Assembling the jigsaw puzzle

Understanding financial settlement on divorce

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November 2013

Published by the University of Bristol, November 2013

This report is also available online at:
www.bristol.ac.uk/law/research/researchpublications/

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The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at www.nuffieldfoundation.org

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ACKNOWLEDGEMENTS

Adam Lennon and staff at HMCTS for their technical and administrative support of the court file survey

The court manager and staff at the four courts used for the court file survey for accommodating us so well on our visits

The anonymous interviewees who generously gave their time during a busy working day

The project's Advisory Group:

- Nick Aspley, solicitor
- Dr Nigel Balmer
- Prof Anne Barlow
- Jane Bridge, mediator
- Prof Rosemary Hunter
- Prof Judith Masson
- Mark Sefton
- Prof Fran Wasoff
- Tracey Budd, Amy Summerfield and Alexy Buck at MOJ

Others from whom we have received advice, information or assistance at various stages of the project, including:

Mr Justice Cobb

District Judge Stephen Arnold

District Judge Sally Dowding

Helen Jones (MOJ statistics)

Prof Richard Moorhead

Prof Liz Trinder

Robin ap Cynan

Sarah Lloyd (Resolution)

Lisa Parkinson

Jane Robey and Sue Tilley (NFM)

Jackie Nicholls and Sian Cundy (University of Bristol administrative support)

Kay Bader (transcription)

Andrew Charlesworth (ethics guidance, University of Bristol)

Prof Richard Young (now University of Birmingham) for assistance with initial funding application

The Nuffield Foundation, in particular Sharon Witherspoon and Teresa Williams

GLOSSARY

Adjudicated case: we use this term to refer to a case which is not concluded with a consent order, but is instead decided following a contested application by a judge at a final hearing.

Ancillary relief: the term formerly used to refer to financial proceedings accompanying matrimonial cases (principally divorce, but also nullity and judicial separation) under the Matrimonial Causes Act 1973 (referred to in our footnotes as "MCA 1973"). Following the introduction of the new Family Procedure Rules 2010 ("FPR 2010"), "ancillary relief" cases are now referred to as "financial remedy" cases.

Approval hearing: a hearing which may be requested by the judge (or in some cases, the parties) before an application for a consent order will be approved.

Calderbank offers: under previous rules (prior to 2006) regarding who would pay the costs of financial remedy cases, parties made such offers to settle the case "without prejudice save as to costs"; a party rejecting such an offer risked being ordered to pay the other side's costs if the adjudicated outcome did not exceed the rejected offer.

Clean break: a financial order which makes no provision for ongoing periodical payments between the parties and precludes any possibility of future liability.

Collaborative law: a process through which settlement is reached by both parties with their solicitors through 'four-way' face-to-face discussions. Parties and lawyers sign an agreement committing them to resolving the dispute through the collaborative process; should the process fail, the solicitors cannot then represent their client in contested court proceedings.

Consent order: a court order enshrining the parties' agreement about the financial claims that arise between them on divorce.

Contested but settled case: we use this term to refer to a case where the parties are initially unable to reach agreement outside of court proceedings, a contested application is issued (using Form A), but the parties later reach agreement and the case ends with a consent order at some point along the standard financial hearings pathway.

FDA – First Directions Appointment: the initial case management hearing, prior to which, parties should have exchanged their Forms E and prepared questionnaires designed to elicit further or clarifying information. The court will typically make directions for the future conduct of the case, e.g. regarding the permissible extent of questionnaires, appointments of valuers or other experts, whether to join any intervening third parties, and so on.

FDR – Financial Dispute Resolution hearing: the next hearing on the standard pathway designed ordinarily to facilitate settlement with the benefit of an indication from the FDR judge about roughly what the outcome should be. That judge is precluded from trying the case, should the matter proceed to FH, so the FDR can proceed on a "without prejudice" basis (i.e. parties can negotiate at the FDR without anything said at that stage prejudicing their positions should the case proceed to final hearing).

