

Creating a better way for couples to divorce: The Withers Separation Model

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Divorcing always causes uncertainty and now more so than ever. It's time for change for the good. How to help separating couples detangle without getting tripped up. Little did I realise last autumn when I started to create a new way for couples to deal with their separation, that the Coronavirus would mean it became almost a necessity for separating couples to have an alternative to going to court or to setting foot in the same room together to be able to sort out their family problems.

The journey to create the new way to separate started when I was asked to become the firm's Partner for Innovation and Change. I say this not to brag, but because it played a part in developing 'The Withers Separation Model'. In that role I wanted to focus on creating new ways of delivering legal services and solutions to clients. That aspiration came from the fact that in London we had moved to agile working almost two years ago and remote working and utilising technology better had already become a core part of how we worked. But it struck me that I should also look to my own doorstep to work out how we could make things better for couples going through a divorce or separation, as I am, first and foremost, a family lawyer.

The other major trigger for me was what I was hearing from clients. Many were saying that they did not want to go to court; they wanted a fair outcome, but they didn't know what was fair; and that they did not understand the options or processes available to them to arrive at a fair deal. They wanted a cost effective solution – no matter what their personal financial position – and for many, going face to face with their ex in Court or a room was a challenge.

Mediation and other options

It is quite understandable for clients to be saying these things given the developments in the family legal system over the past 20 years. I am just about old enough to have been involved in cases pre- *White 2000* (the seminal case which transformed asset division on divorce so as to remove discrimination between the breadwinner and homemaker and introduced the need to achieve 'fairness'). Over 20 years of litigation the law has in many ways been clarified, but it remains a mystery and very hard for divorcing couples to understand really what is 'fair'.

From a practice point of view, until fairly recently, divorce was almost exclusively litigation-based. Not enough cases would mediate despite the excellent Resolution scheme being established back in 1986 – my fellow partner, and co-creator of the new separation service, Diana Parker, being one of the founding members. Since then the number of Dispute Resolution options (such as mediation, the Collaborative model, Neutral Evaluations, Arbitration) have grown, but the awareness by those needing such services, is not as strong as it should be despite the court system becoming less accessible to many.

Court access diminishes

Since public funding was withdrawn from almost all family law disputes, there has been a huge surge in the number of self-represented parties in family cases. Resolution's Manifesto for Family Justice states that four in five family cases now has one or both parties self-represented. This sad development and the fact that between 2010 – 2017 152 Court buildings have been sold, have combined to create long delays for all couples who need assistance from the court to deal with their family problems. The Ministry of Justice reported on 26 March 2020 (during the week we first entered lockdown) that in 2019 on average it was taking over 12 months to get divorces and private law children cases were taking on average six months to get to a final hearing. This was the case prior to the Coronavirus, but since the lockdown the Court system is cracking under the weight of adjourned hearings, and less Judges and Court staff members (who are also grappling with learning how to manage telephone or remote hearings) being available.

One barrister's clerk has said hearings have reduced by 30% since the Coronavirus outbreak. Of those that are being heard, some are being dealt

with on paper without either party being able to make representations either by telephone or VC.

Before Coronavirus, the Government policy on family disputes had shifted, with dispute resolution being a central plank, on the basis that 'The emphasis throughout should be on enabling people to resolve their disputes outside of court whenever possible'. In addition, prior to the pandemic outbreak further reforms were on the cards for more telephone/VC and shorter hearings. Mr Justice McFarlane, the President of the Family Division launched a review of the family court system earlier this year because of the unprecedented increase in children cases. He said such cases would be "better dealt with persuading the parents not to come to court." In his keynote speech to Resolution last year, which was called 'Living in interesting times' he called upon family lawyers to have a "keener focus on a 'solutions-based process'" that maximises the "opportunity for settlement", and enables cases to be managed more effectively in terms of safeguarding, costs, duration.

Devising a solution

It is clear therefore that couples need better choices and a different way of sorting out their family issues. So I started to think about why the current DR options weren't always working as well as they could be and what elements of those options and the Court system worked best.

It then started to make sense:

1. The Court system 'works' as it gives a clear process or pathway which divorcing or separating couples follow and decisions are made for the couple if they cannot reach an agreement. However, it is not flexible. Delays are a big issue but a bigger problem is that the Court system generates more conflict between couples because it requires parties to adopt positions in litigation which create polarisation;
2. The dispute resolution options give couples the opportunity to negotiate, but there are no defined pathways connecting the different options or connecting with the Court system. So, if one option is not successful, there is no 'next step'. Getting clarity on what is a fair outcome can also be challenging because of the non-directional nature of some of the options, but mainly because, again, they all require positional offers (leading to the polarisation mentioned above). This can be even more problematic if there is an imbalance between each party's ability to create and articulate their own proposals.

