Can you afford the Court and what are the alternatives?

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Would you prefer to have your fate determined by a Judge, or would you prefer to be the author of your own destiny and reach an agreement with your (ex-) spouse/partner, or mother/father of your child? It would be nice if you could make that decision (although of course, it takes two to tango and just one to start a fight), but it seems that practical and financial hurdles are making the latter even more desirable. In this blog I consider some of the hurdles that are currently facing the family justice system and I then go on to consider some of the alternatives to Court proceedings.** **Legal aid cuts** Since 1 April 2013, legal aid is only available in very limited circumstances, including: – for family mediation (depending on your financial means); – child abduction outside of the UK; and – if you or your child is a victim of domestic violence you may qualify for legal aid in respect of non-molestation/occupation orders, divorce and financial proceedings, and disputes about the children. According to the Government's own figures, the cuts in legal aid will result in 623,000 of the 1,000,000 people who benefitted from Legal Aid every year now being denied access to it. If denied access, your options are to act in person or pay a family lawyer to represent you. Most people would, I am sure, prefer to pay an expert to represent them, in the same way that most people would go to a doctor to stitch a wound rather than attempt to stitch it themselves. However, this is not always going to be a financially viable option. Being a Self Represented Litigant (SRL) is likely to be, for most people, a daunting and time consuming experience. Equally, being a family lawyer with a SRL on the other side can often be frustrating. It can cause proceedings to be longer and therefore more costly for your client as, understandably the Court has to carefully guide the SRL through the proceedings. **District Judge of the Day** For urgent applications, such as non-molestation or occupation orders in cases of domestic violence, or where a hearing needs to be listed very quickly to determine an urgent matter, the standard practice in central London used to be to make your application before the District Judge of the Day ('DJD') at the Principal Registry of the Family Division (PRFD). For those that are not familiar with the PRFD, each day a Judge (the 'DJD') is assigned to deal with short urgent applications only, and has no fixed hearings. However, on 1 August 2013 family practitioners in London received the news that they had been fearing — there will be no more 'DJD'. The abolition of the DJD is part of a general review of the procedures at the PRFD, which we should receive more details about shortly. The PRFD is under severe pressure with a shortage of Judges and an ever increasing case load. We are therefore being stripped of what the PRFD might describe as a 'luxury' and what we, as family lawyers, have become so accustomed to. However, other family courts (usually) do not have the same time delay in listing hearings, and so the impact on taking away this service is potentially all the more significant. It is envisaged that Judges will consider urgent applications on paper, rather than receive oral submissions, and arrange an early listing for a hearing if appropriate and possible. It is believed (and hoped) that the PRFD will continue to accommodate same day urgent hearings for 'genuine and emergency' without notice applications, such as non-molestation and occupation orders, but on a limited basis. Will this result in more hearings having to be fixed and an (even more) overburdened listing office at the PRFD? Or, will it strip out the (unnecessary) last minute or 'ahead of the game'/strategic applications made by parties (which are not in fact urgent), and leave the (narrow) path clear for the genuinely urgent applications? Only time will tell. **Court fees** The 1st of July 2013 marked the annual increase in Court fees, meaning that the cost of filing for divorce is now a staggering £410 (although that does include both Decree Nisi and Decree Absolute), and the cost of filing a children act application is £215. Inevitably, the more litigious a case is, the more interim applications a party will want to make, meaning even more fees being paid to the Court, and costs going up and up. **Alternatives to Court proceedings** The following methods of 'alternative' Dispute Resolution ('DR') are not only flexible (in terms of pace and structure) and confidential, they can also offer a more constrictive, less adversarial and cheaper route than Court proceedings. **Mediation** - *the Government's answer to an over burdened Court system* — A trained mediator (which can be a family lawyer) meets with the parties and facilitates them reaching an agreement. The mediator will provide guidance on the law and options for settlement but cannot advise either of the parties individually. The parties are entitled to seek independent legal advice outside of the mediation sessions if desirable. Pros: You avoid Court fees and a settlement can be reached much quicker than a determination by the Court. The pace of the process is wholly dictated by the parties and the mediator. A settlement agreed in mediation should help preserve a constructive relationship between the parties (particularly important if there are children) and research suggests that parties are likely to be more comfortable with an agreement reached between them than with a solution being imposed by the Court. Cons: An agreement reached in mediation is not automatically legally binding — if a settlement is reached, it will need to be documented formally and approved by the Court (which the Court will usually do, especially if the parties have received independent legal advice). If a settlement is not reached, it will have just added an extra layer of cost that would have been avoided if Court proceedings were started at the outset. Mediation is generally not appropriate where there has been any abuse or violence, where there are issues of trust (including in relation to financial disclosure), or where one of the parties is very submissive or reluctant to engage in the process constructively. **Collaborative process** — *born in the US* – Both parties and their respective lawyers (who must be collaboratively trained) have four-way meetings to reach an agreement. If it is unsuccessful and litigation resorted to then the lawyers must be sacked — an incentive for all for a consensual agreement to be reached. Clients are side by side with their lawyer in meetings, unlike in mediation where lawyers are not generally present (which might be seen as a pro or a con). Pros: Very conciliatory and open in nature. This is particularly good when parties remain on good terms, where there are children, or where there is a family business as a going concern and parties wish to discuss around the table how it can best be managed going forward. Cons: If unsuccessful, there is the increased cost of having to instruct new solicitors. The lawyers for both parties must be collaboratively trained. **Arbitration** — *The new DR kid on the block* - An independent arbitrator adjudicates the dispute and his/her decision is binding and made into a Court order. Pros: Parties can choose their decision-maker and dictate the pace of the arbitration process. It is a confidential alternative to the Court. Cons: The arbitrator has no power to compel third parties to produce documents (which the Court can), but parties can recourse to the Court for this, and then return to the arbitration process. It is adversarial in nature and so can still create feelings of animosity or hostility. Of course, DR is not appropriate for all cases and, as I say above, it takes two to tango in the DR arena, and just one to

start Court proceedings. However, with limitations currently facing the Court system, DR may be an attractive option for many clients.

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