is *risky*. I has always been so - but there feels an increasing risk of:
    a. vilification for your client or you
    b. costs orders
    c. it may be a poor outcome for your client (including poor outcomes against what you could have negotiated earlier on)
8. The court *may not get it right*
9. and all of this *may be in public*.

Who it is who decides?

When our client first arrives in our offices, very few of them are saying "*I really want to spend 15 months of my life on this case 15-30% of my assets and see what the judge thinks of all of this*"

They come to you to solve this problem they have. If you can't get them what they want – then they would like you to get them what they are entitled to.

I felt this particularly strongly at the start of the pandemic … clients don't want a process that involves them having to venture out – they want a solution brought to them if possible and of course through the normalisation of technological solutions we have the means to do that.

I hear way more regularly from other lawyers than I think is realistic "*my client just wants their day in court*" –

Really?

And this is after we have been clear with them about what getting there is going to be like? Or is this actually you saying that you have run out of ideas – or never really had any about how you might enable them to stay away.

That is why I posed the question in the flier what is on top of Mount Litigation that means we keep doing this climb? Given that :

- the clients don't want to go to court – they want an outcome – (and properly supported will make compromises to achieve that outcome); and
- the judges don't want us there either …

I am just wondering whether that leaves … us. That we are the ones leading the additional unnecessary cases along the mountain paths because of the way that we talk to clients and manage their cases.

What goes wrong?

Is it that we lack a tolerance to keep negotiating – that we run out of ideas? And we issue because that is going to make the other side capitulate? [er as if!]

What are our expectations when we do this?

- is it that we never really expect to have to go to a final hearing;
- that we will parachute in counsel for the FDR in financial cases and that somehow it will all be ok ["*It is going to be so much easier when we have spent 50% of the costs in the case*." ???]
- Or we are down the track in the children case, when each parent is incensed by the allegations – again will it be easier to settle?
- Is it that we feel that only when we have got to that point that *everyone* will be able to see clearly 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 …

And if all of that is so and 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.

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

Self-defeating litigation

Happy to take votes on best quote in category … but Mostyn J's N v F NvF [2011] EWHC 586 Fam @5 must surely be in the running:

- "This is a not very big money case. It is agreed that the assets in this case amount to about £9.714m in value…
- "As can be seen, the parties are £687,000 apart. Not very surprisingly, the combined costs of the parties amount to £652,000. 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."

But for the little dudes – the cases that many [most?] of us are doing day in day out – that gap of difference is truly easy to eclipse in costs, because the canvas of assets is so narrow – even when our costs to FDR are £30-50k each – or whatever is your norm, that is likely to be more than the difference between you if you had moved promptly into solution discussions … That is where I start with most of my clients saying "*if we could settle this now, we have £80,000 to share between you*."

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

- finance
  - spending the difference
- parenting
  - huge work
  - undermining the parental alliance that could have been forged by a different process
  - paving the way for the return match
  - cost
  - delay
  - Hobbesian jungle of unregulated family life during the delay period
  - … and the thing that you are fighting over is going by as you fight - like having a fight in the cinema because someone is disturbing how you want to watch the film – massively more interrupted by the rumpus that you then create.

I wonder whether it is that we lack the skills to diagnose the bind that exists in a particular case and the creativity to find a way forward to address that problem when we know it. If that *is* the case 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 go on being lucky for a bit … but over time our current success rates cannot continue: the days of the business model of issue regardless and hand-off to counsel for the FDR are surely numbered.

"The mountains are calling, and I must go." John Muir
or maybe not

Why we do this work

If the inclination to litigation lies with us then we need to look profoundly at what really are our motivations in this work:

- to delight our client … or at least not get sued?
- to win our case/ get it reported … or is it rather to avoid losing the case?
- to carry out relevant, sophisticated analysis and bring together expertise to assist on a case?
- or is it just struggle to hit budget and bring in the next case to keep us busy?

Surely we came to do this work because we want to

- resolve problems …
- or rather, to help our client move forward

If that is so then it does not point towards routinely issuing and relying on judge-help, because routinely that process is not going to make things better than the agreement that you could achieve early on.

Indeed unless we can say

- "My client needed protection from [**]"… or
- "I can guarantee that my client will beat our open offer" …

You should not be on the mountain path at all.

Re-calibrate our mindset of expectations in the court process
Re-think what should matter to our clients

Paradoxically it may have been the court's attempt to be helpful and kind – to make the best of the particular situation in front of it that has contributed to the problem. By sugaring the downsides of litigation, we have been less wary of court as an option than we should have been. Really, we want our court to be:
- robust
- make perfect decisions all the time
- and impose costs sanctions

[relentlessly in our favour …]

But courts are human (one might say managing to be super-human given the pressures that they are handling in these times) and apt to make mistakes.

So
- Given that the system can't be perfect
- Given its costs
- Putting to one side the safety cases, then in the run of the mill cases, given that It takes two to turn away from court – 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 …"* [– the N v F argument …]

It should also be that we are rated in our profession not for our ability to assemble data to give to counsel for a final hearing but for our ability to keep our clients out of court. Yet as an industry:

- We still doff our caps to the people doing the big cases
- The directories still rate the firms doing the reported cases … and bizarrely not just the ones who win at the hearings but the ones who don't win … and even when the judges are bemoaning why the case ever arrived at their door or making costs orders against that client; and
- Our website profiles still have our cases on them and that trains clients to look for that – a self-perpetuating process.

We should be attentive to that culture too – we have not really made inroads here I think.

What I would like to do today is

1. To remind us of some of those judicial indications about the court and its work
2. Then provide some thoughts about how we might manage more cases for the best
3. Think about the gamut of NCDR offering – and whether we can find a way to select the right process for the right situation …
4. And pull it together with my 7 tips for what now might make things better.

My first section doesn't tell you anything you don't know already -
But I hope it is helpful to bring them together as a platter for your clients contemplating their options.

The weather up on Mount Litigation is worsening.
I would say that there are seven different aspects to the deepening conditions on the route up & when you get there … many have been there for a while but a bit like climate change have been deepening noticeably more recently.

HEAVY WEATHER

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

53. I would remark that 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

Court process is set to be brisk and brusque … The View from the President's Chambers:

- *June 2020 – '43. If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. 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 for the court to hear.*
- *repeated July 12 2021: I make no apology for repeating this central message. There is a need for us all to redouble our efforts*

The operation of this theme is plain in DDJ Hodson's case in AJC v PJP [2021] EWFC B25 … It involved a wife seeking to reactivate nominal periodical payments order. It wasn't brusque at all… it was a careful and rather a lovely fireside exploration - but what was significant in this context was the presence of 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."*

We might have in mind a hermit's hut atop mount litigation and within that cold stone home someone of extraordinary mental brilliance but assailed on every side by cases. They are somewhat in a position of crowd control … DDJ Hodson's decision to close down this application seemed to me to be wise, insightful & incisive but being closed down at the first hearing? That can't have been what the parties were expecting at all.

