St.Mary's
FAMILY LAW SPECIALISTS

ADR – Has there been a new dawn?

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March 2025

There has been talk of alternate dispute resolution ("ADR") for the 13 years that I have been at the Bar. It has always bubbled under the surface as an option that is there and is meant to be encouraged but hasn't ever really gotten that much traction. In fairness to me, as a practicing barrister, most of the time the concept of out of court settlements didn't particularly apply, given that most of my time is/was spent in courts resolving in court disputes.

However, as time has progressed ADR has remained ever present, and with changes introduced in April 2024 to the family procedure rules, it is now being emphasised in its importance more than ever. It is easy to be cynical as to why this might have been, particularly with the ever-increasing delays in the court system, repeated news stories about the state of court buildings and the wish to avoid further cases coming before the court. However, having now engaged in some ADR directly (both as counsel and evaluator), I myself am a definite convert to the real benefits of the vast majority of Family cases in both private children and financial remedy work being resolved through ADR.

One thing that has changed over time is that ADR is now more commonly called 'non-court dispute resolution' however many continue to know it as ADR. For the purpose of brevity in this article I will continue to use the acronym ADR.

Re X (Financial Remedy: Non-Court Dispute Resolution) [2024] EWHC 538

The views of the High Court bench (and no doubt the higher tiers of the judiciary) can be clearly seen in the judgment of Mrs Justice Knowles in this case. She begins the judgment from the very first paragraph by saying:

> *The adversarial court process is not always suited to the resolution of family disputes. These are often best resolved by discussion and agreement outside of the court arena, as long as that process can be managed safely and appropriately.*

Those of us who work in family law can no doubt entirely relate to this as a sentiment. Often when proceedings are issued, and the other party reads the 'lies' that have been written about them any hope of conciliation and a negotiated settlement goes out of the window. Often minute parts of documents are mulled over and exacerbate the tensions that have been caused from the breakdown in their relationship. The longer the proceedings go on, as costs start to increase, parties sometimes become more entrenched in their positions. It is often pre-proceedings, or as early on into proceedings as possible, that the best prospects of a negotiated settlement occur.

Mrs Justice Knowles continues in her judgment to highlight that:

> *It might be helpful for those involved in family proceedings, whether concerning money or children, to understand the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings and, thereafter, at any stage of the proceedings where this might be appropriate. Furthermore, I want to signal that, at all stages*

> *of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable.*

Later in the judgment she reiterates the point saying:

> *Non-court dispute resolution is particularly apposite for the resolution of family disputes, whether involving children or finances. Litigation is so often corrosive of trust and scars those who may need to collaborate and co-operate in future to parent children. Furthermore, family resources should not be expended to the betterment of lawyers, however able they are, when, with a proper appreciation of its benefits, the parties' disputes can and should be resolved via non-court dispute resolution.*
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> *Going forward, parties to financial remedy and private law children's proceedings can expect – at each stage of the proceedings - the court to keep under active review whether non-court dispute resolution is suitable in order to resolve the proceedings. Where this can be done safely, the court is very likely to think this process appropriate especially where the parties and their legal representatives have not engaged meaningfully in any form of non-court dispute resolution before issuing proceedings.*

As lawyers it is entirely right to recognise that however well we think we do our jobs, the act of having to cross examine and challenge the very fundamentals of the opinions or memories of our client's ex-partner can never be helpful to their future relationship. We often leave these cases at a 'final hearing' but at a point where they are just beginning a new stage in their career.

In lots of cases (particularly as counsel) when we become involved there is nothing that can be done to resolve those differences. However, had ADR been properly or robustly attempted earlier things might have been different.

In any event the emphasis from Mrs Justice Knowles judgment was that things are expected to change moving forwards.

Changes to the Family Procedure Rules

Extensive changes to the FPRs came into effect on 29 April 2024 to seek to give added impetus in the push towards ADR. These can be broadly summarised as being changes to five relevant sections of the rules.

Firstly, the definition of 'non-court dispute resolution' in FPR 2.3(1)(b) has been expanded to be:

> *'non-court dispute resolution' means methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law.*

Notably this includes references to pFDRs which appear to have become one of the key developments in ADR. It also specifically references other types of ADR which are becoming more commonplace such as early neutral evaluations and arbitration. Mediation has been a fixture for many years.

Secondly there is an addition of a 1A to FPR 3.3 to provide that:

> *When the court requires, a party must file with the court and serve on all other parties, in the time period specified by the court, a form setting out their views on using non-court dispute resolution as a means of resolving the matters raised in the proceedings.*

I haven't seen or heard of a judge requiring any party to do this locally, however I have no doubt that it is occurring. It is a notable power for the court to specifically get parties to think about alternatives to their litigation before they get too embedded in them. However of course for this power to be enacted proceedings will have had to be issued.

Thirdly, there is a similar addition of a 1A to FPR 3.4 to provide that:
Where the timetabling of proceedings allows sufficient time for these steps to be taken, the court should encourage parties, as it considers appropriate, to —

a) obtain information and advice about, and consider using, non-court dispute resolution; and
b) undertake non-court dispute resolution.