So the new model had to be flexible to adapt to different situations and it had to be more cost and time effective. We focused on using the best parts of all current options, pulled them together into one process, removed the parts which caused conflict, replacing them with new stages designed to ever narrow the issues between a couple until a resolution was identified.

Narrowing the issues

What became clear is that a key element would be for the couple to work with lawyers who were instructed to be independent and impartial with no vested interest in either party. The service works by having someone to direct the couple through the process by facilitating the financial and information sharing, and the making of any preliminary decisions, before calling on other independent team members to identify the parameters of outcomes and options, based on what is important to the couple. Ultimately if a resolution cannot be reached through working with the couple to increasingly narrow the issues and reach a resolution, a final decision can be made for the couple if that is what they want.

For example, if a dispute arises in the information sharing exchange – such as one party wanting a house to be valued by an independent expert but the other party objecting – the couple can have that issue determined quickly in the process and then move to working out how the finances should be sorted. The Withers' Separation Model enables an internal arbitrator (or an external one if the couple prefer) to determine issues about financial information in the same way as a judge would at court. The big difference being that instead of waiting for months for a court hearing, the issue can be determined either on paper or in a virtual or face to face hearing in a matter of days.

Dealing with finances

Only once the financial information had been exchanged fully, can a couple start to negotiate. This is where it can become more challenging for couples, particularly if there is an imbalance in their relationship in terms of their financial knowledge and/or experience. To minimise conflict and to avoid the polarisation that arises inadvertently from the parties exchanging settlement proposals, our model incorporates independent neutral identification of outcomes designed specifically to focus on what's important to each party and builds on a set of parameters for settlement.

The facilitator/mediator's role continues to be focused entirely on managing the process and the negotiations, whilst input is given by other members of the team to ensure the process is increasingly focused on a specific outcome. By working as a team in this way, the firm's and the couple's positions are aligned to focus on achieving a fair result. We act independently and the roles of each team member are very clearly defined, with the facilitator/mediator maintaining a clear pathway through to a resolution. It is a very different approach to teams of lawyers inadvertently pulling couples in opposite directions.

Ultimately, if parties cannot reach an agreement, they can decide to have an independent arbitrator make a final and binding decision for them or they can revert to the court process.

Providing the service in house and under one roof (albeit a virtual one at present, although face to face meetings will of course resume once we are out of the current situation), means that it can be managed more seamlessly and cost effectively as it reduces the administration time of facilitating the exchange and flow of information. That said, at every stage, parties are entitled, and will be advised whenever appropriate, to take independent legal advice. It is not an exclusive club but the model is designed to facilitate the most cost and time effective route to resolution.

Better outcomes

It is also a model that gives couples better choices. Unlike the court system, where a couple has to go through each stage (the First Appointment, the Financial Dispute Resolution and a Final Hearing together with any Interim Directions Hearing), they can elect to jump and skip stages if they prefer. It is very flexible. If a couple, say, had a discreet issue relating to variation of maintenance, they may prefer to have a binding decision made rather than enter into negotiations. Each couple will have different needs and use the model accordingly.

It is also a process that is entirely private and done at the couples' pace, rather than the court system which imposes fixed hearing dates irrespective of solicitors, clients and/or barristers' availability and which are now increasingly difficult to move. There will be some cases that are not suitable to this model; both parties need to embrace it. However, if the options are between long court delays, judicial inconsistency, hearing dates at an inconvenient times and without reference to the availability of the legal teams, and increased costs and conflict because of the positional nature of litigation, and the new model, is it really better to go into the court system which is crumbling under the pressure? Especially as that court system is adversarial, which inadvertently puts parties in opposite positions often with two sets of lawyers pulling them apart. The Withers' Separation Model uses one team, working together with a couple with an aligned interest in reaching a resolution in a mutual and impartial way.

These are tangled times and for couples going through a separation, why make a difficult situation harder? Some will need a litigated outcome but for many others with direction and guidance on what is a fair and appropriate solution for their families, using a joined up process that gives them better choices and working with a team of lawyers with a common aim of arriving at a solution, gives them a better chance of achieving the best outcome...

Find out more about the [Withers separation model](#)

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