The hearing may be remote … and we have heard from the Nuffield as to dissatisfaction with that. "A majority of parents (73%) indicated that they did not feel supported during their hearing(s). Just under half (46%) did not have legal representation, and others raised concerns about not being able to be with their legal representative during the hearing and the difficulties communicating with them as a result. Two in five reported that they had wanted to attend court but had been prevented from doing so." 23/7/21

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

It is in practically every reported judgment, but we probably only need the clearest – almost a cliché for us now but powerful for clients:

HHJ Wildblood QC re B [2020] EWFC B44

> '[6] Judges at this court have an unprecedented amount of work. We wish to provide members of the public with the legal service that they deserve and need. However, if our lists are clogged up with this type of unnecessary, high conflict private law litigation, we will not be able to do so.
>
> 7. To further explain the problem, I give these examples of similar requests for micro-management that have arisen before me in the past month: i) At which junction of the M4 should a child be handed over for contact? ii) Which parent should hold the children's passports (in a case where there was no suggestion that either parent would detain the children outside the jurisdiction? iii) How should contact be arranged to take place on a Sunday afternoon? Other judges have given me many other, similar examples.
> …
>
> [9] Therefore, the message in this judgment to parties and lawyers is this, as far as I am concerned. 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. There are many other ways to settle disagreements, such as mediation.'

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

> 14. As things stand, the court cannot impose a mandatory order on the parties that they must participate in ADR. This much is clear from *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002. There Dyson LJ stated at para 9 "It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court." However, the court can robustly encourage and coerce participation in ADR, specifically by making clear that costs sanctions might await parties who unreasonably refuse to do so. In para 30 Dyson LJ referred to an order commonly made in the Admiralty and Commercial Court which requires the parties to take "such serious steps as they may be advised to resolve their disputes by ADR procedures" and that if the case is not settled "the parties shall inform the court what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed." Obviously, the second part of the order is there to enable the court to make an order for costs if it formed the view that a party had unreasonably refused to engage in ADR. But as Dyson LJ makes clear the order "stops short of actually compelling the parties to undertake an ADR," although it might be thought that the nature of the coercion amounts to much the same thing. Similarly, in paras 33 and 34 Dyson LJ refers to and approves the eponymous Ungley Order which requires the parties to consider whether the case is suitable for ADR, and the terms of which are designed to bring home to them that, if they refuse even to consider that question, they may be at risk on costs even if they are ultimately held by the court to be the successful party.
> Mostyn J Mann v Mann 2014 EWHC 537

That particular sky has darkened rapidly more recently:

Surrey initiative , now Family Solutions initiative
https://www.familylaw.co.uk/news_and_comment/the-family-solutions-initiative-a-response-to-a-system-in-crisis

… 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, as is seen below, 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 (requesting an additional 7 days if required). The response to include proposed arrangements to engage in a non-court process, an offer of alternative non-court process(es) setting out your rationale or an explanation as to why the invitation is being reasonably declined and why you are not offering an alternative non-court process(es).

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.

As we will see below, a congruent approach is taken by Mostyn J and also Mr Recorder Allen QC

And we will see the Master of the Rolls weighing in –

And the discussion is now starting about whether mediation might shed its voluntary element.

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

Lots of these in the cases but surely the first and best was in 2013

> 50 It is, unhappily, symptomatic of a deeply rooted culture in the family courts which, however long established, will no longer be tolerated …
>
> 51 I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders…
>
> 52 The law is clear. As Romer LJ said in Hadkinson v Hadkinson [1952] P 285, 288, in a passage endorsed by the Privy Council in Isaacs v Robertson [1985] AC 97, 101:
>
> > "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void." ...
>
> 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) The funding is going to become more challenging if you want to have a go

- Re F - 2016 Cobb J – discount of 15% on claimed costs on a legal fees provision application …
- X v Y re Z, a form of summary assessment, deducting 30%
- X v Y re Z (no 2) para 32 …I must confess to being dismayed to discover that the solicitors in this case have billed the mother sums significantly in excess of the amount which I awarded to cover the costs of the *Schedule 1* litigation, and which Mostyn J ordered in relation to welfare/medical litigation; they can only have assumed that this overspend would be retrospectively authorised by the court. They were not entitled to make that assumption. … [34] If I had thought that my comments in *Re F* and in the earlier judgment in this case would have the effect of encouraging the mother's solicitors, or indeed any solicitors in similar cases, to assume that they had *carte blanche* to bill their clients as they choose, I would not have made the comments, or I may have expressed myself differently. In November 2020, I set a budget within which I expected the mother's solicitors to work. … [41] Any potential overspend will require prior court authorisation, or will otherwise need to be accepted at the solicitor's risk.

Are we seeing the dawn of fixed pricing and costs capping as discussed by Mostyn J in J v J as what should be put forward for what Lord Neuberger as the inefficient practice that needs to be remedied“:

> 13. In my opinion 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. Naturally this cap would be variable if circumstances change but the change of circumstances would have to be a big one for a variation to be allowed.

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.

It is surely bizarre to have costs capping in civil but not in family where the management of spend should surely be routine. We also saw a step towards fixed pricing on 6th July 2020, when the new form H, courtesy of 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

And a lot of that culminates in:

Weather warning (6): you risk being condemned in costs if you can't justify your journey

"The higher you climb on the mountain, the harder the wind blows." – Sam Cummings

There is a wide-range of opportunities to slip up:
- what you raise / how you raise it
- failure to engage in DR
- failure to disclose
- failure to make offers or respond to offers

This is anchored in the FPR updated with effect from 27th May 2019 …

PD 28A - 4.4

In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.

Just pausing there we know from the N v F 'iron rule' that costs are likely to be disproportionate. That is the rule that should be weeding out most of the cases that should not be at court – because it should force us to assess whether the journey is justified.

> **Costs in financial remedy proceedings**
> 28.3
> …
> (6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).
>
> (7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –
> (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
> (b) any open offer to settle made by a party;
> (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
> (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
> (e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and
> (f) the financial effect on the parties of any costs order.
> (8) No offer to settle which is not an open offer to settle is admissible at any stage of the proceedings, except as provided by rule 9.17.

For anyone concerned that this was somehow changing the rules about conduct that was inequitable to disregard, we had help – who else - Mostyn J in OG v AG [2020] EWFC 52

> 34. Conduct rears its head in financial remedy cases in four distinct scenarios. First, there is gross and obvious personal misconduct meted out by one party against the other, normally, but not necessarily, during the marriage. The House of Lords in *Miller v Miller [2006] UKHL 24, [2006] 2 AC 618* confirmed that such conduct will only be taken into account in very rare circumstances. The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact. In one case the husband had stabbed the wife and the wound had impaired her earning capacity. The impact of such conduct was properly reflected in the discretionary disposition made in the wife's favour. Mrs Miller alleged that Mr Miller had unjustifiably ended the marriage discarding her in favour of another woman. Therefore, she argued that Mr Miller should not be permitted to argue that their marriage was short. This argument was rejected by the House of Lords which held that the conduct in question, although greatly distressing to Mrs Miller, should not find independent reflection in the court's decision.
> 35. The conduct under this head, can extend, obviously, to economic misconduct such as is alleged in this case. If one party economically oppresses the other for selfish or malicious reasons then, provided the high standard of "inequitable to disregard" is met, it may be reflected in the substantive award.
> 36. Second, there is the "add-back" jurisprudence. This arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property. Again, it will only be in a clear and obvious, and therefore rare, case that this principle is applied. In *M v M [1995] 2 FCR 321* Thorpe J found that the husband had dissipated his capital by his obsessive approach to the litigation, which had included starting completely unnecessary proceedings in the Chancery Division. That dissipation was reflected in the substantive award. Properly analysed, that decision can be seen as a harbinger of the add-back doctrine rather than a sanction reflecting a moral judicial condemnation.
> 37. In this case the sums loaned by the husband to TT will all be added back to the matrimonial pot at full value. The husband does not resist this.
> 38. Third, there is litigation misconduct. Where proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition.

