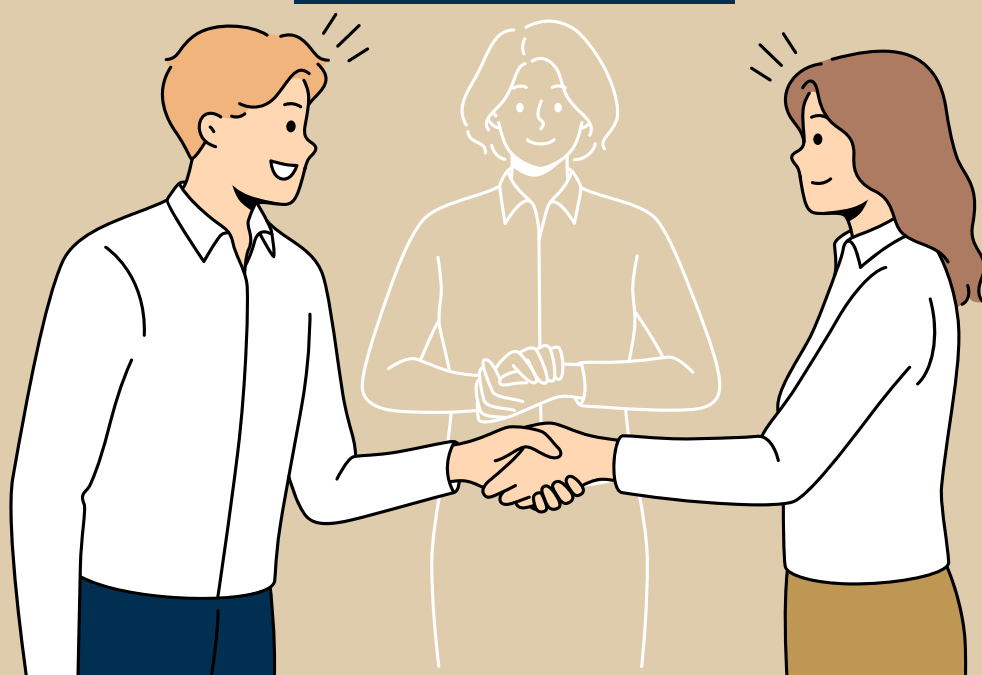


NCDR



PAYNE HICKS BEACH

Authored by: Matthew Booth (Partner) – Payne Hicks Beach

The proactive encouragement of Non Court Dispute Resolution (“NCDR”) including its incorporation into new parts of the FPR¹ is perhaps (to put it another way) the Family Justice system’s most recent attempt to discourage parties from litigation. Some might say, cynics of course, that this policy is driven by the dire funding issues which beset the Justice system more generally and the reality is that HMCTS simply does not have the resources to fulfil its role. Those same cynics might go on to ask if is not the singular purpose of the Courts to resolve matters on behalf of individuals (including, if necessary, imposing a decision) who may otherwise be incapable of reaching a consensus. Is this not why we have all of the legal paraphernalia long cherished as integral to an enlightened state? Some might go so far as to say that the apparent reluctance of the Family Court to do its job; i.e. conduct contested litigation and determine disputes, is an abnegation of its broad purpose in society, rather akin to medics standing outside a hospital refusing entry and encouraging would be patients to resolve their maladies in some alternative (less expensive) forum. Is this not all simply a

manifestation of the long woefully under resourced institutions of the state?

That is not to say that NCDR is a bad thing. On the contrary, in the right circumstances, it is to be encouraged. But it is not a panacea. And, nor should it be (or become by stealth) a de-facto compulsory process for all. It is not always, pace Mrs Justice Knowles, safe or appropriate.

Of course, what was formerly known as Alternative Dispute Resolution (“ADR”) has been around for many years, especially in the commercial context where mediation and arbitration have long been part of the litigation landscape. And it is right to say that those same alternatives to litigation have found increasing popularity in the resolution of family law disputes, in circumstances where the competing parties do still have the ability to agree something, if only to settle on the forum and the identity of their mediator or arbitrator.

Resolving family law disputes outside Court is nothing new for those who wish to do so.