Again, I haven't seen or heard a court make an active encouragement of ADR, however I do not doubt that it has occurred. This again is a notable power for the court to specifically adjourn proceedings for the parties to undertake ADR if the timetabling allows. I rather anticipate that in most busy court centres the timetabling to a final hearing, or another contested hearing, will allow time for the parties to engage in ADR.

Fourthly, there is a development in FPR 3.9(2) on the obligations for the mediator at the MIAM to provide information about methods of ADR, to specifically explain the benefits of ADR< indicate the forms of ADR that may be appropriate and to provide information as to how the parties can engage in that recommended ADR. It would appear imperative that all local providers of ADR services ensure that mediators are aware of their services so that individuals might be signposted to them.

Finally, there is 'the stick' in changes to FPR 28.3 relating to costs in FR proceedings (notably not in private law proceedings). The court already had the power to make costs orders where appropriate to do so given the conduct of a party, however in considering whether to exercise those powers it now *'must have regard to any failure by a party without good reason to attend a MIAM or attend non-court dispute resolution'.* Thus, the failure to engage in ADR can now be punishable in cost sanctions.

Again, I haven't seen or heard of such orders being made, but anecdotally costs orders are now far more frequent in FR proceedings than they were historically. It can be anticipated that with coherent submissions, emphasising the words of Mrs Justice Knowles, and the changes to the FPR, many judges could be persuaded to make such orders when parties simply refuse to engage in ADR.

Types of ADR

It would be remiss having lauded the benefits of ADR and then explained why it may now become more keenly pushed, to not give my views on the types of ADR and their respective benefits. Most ADR fits into one of the following categories:

1. Mediation;
2. Early neutral evaluation (either in person or in written form);
3. Private FDRs or Private DRAs;
4. Arbitration

All may have their benefits and there is a degree of cross over between at least the first three. The key distinction for Arbitration is that it allows a definitive decision to be taken outside of court, whereas the other three are to encourage settlement between the parties.

Mediation can often be described as some form of shuttle diplomacy, with the mediator going between the two parties and seeking to get movements by both parties to seek to reach a resolution.

Mediation is widely undertaken and is a requirement for most to even begin proceedings. As with all types of ADR its effectiveness is often driven by the mediator themselves and how ready the parties are to reach an agreement.

Early Neutral Evaluations are designed to give both parties an early steer to what the likely outcome is. There is a great similarity between them and pFDRs, albeit that they would often occur far later in the process. In many cases however parties often need a robust initial steer as to what is the likely outcome to their dispute before they get wedded to their views and become polarised in their opinions. ENE's offer parties the chance to learn very quickly what happens either financially or with childcare upon separation and allow them to base their views on jointly obtained advice.

pFDRs have become more and more popular over the last few years. They allow parties that have commenced proceedings (and some that haven't) to take a sidestep out of the court process and have a more focussed FDR than they may have in the hustle and bustle of the court. The FDR is one of the better inventions and inevitably is a form of ADR. A knowledgeable, robust but sympathetic judge can often resolve the vast majority of financial remedy proceedings and the same is true of pFDRs.

Arbitration by contrast is an option to effectively have private court proceedings with a separately qualified arbitrator. The arbitrator will be paid to essentially conduct the litigation for the parties out of the court setting and then come to a binding decision. It is possible to have such arbitrations in both FR and children act work. It can be used in conjunction with an early neutral evaluation to conduct all of their litigation out of the court environment.

Benefits of ADR

There are some often quoted benefits of ADR which I will cover below, but in my experience the main benefit of ADR (particularly early neutral evaluations and pFDRs) is that the parties hear or read the indications together. Whilst there is much to be said for parties getting their own separate legal advice, the inevitability (in a system where there are no right answers) is for that advice to be either slightly skewed or at least interpreted in the best-case scenario for a client. If one person gets one set of advice and the other gets another, there is a real risk that there will be at least subtle differences between the advice given.

The great advantage of ENEs or pFDRs is that the parties hear a single person (who hopefully they trust the opinion of) telling them robustly and clearly what the likely outcome is. The evaluator can no doubt caveat their opinions, but done well they can impress upon both parties the likely risks that both take with ongoing litigation. Hearing those risks together can emphasise to both the points that need to be compromised and those areas that are likely set. It has the real benefit that the other party also knows that the other person has heard that advice. So often we caveat our advice with an uncertainty as to whether the other side is being given realistic advice. Crucially in these types of ADR all parties know that the other side is being given a coherent steer. For pFDRs that I conduct I give the parties my indication in writing, which if they don't settle (which is yet to happen) then they know that the other party will take away the written document as well.

In my view the earlier that the parties can be spoken to robustly together and be jointly told the likely outcome the more chance there is of a successful outcome. Of course this will not work in some cases, however in many private cases without any safeguarding concerns or relatively simple needs cases in FR it should go a long way to settling cases.