39. Fourth, there is the evidential technique of drawing inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure. The taking of account of such conduct is part of the process of computation rather than distribution. I endeavoured to summarise the relevant principles in *NG v SG (Appeal: Non- Disclosure) [2012] 1 FLR 1211* , which was generally upheld by the Court of Appeal in *Moher v Moher [2019] EWCA Civ 1482* . In that latter case Moylan LJ confirmed that while the court should strive to quantify the scale of undisclosed assets it is not obliged to pluck a figure from the air where even a ballpark figure is in fact evidentially impossible to establish. Plainly, it will only be in a very rare case that the court would be unable even to hazard a ballpark figure for the scale of undisclosed assets. Normally, the court would be able to make the necessary assessment of the approximate scale of the non-visible assets, which is, of course, an indispensable datum when computing the matrimonial property and applying to it the equal sharing principle.
40. I turn to the computational exercise.

In March 2021, Mr Recorder Salter delivered in his usual brilliant way a brief lecture on the topic in AA v AB , reviewing the key recent decisions:

[86] The courts have had to consider a number of cases where the parties have spent a large proportion of their assets on legal costs to disastrous effect. I will refer only to the most recent and most important of these. In *WG v HG* [2018] EWFC 84, Francis J found that the wife's costs were excessive, that she had presented an unreasonable case, but that the Duxbury fund she was to be awarded could not be completely undermined and that the husband's offer had been too low. Accordingly, the wife was awarded an additional £400,000 towards her costs leaving her to find some £500,000, which would deplete her Duxbury fund. As Francis J graphically put it (at [91])"… people cannot litigate on the basis that they are bound to be reimbursed for their costs ... no one enters litigation simply expecting a blank cheque". He continued (at [93]): "It might be said that I have assessed her needs at a given figure. If I have done that, then how can I leave her with a lower sum which, by definition, does not meet her needs? This conundrum happens in so many cases. People who engage in litigation need to know that it has a cost …. She will have to make the sort of decisions about budget managing that other people have to make day in day out".

[87] In *MB v EB (No 2)* [2019] EWHC 3676 (Fam), Cohen J viewed the case as one which should have been very easy to settle, and that the reason it had not was because of the way in which the husband had chosen to run his case. Although the wife's first offer was light, had there been a sensible (or any) response to her offer, there would have been a quick resolution. It was found that the husband's needs, costs aside, amounted to £335,000. However, the husband's unpaid costs were £380,000. Applying paragraph 4.4, Cohen J limited the costs payment to £150,000 acknowledging that the husband would be left only with the net sum of £105,000.

[88] The decision most directly on the interpretation of paragraph 4.4 of FPR 2010, PD28A is that of Mostyn J in *OG v AG* [2020] EWFC 52, where the parties had run up around £1m in costs. Whilst this was mostly referable the husband's litigation conduct, the wife had also failed to negotiate openly and in a reasonable way. In relation to this failure, Mostyn J said (at [31]):

"It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate or reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, whether it is being decided by reference to needs or sharing".

[89] In *RM v TM*, to which I have referred at paragraph [58], the combined legal costs were £594,000, representing 94% of the proceeds of sale of the only liquid asset of substance, the former family home worth £630,000, when the difference between the parties' offers was only £191,000. Neither party was found to be entirely free from blame in the conduct of the litigation, although the husband was found to be more blameworthy. Consequently, the court felt ample justification in making a modest costs order against the husband of £15,000 …

[90] The Court of Appeal in *Rothschild v de Souza* [2020] EWCA Civ 1215 set out the correct approach to the issue of litigation conduct within financial remedy proceedings, including in needs cases, at [61]-[80]. Paragraph [78] of the judgment of Moylan LJ is of particular relevance:

"The depletion of matrimonial assets through litigation misconduct will plainly not always be remedied by an order for costs. As I have said, such an order simply reallocates the remaining assets between the parties and does not necessarily remedy the effect of there being less wealth to be distributed between the parties. What is important is that, whether by taking the effect of the conduct into account when determining the distribution of the parties' financial resources (both income and capital) and/or by making an order for costs, the outcome which is achieved is a fair outcome which properly reflects all the circumstances and gives first consideration to the welfare of any minor children".

"Mountains have a way of dealing with overconfidence." – Hermann Buhl

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)

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 -*

(a) ***by such date as the court directs****; or*
(b) where no direction is given … ***within 21 days after the date of the FDR appointment****.*

(2) ***Where no FDR appointment takes place****, each party must file with the court and serve on each other party an open proposal for settlement -*

(a) by such date as the court directs; or
(b)where no direction is given under sub-paragraph (a), ***not less than 42 days before the date fixed for the final hearing****."*

So here the Judge is given the wherewithal to explore what 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 this increases considerably the shine of light into what may have gone wrong and encourages more settlement focused behaviours by creating the opportunity for costs consequences where we

have fallen short in the guidance we have given our clients.

Stay away (7): … and all of this may play out in public

J v J [2014]: [9] I must confess to have been almost lost for words when the scale of this madness was revealed to me. They have spent a total of £920,000 in costs. … They have spent on costs nearly a third of everything they built up over 18 years; … The result has been to make a case that was surely so easily settleable almost impossible to compromise, and to impose on the High Court a seven day trial where the principal focus has been a bitter war of recrimination and denunciation about who was more at fault for this appalling state of affairs … [58] the wife will receive … (38.9% of the assets); the lawyers and experts will receive … (31.9%); and the husband (29.2%). These figures speak for themselves.

Antonio v Rokos [2016] EWHC 520 15 I have to say that I do not find it very edifying that people in this financial bracket should be taking up a day of court time over a sum which to them, though not to others, is objectively so small. However, agreement has not been reached and I must rule.

Pulling it together …

Court, then is the lynchpin to the success of NCDR
The court option has to be chilly for NCDR to be adopted for all appropriate cases and we should welcome this.
To that extent one is the Alternative dispute resolution to the other and whether *non-court* or *court* should be regarded as "alternative" is a moot point.

And the court route *is* colder than ever before. There is a reason why those of us who are stepping out in our usual flip-flops and shorts are finding it uncomfortable and the going hard.

If there were no Admiral Byng moment, litigation could remain a simple choice for many cases and an easy and profitable business model for some.

But the court is really telling us now:

- *"we get it – there are cases that need the court*
- *"and there are situations where you are being bullied by no offers or low offers …*
- *"come to us – that is what we are here for … but*
    - *don't bring your rank and file cases*
    - *make an open offer (so we can see the problem);*
    - *comply with the rules every step of the way; and*
    - *continue to be vigilant about finding solutions as you climb …*
- *"and we will support what you are doing."*

"The way up to the top of the mountain is always longer than you think. Don't fool yourself, the moment will arrive when what seemed so near is still very far."

Paulo Coelho

And that brings us to the sheltered picnic sites up Mt Litigation.

SHELTERED PICNIC SITES

So we have in mind that there has been climate change it is blowy and brusque … it is going to be harder going and quite possibly less satisfactory at the end. We need to be better equipped if we are going to go – and the message is that it is really far better to stay indoors, unless court intervention is necessary …

Meanwhile the court is stepping up to support settlement and NCDR, along the way if you are venturing out … It is providing picnic grounds on the slopes where people can settle down to sort things out between themselves … The FDR is the largest and best-appointed but we are now seeing other help and support off the main court path …

In a way most of what is set out on the previous pages is the court supporting NCDR – The more robust court becomes the more alluring the non – court option should seem to be. This resonates with something way back in J v J where Mostyn J said in terms, "if we do costs capping, arbitration will soar".

Where some might read fearfully that a failure to negotiate openly and reasonably may result in a costs award, really, we should be rejoicing and grabbing that truth with both hands …

- You are not now necessarily going to be stuck with being bullied by a ridiculous offer
- If you get your thoughts in order early
- And offer early

then the risk profiles can change rapidly.