FH – Final Hearing: the trial, should it be required, before a judge other than the one who presided at the FDR, at which parties will ordinarily be expected to give evidence and be cross-examined in the traditional way.

Financial remedy / financial order: “financial orders” on divorce are made in “financial remedy” cases: FPR 2010, r 2.3, defines each of those terms.

Form A: the Form which the applicant completes giving notice of their intention to proceed with an application for a financial order (commonly required “for dismissal purposes only” in consent order cases).

Form D81: the statement of information form accompanying a consent order application which provides basic details about each party’s assets, income and other circumstances.

Form E: the more elaborate form parties are required to use to set out their assets, income and other relevant issues for contested applications.

Form H: the form on which are recorded costs incurred by each party in contested cases; both parties are in theory required to file and serve this Form at each hearing.

FPR – Family Procedure Rules: the rules governing the practice and procedure to be used in family proceedings in England and Wales.

Heads of agreement: the agreement reached by the parties following mediation or in the course of proceedings, but not yet drafted into the format of a court order.

LASPO 2012 – Legal Aid, Sentencing and Punishment of Offenders Act 2012: recent legislation reforming the scope of legal aid (public funding for legal services).

LIP – litigant in person: we use the acronym “LIPs” to refer to those acting in person (without legal representation) in contested legal proceedings, in particular in conducting hearings alone, and also more broadly to refer to those acting without lawyer support in other contexts (e.g. in applying for a pure consent order, or in mediation).

MCA 1973 – Matrimonial Causes Act 1973: the legislation governing financial proceedings on divorce.

MIAM – mediation information and assessment meeting: a meeting at which a mediator will explain the process of mediation to an individual/couple and explore whether it is appropriate in their case. Since April 2011, applicants who wish to start contested family court proceedings are expected to attend a MIAM prior to issuing proceedings and/or to complete Form FM1 with their court application either to explain the reason for their failure to attend a MIAM or to explain why, having attended a MIAM, court proceedings are now being initiated.

Private ordering: parties settling their own financial (or other) arrangements without court proceedings (save to approve a consent order), and with or without the support of lawyers or mediators.

Pure consent order case: we use this term to refer to cases where an application for a consent order is made without contested proceedings having been initiated.

Standard (financial hearings) pathway: we use this term (“standard pathway”, for short) to refer to the procedure for contested cases, involving a specific, rule- and court-controlled timetable of hearings and associated paperwork requirements (including standard forms, such as Forms E and H). It typically consists of up to three stages (should the case not settle at some point along the way): the First Directions Appointment (FDA), the Financial Dispute Resolution hearing (FDR) and Final Hearing (FH).

OVERVIEW

This is the first report from a mixed methods study of the settlement of financial cases on divorce, combining data from two sources: (1) a court file survey of nearly 400 cases resulting in a financial order following divorce from four courts in different regions of England; (2) semi-structured interviews with 32 family justice practitioners - 22 solicitors (six of whom are also qualified as mediators) and 10 mediators. This area of law and practice has been the subject of relatively little empirical research in the last decade, in particular since the advent of new procedures for the conduct of these cases in 2000. We aim through this study to help fill the resulting research gap identified in the recent Family Justice Review, to highlight various problems currently evident in practice and to explore potential policy implications.

In this report, we focus on the "how", "when" and "why" of the financial settlement process:

- The vast majority of cases settle out of court or during the course of contested proceedings, but **how** is settlement achieved – what dispute resolution methods are used? In particular, how prevalent are the uses of solicitor negotiation and mediation? What role do the family judges have in superintending or shaping outcomes in cases resolved by consent?
- Where settlement comes during contested proceedings, **when** does it occur? This study provides the first systematic analysis of this since the new procedures came into operation.
- And where settlement is achieved, whether or not out of court, **why** is settlement achieved and why is it achieved at that particular stage? What factors appear to help, delay or – in the unusual adjudicated cases – entirely prevent settlement?