There are of course the other benefits of ADR that are always worth emphasising:

- Speed - ENEs, pFDRs or arbitrations can inevitably be listed far sooner than would be achievable in a court setting. There is much less demand for the service. Whilst for some parties there may be a benefit in dragging out proceedings, for most they want the proceedings concluded as quickly as possible so as to move on with their lives;
- Choice of evaluator – Many District Judges who sit in FR or private children work do not have a background in this area of law, just as many DJs who sit in civil don't have a background in that work. The remit of a DJ is enormous and not everyone can be expected to be an expert. The identity of the DJ to hear a case will often be entirely random. ADR allows parties to select an evaluator who they can be sure not only knows the detail of this type of work, but is proficient and trusted to give sufficiently robust advice to resolve the case;
- Time for and with the evaluator – Court lists are notoriously busy. As a DDJ you can sometimes have four FDRs in a single list. You also often only get access to the papers the night before and have a few hours to prep multiple cases on the morning of a hearing. The advantage of an ADR is that the evaluator will be dealing with a single case and have as much time as the parties make available for them to prepare for the pFDRs. The difference in preparation time is enormous and makes a real difference. On the day of the pFDRs (or other ADR) the parties then have all the time that they have booked with the evaluator focussed entirely on their case. This is never possible in a busy court centre, with many other demands being made on a judge's time;
- Location – ADR can take place in more comfortable and pleasant locations than a busy court centre. In Nottingham the FDRs usually take place downstairs in the Crown Court building, whereas pFDRs can occur in modern barrister chambers or in solicitors' offices. Our chambers even include lunch as part of the package ….
- Confidential – There is absolutely no prospect of any transparency orders being made in ADR, whereas there is now the ongoing risk in the Family Court with the rollout of the transparency initiative.

Have these changes yet had an impact?

Changes to the detail of the family procedure rules are never likely to be headline news, even on Family Law Week. If I am being entirely honest, they had rather passed me by either as a barrister or as a fee-paid judge. That is not to say that they hadn't been publicised (as they were) however often changes take some time to take effect or for established practices to change.

In my opinion there hasn't been much change in practice on the Midland's Circuit where I predominantly practice, however there are the first signs of a trend towards a greater uptake in ADR and use locally. Articles like this (and a talk that I gave to East Midlands Resolution that inspired this article) hopefully can continue to push that trend. Judges I have spoken to are more than happy for cases to be diverted away from the court lists, leaving only those that need to be before the court. For there to be a more widespread change there would appear to need to be the following:

1. Greater knowledge about ADR – The more legal practitioners who know about local offerings of ADR will no doubt increase the uptake of these services. Similarly, if parties who have recently separated approach each other about ENE or ask questions of their representatives about it, this greatly increases the chances of an out of court settlement;
2. Greater trust in ADR – Whilst mediation is embedded within the family justice system, ENE, pFDRs and arbitrations are not yet so embedded. The more representatives that have had positive experiences in these other forms of ADR the more likely that these will be recommended to clients moving forwards;

3. Greater push from the judiciary to using ADR – The changes set out above allow the judiciary to gently push parties to undertake ADR or at least learn more about it. The more that judges realise these powers exist they can hopefully yield a greater uptake in out of court resolution.

We as a set have seen a drastic increase in the amount of ADR that we undertake in chambers, with now us undertaking approximately 5 pFDRs every month. We are aiming to expand our ADR service to also include private DRAs (or ENEs) in private law children work. Whilst ADR will only be appropriate in this area where there are either no safeguarding risks (or risks to such a limited extent to not require a factual determination) it is just as possible to engage in ADR in this area as in financial remedy disputes.

Thus, in answer to my own rhetoric question in the title of this article, whilst I don't think there has yet been a new dawn for ADR (certainly locally in the East Midlands) the sun is very much on the horizon, and the new dawn is imminently about to begin.

ADR offering at St Mary's

I will end this article with a mention for the ADR offering by my Chambers, St Mary's, in Nottingham. We as a Chambers offer the whole gamut of ADR, namely ENE, pFDRs and arbitrations. Like many other sets we offer a range of evaluators with a range of differing skillsets and experiences:

- We offer evaluators ranging from retired circuit judges to barristers with almost 50 years' experience, Kings Counsel and barristers who are of more junior call (like myself) who sit as fee-paid judges. We also have a number of associate members who just undertake ADR work through St Mary's;
- pFDRs (and ENEs) are booked out for an entire day of sitting with no other matters being booked with the evaluator, meaning the sole focus is on the single case;
- pFDRs (and ENEs) can take place in our modern chambers building in the Lace Market in Nottingham. We book out four rooms in our building which parties can use for the entire day. We include lunch as part of the cost of the pFDRs service and bookings can be made at short notice;
- Some evaluators will undertake written evaluations as part of the pFDRs service or as part of a separate instruction.
- Parties can be represented by counsel from our chambers, from external chambers or by their own solicitors.

Full details can be found here, https://www.stmarysfamily.co.uk/files/Private-FDR-Brochure.pdf

As above we are starting to expand our pFDRs service beyond just financial remedy work, to also include pFDRs within private law proceedings.

We have a number of qualified arbitrators for both financial remedy and children act work. Again, with the similar range of expertise and costs.

For more information, please contact our senior clerk, Tim Smith (tim@stmarysfamily.co.uk) to get further information about our ADR offering or to book some form of ADR for your client.

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