But beyond this we also see specific other support from the judiciary:

8. interlocutory steps out to arbitration

March 2019, Moor J in CM v CM [2019] EWFC 16

10 … On this occasion, there was no legitimate dispute as I had already made an order that set out the issues Mr Bezant had to consider. If, however, in a future case, there is a genuine issue as to drafting, I consider it would be exactly the sort of matter that should be referred to an arbitrator who is accredited by the Institute of Family Law Arbitrators.

12. I have decided to put an anonymised version of this judgment on Bailii to highlight Paragraph 10 above. 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. This may be a result of more time being available to the judge both for preparation and in the hearing itself. Private FDRs take a lot of pressure off the court system which is highly beleaguered at the present time. They free up judicial resources to hear cases that must be heard in court.

15. However, the private FDR system must not be abused. … If they were in the court system they would not be allowed unilaterally to pull out of an FDR even if they felt that there was a deficiency of disclosure likely leading to a barrier to negotiation and an ultimately fruitless outcome. If such a party were in the court system, and felt that way, then it would be incumbent on her to apply to the court for an adjournment of the FDR.

20. … where an agreement is reached that a private FDR will be held then an order should be made which (a) disapplies the in-court FDR process, (b) requires the parties to attend a private FDR on a specified date, and (c) provides that the date may only be altered by an order of the court (which may, of course, be made by consent).

10. Promote agreement through FPR part 3 adjournments

Mostyn J in JB v DB [2020] EWHC 2301

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."

30… However, the afternoon before the meeting was due to take place the husband's solicitors wrote to cancel it stating that there was a funding issue. This was a surprising statement to be made, given that the husband has, for the purposes of this hearing, apparently spent over £92,000 in costs, and was well able to find the funds to pay for the fees of Mr Langer. Although the date of the meeting came and went, one might have hoped that a new meeting would have been set up, but by 10 June 2020 the husband's new solicitor was writing to say that she did not consider that a counsel only conference at this stage would achieve anything at all, which seems to me to represent a rather cavalier approach to the obligation incorporated in para.11 of my order 16 April 2020.

Mr Recorder Allen QC WL v HL, WL v HL [2021] EWFC B10:
[*do please read if you haven't already, wise, firm and patient persistence over a number of appointments]*

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 even though agreement was not reached in mediation but was reached thereafter between the parties themselves. My order took the matter out of the court arena and the inevitable focus on the next court hearing. It allowed the parties to maintain a direct dialogue rather it being conducted in writing via their solicitors (with the potential for polarisation and the inevitable increase in costs). It also allowed them to discuss with a third party and eventually agree a solution that worked for them as parents of their young child (rather than having one imposed) but, importantly, in the context of knowing that I was maintaining an overview of the progress of their negotiations.

… 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.

> **It would be helpful to gather data on the extent to which these duties and powers are applied.** Are there universal standards across the country or are differing courts adopting differing approaches? 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.

WL v HL relates back to weather warning 3 and a new wakefulness around the court's dispute resolution powers. So whilst it may be early days, we can see our judiciary working around the edges of the case to promote dispute resolution and this appears to be part of the new vision:

Master of the rolls, Sir Geoffrey Vos:

I want to see ADR integrated into every stage of what we call the dispute resolution process. The focus throughout ought to be on resolution rather than dispute.

"It is an easy thing to say, but a much harder one to achieve. 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."

Sir Geoffrey said his theory was that "almost every dispute has a sweet spot when it is amenable to consensual resolution".

But that sweet spot occurred at different times for different disputes, and in many cases would be hard to identify.

"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."

29 March 2021

"It's always further than it looks. It's always taller than it looks. And it's always harder than it looks." – *The three rules of mountaineering*

OUR MARKET – AND THE INFLUENCERS

The not for profits have always been clear that away from court has many benefits – as trailed in the Mr Recorder Allen QC judgment, the point was given banner headlines in November 2020 from a sub group of The Private Law Working Group - that families need sign-posting to appropriate support and the signpost to court is small and for a minority.

"What about me

8. Society's response to family breakdown must therefore promote children's rights and the long-term benefits of cooperative parenting. This may not be possible in the immediate aftermath of relationship breakdown, but a holistic and relational response to separation is needed to promote the chances of both parents providing cooperative parenting to their children.

9.For some families, this may not be safe. In cases of high conflict and abuse, safety is a priority and a court intervention may be required as one of a number of responses. Children in these cases must be identified early and they, and any parent who is at risk, need appropriate support and protection.

10. However, the majority of families need an entirely different support which is holistic and relational:

A framework and language which promotes child welfare and a cooperative parenting approach.

Access to information and direct services for children.

A mechanisms for the child's voice to be heard at the time when decisions are being made which affect them.

Access to information and direct services for parents about how to parent following separation.

A consideration of the emotional state of the parents and the impact this has on their parenting decisions.

A multi-disciplinary response, involving therapists, parenting specialists, mediators and legal services.

These do not form part of the administration of justice and currently there is no framework for the provision of suitable services, clearly signposted and accessible to all.

11. The absence of adequate provision for families who do not need the justice system comes at great cost to society as a whole. Taking just the financial cost, the annual cost to the taxpayer of family breakdown is now estimated to stand at £51 billion, up from £37 billion ten years ago.

THE OVERVIEW

So don't we have a symbiotic system where

- 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 (appropriately named if you were the solicitor in JB v DB?) 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 that is our role - to add value to this client and help them to move forward with their lives:
  - not only to provide effective management of the litigated case (which should remain, given the weather warnings, our very last and somewhat desperate choice]; but
  - primarily through facilitating the settlement

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."

So

- when our judges are telling us things
- Our clients are telling us things
-

And we are doing something else … then we want to be careful about the longevity of our careers – someone is going to take a long hard look at what is really wanted and needed and will successfully identify something that is transformatively different. The landscape then is going to change beyond measure.

What do we learn?

- Our courts are reaching out to support NCDR,
- because they don't want to hear from you in the routine case
- You should expect as- good- as- they- can- make- it pragmatism if you insist on going there rather than visionary truth and justice
    - and if the costs are high
    - or you have breached the rules
    - or you have fallen short on accepting an offer or adopting DR

    then you may find yourself with hypothermia

    - which may just happen – in public.

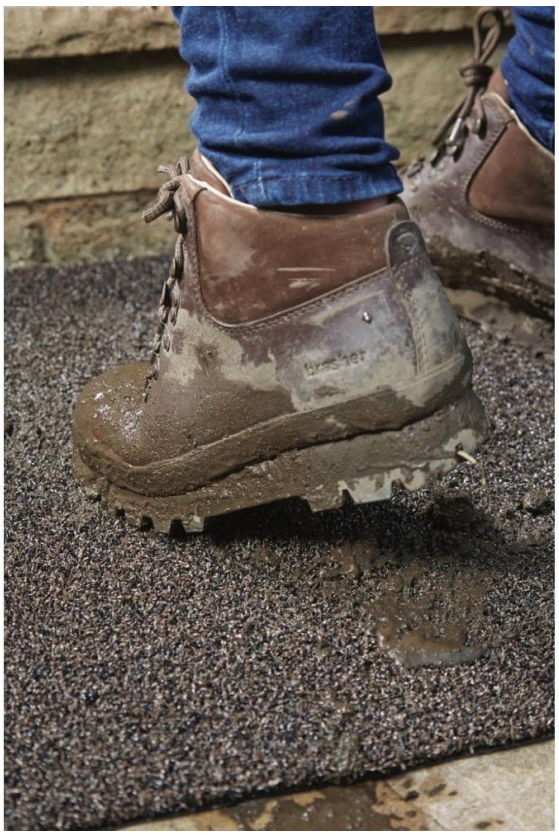
    And given the workloads you can't realistically expect it to be managed perfectly at every turn.