We also examine the prevalence of litigants in person (prior to the recent legal aid reforms) and the difficulties that they may encounter in reaching settlement.

The factors which contribute to settlement (or its failure) are rarely simple: a number of factors, many of them non-legal in nature and inherent in the individual parties involved in the case, must coalesce in order for settlement to be achievable at that point in time for those parties. Solicitors and mediators have complementary roles to play in helping parties to reach that point. Solicitors play a central role in achieving settlement out of court, and where proceedings are begun, the involvement of the court can be a key stimulus to settlement at all stages. Where lawyers have not been involved, settlement may be harder to reach and the burden on the court system correspondingly increased. The additional support needs of litigants in person attempting to navigate contested proceedings unaided (even before the recent legal aid reforms) may require adaptation of court processes and paperwork, and of judicial style in handling such cases.

CHAPTER 1: INTRODUCTION

THE RESEARCH GAP

Financial settlement on divorce has been examined in several research studies since the late 1970s, but until very recently,[1] there has been no project since the piloting of what was then the "new" procedure[2] for the conduct of contested "ancillary relief"[3] cases. The Family Justice Review conducted in 2011, which identified "data gaps" in relation to financial settlements/agreements in ancillary relief cases generally and (more specifically) the stage at which settlement is reached in cases where financial orders are made by consent (rather than following adjudication).[4] Analysis of official statistics also suggests that a declining proportion of all divorces, now only around 40%, are followed by a financial order.[5] So financial remedy cases in fact constitute only a minority of all divorces, albeit a

[1] The most recent project in this area, the fieldwork for which was conducted a year before ours, is Hilary Woodward's project, which focuses particularly on the issue of pension sharing on divorce: Woodward with Sefton (forthcoming).

[2] Introduced in June 2000. See below.

[3] "Ancillary relief" is the term formerly used to refer to financial proceedings accompanying matrimonial cases (principally divorce, but also nullity and judicial separation) under the Matrimonial Causes Act 1973 (referred to in our footnotes as "MCA 1973"). Although the financial aspect of a divorce tends to be more complex than the "main suit" (the divorce petition) to which it relates, the former is technically regarded as "ancillary" to the latter. Following the introduction of the new Family Procedure Rules 2010 ("FPR 2010"), SI 2010/2955, "ancillary relief" cases are now referred to as "financial remedy" cases in which "financial orders" may be made: see FPR 2010, r 2.3, defining each of those terms.

[4] Norgrove (2011a), Annex L and Norgrove (2011b), Annex E.

[5] Calculated from MOJ (2013), tables 2.8 and 2.9. It would seem that the proportion of divorces with financial orders is falling: in 2011, 119,610 divorces were granted but only 45,106 financial orders made: 38% (this and the following calculations exclude the small number of decrees of nullity and judicial separation – 361 combined in 2011 – which might also have been accompanied by a financial order). Some of those financial orders will have related to divorces in a previous year, but equally some 2011 divorces will have financial orders in a later year, so taking one year's data for both issues provides a fair if rough approximation of the overall position. The steady fall in the proportion of divorces with financial order can be observed from data for 2010-2006. 2010: 47,038/121,265 =39%; 2009: 45,781/115,174 =40%; 2008: 51,663/122,661 =42%; 2007: 58,168/122,661 =47%; 2006: 60,653/132,749 =46%. Compare Davis et al (2000a), who found that

sizeable one. Where cases are brought to court, official statistics report whether financial orders are made (i) by consent, following an application for a consent order (we call these "pure consent order" cases),[6] (ii) by consent, but following the initiation of contested[7] court proceedings,[8] ("contested but settled") or (iii) following adjudication ("adjudicated"). But these data necessarily give only the broadest overview of activity in this type of case: they tell us nothing about how and why those who manage to reach agreement without initiating contested court proceedings do so, and nothing about how, when exactly and why those who embark on court proceedings manage to settle and seek a consent order.

