

THE INTERNATIONAL FAMILY LAW GROUP

iGuides to family law and practice

Resolution by out of court settlements.

The International Family Law Group, along with many other specialist lawyers, is committed to out of court resolutions.

The vast majority of cases do not need to go to a final court hearing. This is not the same as not starting proceedings. Very often there is a considerable benefit in commencing proceedings. This includes creating a more formal and structured timetable and preventing delay, having the opportunity to seek additional disclosure or prevent unreasonable requests for excessive disclosure, having the assistance of experienced family court judges in guidance and prediction on outcomes and in other ways. Perversely as it may seem, it can often be much more cost-effective to settle a case once proceedings are under way rather than against the background of voluntary disclosure and correspondence which can sometimes drag on for ages and get absolutely nowhere except incurred costs and then have to start the proceedings.

There are just a few cases which do require a final hearing in court, to test evidence, perhaps complex points of law or simply because the other side are being utterly unreasonable. They are a rarity and should be avoided wherever possible.

There are many different ways to resolve a case without a final court hearing. This is known as alternative dispute resolution, ADR. What is important is to choose the best and most appropriate method for each case and at each stage of a case. This is a summary of the opportunities. We have a spreadsheet setting out the advantages and disadvantages of each.

At The International Family Law Group we have trained professionals able to undertake all these different forms of ADR.

Mediation

This is a process of negotiation between a couple, assisted by professionals who may be lawyers; it runs alongside the advice given by lawyers but offers a different way for couples to resolve themselves the issues they face. It is not to be confused with counselling. In orthodox mediation, the mediators can say if a proposed outcome is unlikely to be upheld by a court. This should be compared with directive mediation, which is increasingly favoured by many specialist lawyers and many clients.

Directive mediation

This is a variety of mediation where the mediator is empowered to give guidance and direction to the couple on what is likely to happen if a matter were to go to court for an outcome. It is not so passive and non-interventionist as rational mediation. It also works very well where lawyers play a greater role in the mediation including sometimes being present at mediation sessions. It is the resolution model of choice of many specialists. On our information pages are terms of directive mediation and an article on its benefits and a report of a family lawyers working party on directive ADR

Collaborative law

This is another alternative method which enables clients to resolve all issues arising from their separation or divorce without going to a final court hearing. In the collaborative law process both parties are represented by a trained “collaborative lawyer”. The case is dealt with mostly in four-way meetings

between the couple and their respective lawyers. Other professionals such as accountants, valuers may also join the meetings to give neutral information.

Each party signs a contract to provide full disclosure, negotiate in good faith and not to use the court process save by agreement. The last aspect is fundamental to collaborative law. It is perceived by some as its greatest strength. If either party issues court proceedings such as an application to the court, then the collaborative law process ends, both parties – not just the one issuing proceedings– must change lawyers and both the collaborative lawyers will have no further involvement in the case.

Equally many specialist family lawyers regard this requirement as a real weakness and disadvantage, and makes it unsuitable in any case in which there is any reasonable concern that proceedings may subsequently be needed e.g. to protect one's position, to make timely progress, to seek urgent interim financial support, prevent disposals of assets or in other ways have to apply to the court. In these circumstances collaborative law is not appropriate as it would then be necessary to change lawyers during the case, instruct a new firm of lawyers and this adds to delays and increases costs. Having to leave the collaborative law process can put the more vulnerable party into a very difficult position as they may be unable to afford to instruct a new firm of lawyers.

Collaborative law combines the commitment to endeavour to reach a settlement which is at the core of mediation, with the added benefit that each party is represented by their own lawyer to advise and guide them in the negotiation process. It is a process that is suitable and attractive for some people and some couples.

Early neutral evaluation

This arises when a senior lawyer, solicitor or barrister or judge, gives a view on what is likely to be the final outcome of a case if it were to be decided at court. One example of in court ENE is the financial dispute resolution hearing. Out-of-court ENE occurs from time to time when two lawyers representing their clients struggle to settle because of differences over matters of law, outcome, practice or procedure. Whilst these matters could be the subject of an application to the court, some prefer the more informal approach of instructing a senior family lawyer to give an opinion.

iFLG is able to provide this out-of-court early neutral evaluation on complex issues of finance and children matters including those with an international dimension. The directive ADR working party of resolution/SFLA has just recommended more referral to early neutral evaluation as a means in some cases of removing the stumbling block from getting to a settlement. On our information pages is that the report, referring to early neutral evaluation in more detail. Please contact us about terms and how we can be of assistance.

Lawyer negotiation

The vast majority of family law dispute in England and Wales are resolved by lawyers negotiating on behalf of their clients. These are invariably very satisfactory as a client receives ongoing advice about the merits of a settlement. It is in the context of disclosure. Skills in negotiating a settlement is very different to preparing to go to court. There are different tactics, approaches, language, offers and counter offers and styles. Different forms of making offers can be appropriate at different stages of getting to a settlement, such as round table meetings, offers in writing, discussions on the telephone. We have lectured on these skills and techniques.

Arbitration

This is a form of independent adjudication but outside the court system and with the opportunity to agree timetables, choice of arbitrator, procedures, location of hearings etc. It can be for all issues in a case or just a narrow point in dispute. At present it is yet binding in English family law. We are actively

involved in its introduction. We know the government is considering law change.

This iGuide is for information only and a specialist legal advice should always be taken. For further details contact The International Family Law Group at 020 3178 5668 and www.iflg.uk.com. (c) February 2009