That should mean that we really need to pause (for ourselves and for our clients) and ponder how taking this route in the routine case is consistent with our goals.

- We have to assess our offers not against what is right but what the situation will be by the time that we get to court. The early assessment is beyond value.
- The really sophisticated analysis is more likely now in arbitration or private fdr where the tribunal is not pressed for time or limited in scope to the 350 pages of the bundle.

This is not about the way that our counsel manage our cases – we need to be thinking

- way earlier, from our decision to put on our boots
- but also all the way up and over the foothills to the final scramble to the summit.



OUT OF COURT OPTIONS

One way of looking at the different NCDR options is to think about who is involved and how:

- Your own advisor
  - none
  - ad hoc as you ask for it
  - in the room with you
- A non-aligned professional
  - none
  - a neutral facilitator of views
  - as above with legal information
  - as above sharing views and concerns on the positions being taken
  - giving an opinion on the law
  - giving an opinion on technical issues
  - imposing an outcome
- These professionals can come in different flavours, with expertise that might be more about:
  - the relationships
  - the children
  - communications
  - law
  - technical matters such as pensions, tax or investment.

The most used alternatives are shown in the grid below:

<table>
<tr><td></td><td>No advisor/ occasional advice</td><td>Directly involved advisor</td></tr>
<tr><td rowspan="2">No facilitator</td><td rowspan="2">The “DIY” divorce, with or without lawyer support in the wings.</td><td>Collaborative practice</td></tr>
<tr><td>Lawyer-Led negotiation
This might be negotiations by letter or a one-off or a series of meetings.</td></tr>
<tr><td>Neutral facilitator</td><td>Family mediation</td><td>Occasionally we see family mediation with the lawyers brought in - usually during the later stages</td></tr>
<tr><td>Facilitator and law guide</td><td>Directive mediation

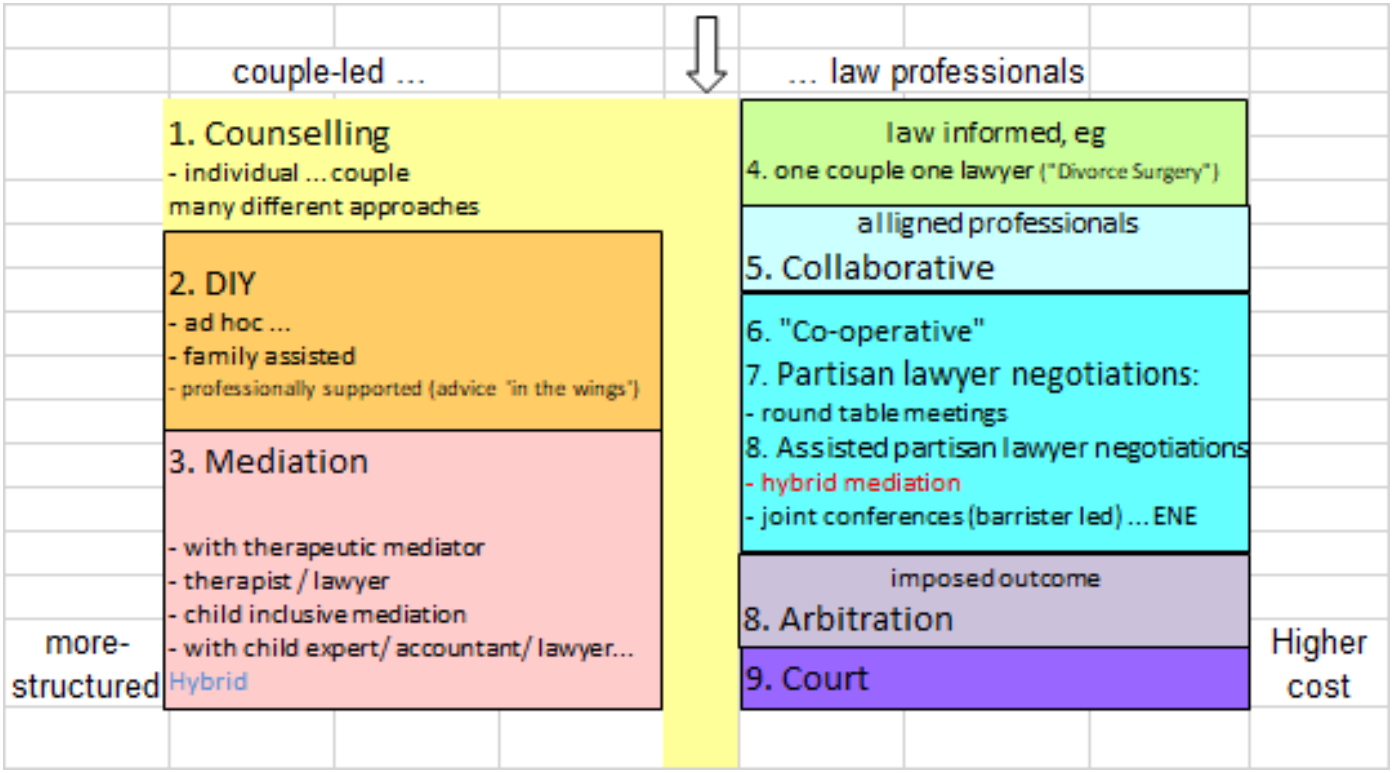
Occasionally you might have a neutral facilitator with legal expertise parachuted in</td><td></td></tr>
<tr><td>Facilitator and tester</td><td colspan="2">Hybrid / Crunchpoint mediation
[1]</td></tr>
<tr><td>Help with the law</td><td colspan="2">Neutral Evaluation /
Private FDR</td></tr>
<tr><td>Imposing an outcome</td><td colspan="2">Arbitration</td></tr>
</table>

[1] *Possible but more rarely without lawyers*

These processes might come in combinations or in a sequence …

- for example, neutral evaluation is pretty pointless unless it happens in the context of what is then done with the guidance on the likely outcome; so this might be couched in
    - mediation; or
    - lawyer-led negotiation.
- Med-2-arb would see a process:
    - commencing in neutral facilitative mediation; but
    - with the unresolved issues then being referred to arbitration if an overall agreement can't be reached.

An alternative way of looking at the process might be the extent to which is it controlled by the couple or managed by lawyers. This might be thought of as a series of rooms in the following form:



But Angela Lake Carroll has long been promoting this approach where she says "stop thinking about a series of process options and trying to select the one that works and try to think about client needs – patchwork together the process that is most likely to generate what is likely to address the problem and find good solutions:

To this I would add tolerance and respect …

- there are vast numbers of people using similar-named processes in diverse ways.
- You may not know better than them – they may be able to use a process in a way that twinkles …
- Let's try to listen out for new departures and use those who are able to provide families more of what they want.

the litigation wheel

as an alternative focus on what clients actually need

SETTLEMENT FOCUSED EARLY STAGES

So how would this play out in the different process chapters before we elect to go to court in the routine case?