This project was devised to begin to fill those gaps, combining data from a court file survey with interviews with family justice professionals, solicitors and mediators, regarding their experience of settling these cases. In this first report on our work, we focus on the more procedural questions: the *how*, *when* and *why* do people settle – or not settle – these cases. Later publications will address how the financial resources are divided: in a sense, *what* the parties are each settling for. Before introducing our work, we sketch the development of the legal and procedural context in which these questions arise and review earlier research.

THE PROCEDURE FOR FINANCIAL REMEDY CASES ON DIVORCE

The development of the consent order process

As we shall see, the majority of couples bringing their financial issues to court following divorce do so simply with an application for a consent order. A consent order enshrines the parties' agreement regarding the financial claims that arise between them on divorce, transforming that agreement into a binding order of the court. An agreement which has not

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40% of divorce cases in their sample of all divorces (N=756, mostly petitions from last quarter in 1996, but some running into 1997) were accompanied by financial applications: see table 1.

[6] The concept of a consent order and the process for its approval are discussed below.

[7] MOJ (2013), table 2.9.

[8] The development of the now standard procedure is discussed below.

been converted into a court order, however formally executed, cannot prevent either party from later inviting the matrimonial court to make financial orders between the parties that are inconsistent with what the parties had previously agreed.[9] So parties who wish to secure finality, particularly for a 'clean break' agreement which precludes any possibility of future liability, should apply for a consent order that sets out the financial arrangements, if any, which they have agreed and dismisses all other potential claims arising from the marriage and divorce.

The process whereby judicial approval of such agreements is granted has developed in fits and starts over the last 50 years, oscillating unpredictably along a spectrum of greater and lesser judicial oversight.

Today's strong culture of private ordering of family law issues would be completely alien to family lawyers half a century ago. Prior to 1963, divorce was barred in cases of collusion, effectively a finding that the parties had perverted the course of divorce justice, which then required the identification of an innocent (aggrieved) and a guilty party. *In theory*, this meant that parties could not reach <u>any</u> agreement on the financial consequences of their divorce for fear of a finding of collusion and so of being deprived of divorce. However, Eekelaar and Dingwall have suggested that in practice courts tolerated negotiation of financial settlements; what mattered more was any hint of collusion regarding the grounds for the divorce itself.[10] The down-grading of collusion to a merely discretionary bar to divorce[11] lifted any theoretical danger of losing the whole divorce through a financial agreement, and rules of court provided for parties to put their financial agreement before the court in order to receive an indication of how it might be received at the full divorce

[9] This continues to be the effect of *Hyman v Hyman* [1929] AC 601, even for agreements which might otherwise be regarded as fully binding in law; see also MCA 1973, s 34; *Edgar v Edgar* [1980] 1 WLR 1410.

[10] Cited in Ingleby (1989), 231. Much of this early history is taken from Ingleby (1989); the story from the 1980s onwards is usefully taken up by Lord Bingham in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, 632-5.

[11] Matrimonial Causes Act 1963, s 4.

trial.[12] Ingleby (1989) relates how from that point more and less interventionist rules came and went. Thus in *Nash v Nash*,[13] Scarman J indicated that in order for judges to be able to decide whether to relieve parties from the (now discretionary) collusion bar, the parties had to provide the court with information regarding their financial circumstances so that the court could determine whether the proposed arrangements were reasonable. But the rules which followed three years later did not require submission of information regarding the parties' means.[14] Only parties who had not agreed the financial issues were required to file full details regarding their assets and income, unless applying for a property settlement or avoidance order.[15] A Practice Direction issued in 1972 (after the new divorce and financial remedy laws had come into operation[16]) went so far as to state that the practice of referring agreements to the judge prior to the hearing was "now rarely necessary or desirable", given the "considerable expense" involved,[17] and the pre-trial review procedure was removed in 1973.[18] This development was logical given the now total removal of any collusion bar to divorce, but it would seem that no one thought that judicial oversight of parties' financial arrangements might be desirable on paternalistic grounds.[19] To the contrary, a further Practice Direction in 1974 relieved parties in the Divorce Registry of the need to attend an approval hearing for a consent order based on their agreement.[20]

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[12] See Matrimonial Causes (Amendment No. 2) Rules 1963, SI 1963/1990.