In the year 2000 an estranged married couple (one a doctor and the other a musician) attended a handful of sessions of mediation in an unglamorous building in Finchley, just around the corner in fact from the Barnet Family Court. With their respective solicitors in the background and with the assistance of two mediators; one a solicitor mediator and one with a therapeutic background (the redoubtable Suzy Power), that couple resolved their (admittedly rather straightforward) financial affairs and, more importantly, the living arrangements for their young daughter. No attendance at Court was required.

1 Those changes to the Family Procedure Rules (2010) which came into force on 29 April 2024

In January 2024 that musician, by then a family lawyer, was sitting next to his client in the High Court when Mrs Justice Knowles took the opportunity at what was a post-FDR Directions Appointment to make a significant ruling in a judgment published anonymously as *Re X (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538 (Fam).

In paragraph 1 of her ruling, Mrs Justice Knowles said this:

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.

She goes on (at paragraph 5) to say this:

The parties participated in an FDR in July 2023 which regrettably did not settle their dispute. I learned today that the parties never engaged in any form of non-court dispute resolution before issuing either financial remedy or children proceedings. I regard their failure to do so as utterly unfathomable.

Mrs Justice Knowles was, it seems, inspired by the example being set by the Court of Appeal in civil proceedings² which has now held that the Court has the power to compel parties in civil proceedings to engage in NCDR and/or stay proceedings to allow for such a process to take place.

It is one thing, perhaps, for there to be compulsion in civil proceedings but are not the travails of litigants in the Family Division inevitably of a more emotive and personal nature? Is there no room there to fathom why, perhaps, certain parties are simply unable to engage in NCDR?



There is no doubting the success of the private FDR as a means to resolve many matrimonial disputes. But even this requires a measure of agreement to even convene. Who shall be the tribunal? Where shall it take place? Who will pay for it?

But, of course, an important part of the private FDR process is that it apes what would otherwise happen in Court. The parties are (typically) fully represented by solicitors and specialist Counsel. If necessary, the parties may thus be shielded from one another. And both parties hear simultaneously from an independent tribunal and objective account of how matters may likely be resolved and, with more certainty the continuing costs and uncertainty of litigation. This can often prove to be conducive to compromise.



As noted by Mrs Justice Knowles, the parties in *Re X* had already attended a FDR in the High Court which did not result in settlement and that they had never otherwise engaged in NCDR. One wonders why that might be. And, it is here that one has to question her exhortations and the otherwise superficially laudable sentiments she expresses in her ruling. Of course there should be incentives to litigate reasonably. But as a practitioner, one recognises that some cases, inhabited by the (often deeply contrasted) personalities of the parties simply do not lend themselves to parley. One (or both) of the parties may be utterly intractable. One of the parties may have all of the control and resources. That individual may possess a more domineering and pugnacious personality and perhaps have spent the relationship controlling and bullying the other party, who now seeks and needs the assistance of the Court to identify a 'fair' outcome. It is neither edifying nor reasonable for judges to expect that person to shrug off what may potentially be a lifetime of oppression and be expected to attend, say, mediation with their former partner.

After twenty years in practice, it seems to me that those people who will engage with NCDR will choose to do so anyway. It is a self-selecting process. Why? Because those individuals will (both) be reasonable and not scared of one another. There will be a certain 'equality of arms' and they will both understand the reality that they will likely each need

to make concessions and compromise to reach an agreement. But this is not always the case and that is why the Family Court must remain open for business and available to all who need it.

As that former musician turned family lawyer, I know this because I have seen, first hand, both sides of the coin.





Specialist Legal Services

A distinguished full-service law firm providing tailored legal advice and litigation services for domestic and international high-net-worth individuals, families, family offices, and commercial clients.

- ESTATE & SUCCESSION PLANNING
- UK & OFFSHORE TAX ADVICE
- CONTENTIOUS TRUSTS & PROBATE
- FAMILY, CHILDREN, DIVORCE & SURROGACY

Payne Hicks Beach LLP is a firm of solicitors who take pride in building strong client relationships based on trust, integrity and the vision to succeed.