	stage	***Purpose***
1.	Settle your client	Listen first carefully to the story for safety. Then seek to build the relationship of trust: the client may come to you looking for gladiatorial levels of commitment and support – but what they probably need from you is the balanced objective assessment and the step of reaching out to the other side which may appear vulnerable. Carry out an assessment of what is realistically achievable and get the client on board with that.
2.	Manage your response to your client	It is so easy to be hijacked by client's demonising story We do best building empathy But we must also come from a place of calm and objectivity
3.	How we connect with the ex Who we connect the spouses with for advice	Reducing the shock of contact Planting the prospect of a constructive, solution-focused dialogue. Connecting them up to our best in class and one of our preferred working-partners
4.	Where safe to proceed, connecting up in person with other side to agree forum: - how to progress - when to progress When we are the person being connected with – we have a professional duty to engage	and that means that we need to be - skilled - connected and with those skills and connections we should be able to create safe space for discussions between clients Hold in mind that Covid has broken down geography – we can connect way more widely now. Shouldn't our conversations begin "*Wouldn't it be great to do this well for them – how do you think we go about it*?"
5.	*<u>If it is going wrong</u>* Stop and wonder why … Why are we feeling pushed to court – were we: - too quick - too slow	 The other side is not ready to talk – pacing is all by starting early we have time to listen – we are not at the end of our tether by the time we ask the question

	stage	***Purpose***
6.	- Insufficiently tolerant / curious	Tolerant and curious in terms of "ok they are reasonable people… so what is happening" [2] I would like me to be better at trying to work out what is going on. [3]
7.	- Insufficiently creative	In financial remedy cases there will often be a big gap between us – one of the acceptable reasons for going to court – how do we manage those cases better
8.	And we can't just sit waiting endlessly for sense to dawn – we need a way to go forward – and if we are being blocked we need to unblock We may appreciate that we don't want to go to court - but if we have to do so do then we need to get there efficiently	Remember para 4 of the Appendix to PD9A "*Making an application to the court should not be regarded as a hostile step or a last resort, rather as a way of starting the court timetable, controlling disclosure and endeavouring to avoid the costly final hearing and the preparation for it*." We surely need a theory to work with to understand whether we need court or we need to talk:

[2] I remember in the very early days of The Family Law Consortium, well known therapeutic mediator Ruth Smallacombe saying to me in terms "*you are weird you lot – you ask nicely once but then if there is no response, it is wham – straight into the bloodbath; there is no real endeavour to make it work*" … more recently began to understand what she meant … we reach out nicely most of us – but we struggle to have the patience to keep on reaching out and evaluating what is happening if it is not going well.

[3] So often, I start from my client's narrative – that the other person is unreasonable/ coercive and worse … then find that I am not getting the progress that I want and that of course confirms the cartoon that I have been carrying in my head

I must hold harder to the idea that no-one wants to litigate – sure there are people who think that they may end up having to – but that is altogether different … if I could engage that authentic curiosity and pick up the phone – far fewer cases would end at court – and if they won't talk to me then I will write – and if I do end up at court then my correspondence will be more compelling than the Ruth-route: one chance and you are out

AUDIT WHAT IS GOING WRONG

As we have seen, Karen Barham, Nick Allen and Sir Geoffrey Voss [and who is going to argue with that team?] – as well as a whole lot of others are saying the same thing:

- stop thinking of NCDR as this alternative course you go on …
- opportunities to settle are at every step in the litigated case – pre issue, at issue, after issue

But none more than before the process starts.

Rather than issuing because the case is stalled, don't we need to carry out an analysis to see why it is stalled and whether there is a safer way to progress it – I have tried to pull together a list of motivations/ blockages and would love thoughts on what is missing:

Who	*Problems related to*	*Solutions*
you	*Internal* ◦ Too busy to engage and perhaps even raise the question ◦ Feel out of your depth/ fearful/ unskilled ◦ Don't know the answer to find the ZOPA and do best by your client ◦ Always litigated – always will ◦ *"This is our business model … gather facts – put in bucket hand to counsel for FDR/ FH … get paid."* *Client* ◦ Dislike your client eg feel bullied by them ◦ Don't feel able to manage client / contain their expectations *Client's Ex* ◦ You are fearful of the ex … feel incompetent to hold the ring with them ◦ Think they are incapable of engaging – they have bullied my client now and any process will simply host more of the same ◦ They are lying *Other lawyer* ◦ Feel out- gunned by them / ◦ don't trust them / ◦ there is no common-cause to be created with them *The other team (ex & lawyer)* ◦ They have been given a chance to engage and did not step up – that speaks for itself … game on!	
Your client	*Internal (themselves)* ◦ They feel chaotic – scarcely able to get through the day. Have no clear idea of what they want. This is all happening way too fast; or perhaps holding on to the relationship.	

Who	*Problems related to*	*Solutions*
	◦ They have no real sense of what is going to happen in the court process and it is just one step in front of the other – they think they learn from you that issuing is what they have to do next. ◦ They feel hurt and this is payback … ◦ or their ex was 'never entitled anyway' ◦ There is some factor [conduct / promises / bad behaviour / family support / new relationship] that seems massive to the client in the scales of what is fair but which they haven't yet worked out won't register at court. *You* ◦ They don't feel confident in your plan / your motivations / your skills to manage it well ◦ The relationship between you is rocky ◦ They don't understand what you are recommending *Other party* ◦ Domestic abuse (not yet shared with you) ◦ Outgunned by the other ◦ Feel terrified / unsafe ◦ *"s'/he's always lied and been unreasonable. Why would this change?"* ◦ Doesn't trust their ex otherwise to play fair ◦ Raging – your client sees their own refusal to engage as the start of pay-back to their ex ◦ Sees tactical advantage in delay ◦ Eg, believes that the other party will "break" given time ◦ *"It will be the same old tired record – my ex has never listened/ never will."* ◦ Believes in "the wire" – load up the issues and look to do a deal later on [The Lucius Tarquinius Superbus book-burning strategy] *Other party's lawyer* ◦ Sees them as powerful/ upsetting / intimidating/ taking control of the process; or ◦ Just too irritating/ smug/ [**] to sit in the room with for more than 5 minutes *Or …* ◦ There are others (relatives / friends / parents) who are providing the trusted guidance to the client ◦ ?	
ex	*The same categories and questions as in the box above* *With themselves* ◦ They feel chaotic – scarcely able to get through the day. Have no clear idea of what they want. This is all happening way too fast; or perhaps they are holding on to the relationship. ◦ They have no real sense of what is going to happen in the court process and it is just one step in front of the other ◦ Or they feel hurt and this is payback to your client … or your client "was never entitled anyway'.	

Who	*Problems related to*	*Solutions*
	◦ There is some factor [conduct / promises / bad behaviour / family support / new relationship] that seems massive to the client in the scales of what is fair but which they haven't yet worked out won't register at court. *Their lawyer* ◦ They don't feel confident in their lawyer' plan / motivations / skills to manage the situation well ◦ The relationship between them is rocky ◦ They don't understand what their lawyer is recommending *The other party, [ie your client]* ◦ Domestic abuse (not yet shared with their lawyer) ◦ Feel Outgunned by your client ◦ Feel terrified / unsafe ◦ *"s'/he's always lied and been unreasonable. Why would this change?"* ◦ Doesn't trust your client to play fair ◦ Raging – they see refusing to engage as the start of pay-back towards your client ◦ Sees tactical advantage in delay ◦ Eg, believes that your client will "break" given time ◦ *"It will be the same old tired record – my ex has never listened/ never will."* ◦ Believes in "the wire" – load up the issues and look to do a deal later on *Other party's lawyer – ie you* ◦ Sees you as powerful/ upsetting / intimidating/ taking control of the process ◦ Too irritating/ smug/ [**] to be able to sit in the room with them. *Or …* ◦ Perhaps there are others (relatives / friends / parents) who are providing the trusted guidance to the ex ◦ ?	
Ex' lawyer	*Internal* ◦ Too busy to engage and perhaps even raise the question ◦ Feel out of their depth/ fearful/ unskilled ◦ Doesn't know the answer to find the ZOPA and do best by their client ◦ Always litigated – always will ◦ *"This is our business model … gather facts – put in bucket hand to counsel for FDR/ FH … get paid."* *Their client (your client's ex)* ◦ Dislike them eg bullied by them ◦ Doesn't feel able to manage them / contain their expectations *Your client* ◦ Fearful of the ex … feel incompetent to hold the ring with them	