[13] [1965] P 269.

[14] Matrimonial Causes Rules 1968, SI 1969/219, r 6.4.

[15] Ibid, r 72(2), and rr 74-5.

[16] Originally in the Divorce Reform Act 1969 and Matrimonial Proceedings and Property Act 1970, later consolidated into the MCA 1973.

[17] [1972] 1 WLR 1313.

[18] Matrimonial Causes Rules 1973, SI 1973/2016: Ingleby suggests that this move, like the extension of the "special procedure" – the paperwork-based divorce system – to all divorces in 1977, was the result of a pragmatic, resource-conscious decision rather than a principled decision regarding the desirability of judicial oversight: (1989), 234-5.

[19] Compared with judicial approval of arrangements for children: MCA 1973, s 41.

[20] [1974] 1 WLR 937; this practice was extended at some stage to the county courts.

And so, by the mid-1970s, a rather unsupervised, light-touch situation had developed, with no specific statutory provisions, rules of court or practice directions governing the consent order process.[21] The effects of this laissez faire approach were demonstrated by *Tommey v Tommey*, in which the wife unsuccessfully challenged a consent order where the husband had filed no details of his assets and income (as he was perfectly entitled under the then rules not to do, the case being agreed).[22] Balcombe J held that the wife could not complain that the judge had not inquired further: the judge had been entitled to assume that parties of full age and capacity, particularly when legally represented, knew what was in their own best interests, and so was under no particular obligation of inquiry – even if fuller knowledge of the facts might have affected his decision to grant the order sought.[23] The Court of Appeal in *Livesey v Jenkins* noted that it was common for parties simply to submit the proposed order to the court, with little or no contextualizing information, and to make no court appearance. The courts clearly relied heavily on solicitors protecting their clients' interests:

> *"Registrars were accustomed to rely simply on the circumstance that the joint application was made by firms of solicitors with whom they were well acquainted and where this was so to give their sanction and approval simply because of the conviction that such firms of solicitors would not put forward agreed terms unless they were fit to be approved by the court."*[24]

But *Tommey* proved to be the high-water mark for the laissez faire approach. The Court of Appeal in *Livesey* prescribed that parties ought ordinarily to come to court to deal with any questions that the judge might have, apparently causing some disquiet within the

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[21] See *Livesey v Jenkins* [1985] AC 424, 437.

[22] MCR 1968, r 73(2) inapplicable where parties agreed.

[23] [1983] Fam 15, 21. The decision in *Tommey* was approved by the Court of Appeal in *Livesey v Jenkins* [1984] FLR 452 (in preference to a competing, more paternalistic line of authority: see *Robinson v Robinson* [1982] 1 WLR 786), before being overturned by the House of Lords [1985] AC 424.

[24] [1984] FLR 452, 455-6.

profession by upsetting the common practice of non-attendance that had prevailed.[25] And while the House of Lords in *Livesey* commended Balcombe J for doubtless showing "a great deal of practical common sense", their Lordships nevertheless held that he had erred in law in suggesting that it was "open to the parties, whether represented by lawyers or not, to disregard, or to contract out of" the requirement of full and frank disclosure that is necessary for the court to discharge its function under section 25 of the MCA 1973.[26]

Meanwhile, Parliament and the rule-makers had introduced s 33A of the MCA and accompanying rules.[27] These permitted the court to make the consent order having regard only to prescribed categories of information provided by the parties, "unless it has reason to think that there are other circumstances into which it ought to inquire".[28] However, the rules did not require any class of parties to appear in court,[29] and the form on which parties were invited[30] to supply the prescribed information was "brief and simple", providing "little space for elaboration of the information required".[31] Nevertheless, the House of Lords in *Livesey* emphasised the court's need to have full and up to date information, and made

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[25] Cretney (1996), 276; as to that practice, see Baker et al (1977).

[26] [1985] AC 424, 441 and 444, Lord Brandon. Under s 25, the court has a duty to have regard to all the circumstances in deciding whether and how to exercise its power to make a financial order.

[27] Matrimonial Causes (Amendment) Rules 1984, SI 1984/1511, inserting new r 76A into the MCR 1977, in turn varied by SI 1985/1315, which removed a requirement that the solicitor (if any) certify that the client had been advised whether it was in his/her interests to agree to the proposed order.

[28] MCA 1973, s 33A(1).

[29] Contrast with earlier Practice Direction [1984] 1 WLR 674, which had specified that a wife acting in person and having her claim for periodical payment dismissed must appear in person, save in exceptional circumstances.

[30] The first manifestations of the statement of information in support of a consent order application (what is now Form D81) were optional: see Practice Direction [1986] 1 WLR 381, then [1990] 1 WLR 150, later Form M1 annexed to the FPR 1991 (SI 1991/1247) in support of r 2.61. Use of current Form D81 is made compulsory by the language of FPR 2010, r 9.26(1)(b); see also PD5A which accompanies Part 9 of the FPR 2010.

[31] *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, [26], Lord Bingham.

clear that the full and frank duty of disclosure – both between the parties and to the court – applied with full force in consent order cases.[32]

Section 33A and *Livesey* sit alongside each other somewhat uneasily: the former gives the judges the green light to rely exclusively on what the parties tell them, the latter suggests a more onerous judicial obligation to be satisfied that the proposed order is justified in terms of the section 25 criteria. Waite LJ attempted to square the circle in *Pounds v Pounds* in the following well-known passage:

> *'It is clear, however, that [Lord Brandon's account of the duty of the court in terms of s 25] was intended to be an assertion of general principle only, and not to impose on the court the need to scrutinise in detail the financial affairs of the parties who came to it for the approval of an independently negotiated bargain. It could not be otherwise, for earlier that year, Parliament had specifically enacted a more cursory regime for the scrutiny of consent orders…*
>
> *The effect of s 33A and the rules and directions made under it is thus to confine the paternal function of the court when approving financial consent orders to a broad appraisal of the parties' financial circumstances as disclosed to it in summary form without descent into the valley of detail. It is only if that survey puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply that any further investigation is required of the judge before approving the bargain that the spouses have made for themselves. It is interesting to note that although this statutory limitation might be thought to be provide an exception to the principle asserted in Livesey v Jenkins, it was not apparently so regarded by the HL, where Lord Brandon preferred to describe it (at 444) as a "step in the right direction".'*[33]

And Balcombe J's practical common sense remains appealing, commended by Ward LJ in *Harris v Manahan*:

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[32] [1985] AC 424, 441.

[33] [1994] 1 WLR 153, 1540-1.

> *'It is important to stress the practical common sense of Balcombe J's approach. The realities of life in the Principal Registry and the divorce county courts are that the district judges are under inevitable pressure and the system only works because the judges rely on the practitioners' help. I would, therefore, be very slow to condemn any judge for a failure to see that bad legal advice is being tendered to a party. The statutory duty on the court cannot be ducked, but the court is entitled to assume that parties who are sui juris and who are represented by solicitors know what they want. Officious inquiry may uncover an injustice but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which conciliation is designed to avoid.'*[34]

These remarks were approved by Lord Bingham in *Arthur JS Hall & Co v Simons*,[35] who also endorsed the view that the court remains subject to a duty to "survey the efficiency of the proposed consideration and the overall fairness of the orders proposed".[36]

So it would seem that the House of Lords' decision in *Livesey v Jenkins* was another high-water mark, this time of paternalism. One key task for researchers is to endeavour to ascertain where along the spectrum of judicial intervention the consent order approval process now lies. How frequently do judges intervene and for what reason? Are judges now supplied with adequate information to enable them to "do their job" – and what is that "job" understood to be? Do judges appear still to rely to some extent on solicitors to protect the parties' interests, and what happens where there is no solicitor on whom the court can rely? In Ingleby's terms, is there still "something of a disparity between the rhetoric and reality of supervision"?[37]

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[34] [1997] 1 FLR 205, 213.