Who	*Problems related to*	*Solutions*
	◦ Think they are incapable of engaging – they have bullied my client now and any process will simply host more of the same ◦ Thinks your client is lying *You* ◦ Feel out- gunned by you ◦ doesn't trust you ◦ there is no common-cause to be created with you ◦ scared of you ◦ irritated beyond measure by [you][your intransigence][your arguments] *You and your client* They gave you a chance to engage and you did not step up … game on	
	With their lawyer ◦ The relationship is rocky ◦ Haven't had time to engage	
Or combinations of the above		

SOME THINGS THAT SEEM TO WORK WELL IN THE NEW CLIMATE

With time, we could grind through each of the above and think about whether it is court or a different sort of talk – I think that perhaps it is only the ones in red which are best answered by court rather than one of the following …

[I accept that the open offers are in preparation for court – but you should not step out for court till that is done.]

1. Therapeutic support for your client:
   - to enable them to regain control
   - to gain understanding of what is going on – what are the motivations for themselves and their ex
   - to think through what is going on for the children
   - as a place to contain the feelings from the separation
   - and the feelings about this process – which is why I say that this element goes right down the corridor

2. An efficient process so that you have time to connect well with them and provide the support they need.

3. If it is you who is overwhelmed by this case then bring support for you
   - to cope better
   - to have time to reach out to your client better – mentoring / supervision

4. if you are lacking confidence then buy in expertise for the case
   - Financial expertise
   - Counsel

5. Always reach out to talk
   - reaching out to the other side
   - meeting/ zooming- up
   - The aspirations audit – *The Brighton questions (see last page)… they will ground our work in the aspirations of our clients and pull us away from law-only thinking*
   - help from the therapist at 2 as to what is going on.

6. The top-end version of this is still collaborative – we probably do our best work for clients with other professionals we trust sitting down and listening and being listened to.

7. Mediation or
   - Hybrid mediation
   - mediation with parachutes
   - The joint conference
   - Med 2 arb

8. The private FDR
   - this was invented to be very early – it happened in a collaborative case in ?2008 because the wait for court would be so long and disclosure would go out of date

9. Open offer
   - process
   - substance

I have shown you what these might look like in the appendix.

TAKE AWAYS

1. Be skilled in [or at least have good connections to access those skills] and focus upon what the client needs:
    - First they want Solutions
    - Law is simply the safety net
    - Therapeutic support
    - Negotiation skills
    - Good transitions for children / management of the relational divorce

2. Agree a contract with the client
    - that you have authority to bring them back on track
    - get them supported
    - remind the client of the *risks of* court and the benefits of settlement

3. Create your community
    - trusted partners to whom to introduce the other party to be our partner in this work … dust off that collaborative pod, it is where you may do your most valuable work
    - those with other skills to refer to – our connections are a thing of real value to our clients

4. Audit clients needs
    - and match them to a plan
    - If you are not getting results, think about why it is not happening
    - Be persistent –
    - Authentically pursue dialogue

5. Systemise and be equipped to manage clients' cases economically

6. Audit for safety – you may need court

7. But fundamentally STOP believing that a court is there to put all of this right
    - Check yourself:
    - Start to think of law as the low-hanging [ie sub-optimal] safety net for the stuck and hard case, when all other options are exhausted …
    - We should be doing our work up on the trapeze – that is where the client will find the solutions that speak to their values and their knowledge of what will work
    - If you are going to court then go open early and keep that offer under review

8. Audit all your correspondence and position statements and documents
    - (not only for being professional, honest, working for your client and their ex and that person's lawyer but also)
    - for its promotion of settlement; and
    - for the court that may read it and assess it for that too.

APPENDIX – MODEL OFFERS TO GIVE PROTECTION IN COURT CASES
Extracted with amendment from upcoming schedule 1 publication

1. *Offers on process*

We know that court is likely to be the most expensive of the options – but ultimately it is the only one that does not require "buy-in" from the other side: mediation, collaborative, ENE, private FDR … all require agreement from the other side

- to do them,
- who to do them with; and
- when to start.

It is only court that is free from the other side's control in this way: you can't be stopped from issuing and whilst the period to the first appointment is long, ultimately the other side can't safely refuse to engage. As we have seen above, case-management has to be done impeccably and we know that there is a risk that it will be all-consuming so try to get your case straight before you start:

If you have to go this route then at least give your client the best protection you can. This protection will help:

- in a LASPO application, when:
  - the applicant will benefit from being able to show the reasonableness of their substantive 'ask' and the efforts made to be cost effective and to settle in the process prior to the application
  - the respondent will want to show a rush to court heedless of the offers to talk as a defence against the claim for funding.
- the court's discretion as to costs at the end of the day (when efforts to settle will be centre stage in the courts discretion);
- the court's discretion as to costs in the interlocutory stages; and
- generally the view taken of your client by the court as it expresses (as is increasingly likely) its disquiet as regards the costs being incurred and starts to hunt around the court for where responsibility for this lies. A clear paper trail (often front and centre in the court bundle) will often help.

Protection can come:

- either from an offer of substance (that is the other party is condemned in costs for failing to accept a reasonable offer)
- and/ or from offers as regards process (here the party might be condemned in costs for insisting on an expensive – perhaps court – route, when cheaper alternatives were available – or from failure to carry out the MIAM process appropriately).

We should aim to cover off each avenue.

But as we write, our letters should do more than seeking simply to provide the killer moment at some eventual hearing. The best letter should still be authentically encouraging the settlement dialogue, promoting the way back to the negotiation table rather than tending everyone to retreat into trench-warfare litigation.

This section focuses first on some of the process options.

[Here XX is for applicant and YY for respondent]

a. A paper trail to show your preference for appropriate dispute resolution alternative

*Dear ***
Open ISSUE OF PROCEEDINGS
I am writing to express my concern that we have not been able to progress towards a resolution of the issues standing between XX & YY.

- *On * I called you offering to meet to talk matters through and I did not hear from you;*
- *On *, I wrote to you repeating that offer and confirming XX/YY's willingness to have a round table meeting or such other NCDR process as you might think appropriate. I invited*

you to volunteer disclosure of your clients [means][case as to needs] and again unfortunately we have not heard from you.

- *In the absence of help from you, I am not in a position to propose measures that might reassure your client to enter into the constructive discussion that is sought on this side.*

I am conscious of our duties to the court under the overriding objective and conscious too that [child]'s needs mean that we need to regularise the financial arrangements between our clients so that they can each move forward with their lives with clarity around the financial structures between them.

Please call so that I can understand the difficulties. I currently anticipate taking the first steps towards the issue of proceedings on [date] in the absence of hearing from you and our agreeing another way forward.

XX and I remain hopeful that agreement can be reached without a court determination.

- *All being well, discussions can begin, even if we have issued. There will be time to start and conclude discussions before the likely date of the first appointment and the hearing can be vacated and an order obtained, all being well, by consent;*
- *Alternatively, if matters are well advanced but not finalised, we might be able to secure the court's help to ensure finalisation (either under FPR rule 9.20(4) or 9.20(1).*

We do, however, make clear that we will refer to this letter in support of XX/YY's application as regards costs [and costs provision], should the future events of this process make this step appropriate.