[35] [2002] 1 AC 615, [28].

[36] *Peacock v Peacock* [1991] 1 FLR 324, 328.

[37] (1989), 247.

The standard financial hearings pathway for contested applications

While the majority of financial remedy cases arrive at court as consent order applications, a substantial minority of cases start life as a contested application. Since the introduction of the new scheme in 2000, these cases embark on a standard procedural pathway involving a specific timetable of hearings and associated paperwork requirements. A principal objective of this pathway is to secure settlement along the way and so avoid a trial and adjudicated outcome.

The new scheme replaced a procedure which, in the words of the Law Society, gave solicitors "considerable discretion as to the speed and manner in which a case was conducted. Clients could likewise affect the timetable of a case".[38] The old system had very little standardization of forms or procedure. In the absence of an adequate pro forma[39] requesting specific information in support of an application for ancillary relief, the applicant typically filed an affidavit of means, a self-structured sworn statement regarding their finances and other circumstances which they felt that the court should take into account in deciding the parties' financial dispute (however irrelevant they might objectively be). The respondent would reply in like terms. Disclosure in response to questionnaires would then follow, and the progress of the case from that point (including further requests for disclosure) would depend on directions from the court. But there was no standard, jurisdiction-wide case timetable, and practices varied locally. In the Law Society's view, absent a clear timetable moving matters forward, "a typical problem was that a financial dispute could sometimes go on for years before being resolved", with the potential for disproportionately high costs to be incurred in the process.[40]

Dissatisfaction with the old procedure was evident for some time before the current procedures were introduced, and many local initiatives sprang up designed to improve the conduct of these cases. These shared the aim of encouraging parties to settle their cases

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[38] (2003), [103].

[39] The Law Society reports that the form which did exist was "only adequate in the simplest of cases and seldom used": (2003), [104].

[40] Ibid, [109].

early, often with the aid of a judicial indication as to the likely order that would be made were the matter to go to trial or some other form of conciliation.[41] Not least with a view to providing a uniform approach jurisdiction-wide, a special working party – the Ancillary Relief Advisory Group (ARAG) – devised a new procedure designed to:

- identify important issues and encourage agreement
- reduce unnecessary cost, delay and personal distress
- ensure parties understand at every stage the level of costs they are incurring, and
- curb unnecessary disclosure so parties and courts can focus on the most relevant facts.[42]

Following a pilot study,[43] the new ancillary relief procedure came into operation throughout England and Wales in June 2000.[44] The new procedure involved a set of standard forms, including Form E – the form parties are required to use to set out their assets, income and other relevant issues[45] – and a rule- and court-controlled timetable intended to secure the proportionate, expeditious and fair resolution of cases.[46]

The standard financial hearings pathway typically consists of up to three stages (should the case not settle): the First Directions Appointment (FDA), the Financial Dispute Resolution hearing (FDR) and Final Hearing (FH).

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[41] See for example the conciliation project at the Principal Registry of the Family Division in the early 1980s: see Davis and Bader (1983); the more successful Bristol in-court conciliation scheme: Davis et al (1994), ch 8; see also the Booth Committee report (1985), which recommended early initial hearings for financial cases involving children to provide an opportunity for conciliation; and proposals from the FLBA in 1992: see Thorpe (1996).

[42] See LCD (1999), [16].

[43] LCD (1998).

[44] See now Part 9 of the FPR 2010. For early reactions, see Gerlis (2001), Bird (2002), Mears (2001).

[45] This form was substantially revised in light of recommendations by the Law Society (2003).