YS

b. <u>A letter as regards costs of NCDR [applicants]</u>

*Dear **,*
<u>Open: COSTS FUNDING</u>
*Thank you for your proposal to [meet][instruct ** as a mediator][engage in a joint conference with counsel **].*

As you are aware from our earlier correspondence XX has scant resources for the funding of the costs of the current negotiations. Our position is as follows:

- *We require our costs to be met as they fall due, but in addition, we need such pre-funding of costs as will enable XX at all times to have sufficient to discharge such costs as [s/he] has incurred at that point. To do otherwise up-ends the level playing field, where XX may find themselves under pressure to agree because it is the only way of being able to discharge an accumulated debt for costs. That is not a fair way to proceed.*
- *We ask our clients for a float of £* and a higher sum where the work in the upcoming month may exhaust that amount.*
- *If YY is kindly willing to put us in funds in line with these principles then XX would be very pleased to engage in the process that you have described but otherwise is unable to do so.*
- *Would you confirm by [date] as otherwise we will clearly need to put in hand our application for costs provision (under the principles in Rubin etc).*
- *We should add that we suggest that this matter could be dealt with more efficiently, quickly and cheaply by an arbitrator, instructed to deal with the point and we would be pleased to deal with matters in this way.*
- *Please confirm your agreement – for the avoidance of doubt we will refer to this letter if it is appropriate because we have not been able to reach agreement and so have had to make the more expensive application to court.*

[consider adding]

- *We have told XX that we would conduct their costs provision application within arbitration which we suggest can be conducted on a papers-only basis for a fixed fee of*

£ plus vat plus their share of the arbitrator's fee. Accordingly we reserve the right to seek reimbursement as a costs order for any larger outlay incurred as a result of having to deal with this matter through the court.*

YS

c. A letter offering arbitration as a more cost-effective alternative

*Dear ***
Open: PROPOSAL OF ARBITRATION

We are sorry that it has not proved possible to reach agreement in this case. It is clear that our clients now need the certainty of closure offered by the prospect of an imposed outcome and the structure of timetabling to ensure progress towards that end.

Whilst I hope that we will yet be able to reach agreement, we are mindful of FPR PD9 Annex para 4.

We are also conscious of the overriding objective, including the scarcity of court resources and the need to manage cases expeditiously and cost-proportionately.

We are conscious that through arbitration

- *our clients could have the equivalent of a first appointment in the next week or so rather than the 20 or so weeks likely from the court*
- *we could, if appropriate avoid the cost of the FDR*
- *and generally, we could have a determination in a matter of 3-5 months rather than the 11-16 likely from our court.*

We therefore propose that our clients agree to deal with the claims by arbitration. [We could alongside deal with the issues of the section 8 claims, the resolution of which could be integrated within this process creating further economies for our clients].

[consider adding] *We have told XX that we would conduct their application within arbitration for a fixed fee of £* plus vat plus their share of the arbitrator's fee. Accordingly we reserve the right to seek*

- *reimbursement as a costs order for any larger outlay incurred as a result of having to deal with this matter through the court; and*
- *any other losses arising from the default generally.* [4]

*We hope you are able to agree to our proposal. If you are not then we invite you please to set out your reasons for refusing this avenue in accordance with the Family Solutions Initiative [*https://www.familylaw.co.uk/news_and_comment/the-family-solutions-initiative-a-response-to-a-system-in-crisis *] so that this letter and your response can be put before the court as the "Part 3 correspondence" referred to in that scheme. We anticipate referring to this letter in support of XX/YY's application as regards costs [and costs provision], should the future events of this process make this step appropriate.*

YS

[4] Here one has in mind the comments for example of Moylan LJ in Rothschild v De Souza [2020']EWCA Civ 1215 at paras 63 etc where he suggested that in some cases, there are losses beyond the incurring of costs: a shrinking pot may need recognition as conduct.

d. MIAM letter

*Dear **
Re [child]; prospective claims under schedule 1 Children Act 1989:
Open: MIAM
*Please note that we are introducing XX/YY to mediator ** for the purposes of the MIAM certificate that will permit application to court.*

*We have indicated to ** that they should contact YY/XX in the hope of their joining the exploration as to whether mediation or some other out of court approach could be effective in this matter.*

YS

Offers on substance

Dear **
Open offer

I write to set out the terms on which XX/YY would be prepared to settle the claims in this matter. To assist with your compiling your response, we have set the offer out in a word-document schedule ***attached***.

Introductory paragraphs around process

[perhaps chronological list of procedural matters complained of]

XX has elected to make this offer without knowing the detail of YY's finances.

- the court of course will take this endeavour into account when exercising its discretion as to costs
- it will no doubt take into account YY's conduct ***outlined above*** and his refusal of the out of court dispute resolution opportunities that we have urged upon him.
- It will also have in mind the encouragement of Moor J in MAP v MFP [2016] and FM v PS [2016] to the court make awards to an offeror in excess of their offer in appropriate circumstances.

We say that this is modest provision in the circumstances of this case.

- They are not open for negotiation; either YY pays in full and promptly or takes his chances with the litigation;
- If YY elects to put XX through the trauma and expense and delay of litigation then [she] will pursue such further entitlements as she is advised to do and her entitlements should not be treated as constrained by this effort to avoid the court having to allocate time to the management of this case.

Introductory paragraphs justifying quantum

****

Provisions

1) Acceptance
    a. The deadline for accepting this offer is **fourteen days**.
    b. After that point it may still be accepted (unless withdrawal has been notified to you prior or the offer has expired as set out below) but only if XX's costs are paid in full, from the moment of the deadline to the moment acceptance is notified.

The point here is that if the offer is left open then XX should not be worse off because YY has delayed accepting it.

2) Withdrawal
   a. This offer replaces all other offers which should now be regarded as withdrawn.
   b. It may be withdrawn without notice after the deadline above.
   c. It will stand withdrawn automatically at the point that XX's counsel's brief is delivered (or deemed delivered if earlier) for the final hearing should matters have to advance so far (we hope not).
3) Purpose
   a. The right is reserved to refer to it on the question of costs and it will be included in the bundles for hearing (please advise immediately, with reasons, if you have any objection to this).
4) Response
   a. The overriding objective (and our duty to support that objective applies); accordingly please indicate (if the offer cannot be accepted in its entirety), in relation to each element:
      i. What is agreed
      ii. Where we are apart and why.
   b. It may be that we are able to settle some parts of the case so that only residual elements require determination (and which might conveniently be referred to arbitration – we are open to all proposals).
   c. If you feel able to support the methodology / approach but identify factual or computational errors, please advise us so we may correct the offer and re-issue a proposal that can lead to agreement.
   d. We believe that we have given adequate disclosure of all matters within XX's control –please indicate if you think that there are matters where reasonable information has not been given.
5) Information
   a. XX'costs at todays date stand at circa £** - we do not anticipate their increasing substantially prior to the deadline indicated above.

We look forward to hearing from you

YS

"Let's not mince words: Everest doesn't attract a whole lot of well-balanced folks. The self-selection process tends to weed out the cautious and the sensible in favor of those who are single-minded and incredibly driven. Which is a big reason the mountain is so dangerous." – Jon Krakauer

The Brighton Pod Questions

Anchor Statement

1. What are you hoping to achieve?

2. What is the best outcome you could hope for?

3. What do you really want to avoid?

4. What really matters to you?

5. What do you feel is most important for you and your family?

6. What are you most worried about?

7. What do you want things to look like in 1 year, 5 years, 20 years time?