[46] The germ of these ideas can be seen back in 1985, when the Booth Committee recommended what may be regarded as a proto-type Form E and some degree of stronger judicial case management, though the parties, rather than the court, would have been left in the driving seat.

(1) The First Directions Appointment is the initial case management hearing. Before this, parties should have exchanged their Forms E and prepared questionnaires designed to elicit further or clarifying information. Standard directions at an FDA will include decisions about the permissible extent of questionnaires, appointments of valuers or other experts, decisions whether to join any intervening third parties (such as legal or beneficial owners of property in which one or other spouse is claimed to have an interest), and so on.

(2) The Financial Dispute Resolution hearing is a crucial stage designed ordinarily to enable parties who have not yet settled to do so with the benefit of an indication from the FDR judge about what that settlement should look like (see further below). The judge who presides at the FDR is precluded from trying the case, should the matter proceed to FH, so the FDR can proceed on a "without prejudice" basis.[47]

(3) The Final Hearing is the trial, should it be required, before a judge other than the one who presided at the FDR, at which parties will ordinarily be expected to give evidence and be cross-examined in the traditional way.

The pathway is not always tackled in that order: there are bypasses, pit-stops and detour loops available along the way. For example, if the parties are ready, the FDA appointment may be used as an FDR. In complex cases, or if one party has been dilatory or entirely obstructive with disclosure of his or her financial position, further directions hearings may be required after the FDA (or after the FDR). If holding an FDR seems futile – for example because of the total failure of one party to cooperate in the process or because a factual dispute precludes any possibility of settlement and so requires judicial determination – the FDR may be dispensed with and the case may proceed directly to FH. The case may be adjourned at any point, not least whilst the parties are attempting to settle the case out of court, and once settlement is reached in principle and the details are being thrashed out, 'mention hearings' may be listed to enable the court to keep tabs on the parties' progress.

[47] See FPR 2010, r 9.17(5). Proceeding on this at the FDR enables the parties to negotiate without the fear that anything said during those negotiations will prejudice their positions if the case proceeds to a final hearing.

The FDR stage

The introduction of the FDR was a key aspect of the new ancillary relief procedure. The FPRs themselves do not say much about the role expected of the judge at the FDR, save to bar further involvement in the case. However, some early insight into the use of FDRs was provided by Thorpe LJ in *Rose v Rose*,[48] who reported that a variety of methods were in use two years into the operation of the new rules, depending on the style of the individual judge. Thorpe LJ thought it would be unhelpful to "impose any restrictions on the exercise of the judicial discretion in this innovative and elastic field",[49] but he described as a "classic method" the provision of an "early neutral evaluation" of the likely outcome should the case proceed to trial around which parties would then be encouraged to settle if possible, together with "an objective risk analysis of the costs incurred, and the costs to be incurred by proceeding to a full trial, against the value of what is truly in issue".[50] Costs warnings are aided by the requirement (not always observed) that parties file Form H (recording costs incurred to date) at each hearing. He regarded the process as an "invaluable tool for dispelling unreal expectation",[51] but warned judges against "over-estimating their ability to bring about a compromise by the use of other forms of mediation[52] for which they have received no training" and against making "superficial or ill-considered" remarks about the likely outcome of the case were it to go to trial, given the likelihood that parties will regard any such remarks as a "decisive statement of outcome".[53]

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[48] [2002] EWCA Civ 208.

[49] Ibid, [29].

[50] Ibid.

[51] Ibid, [32].

[52] The language of 'mediation' in connection with the judge's role at the FDR is perhaps unhelpful and better avoided, not least given that attendance at the FDR is compulsory and the process is conducted in a court building. These factors, together with the involvement of a judge and the lead role commonly played by lawyers in thrashing out negotiation at or around the FDR appointment, arguably do not sit entirely comfortably with the principles of voluntarism and client self-determination that underlie mediation proper; see further Singer (1996) FL 751, writing at the start of the pilot scheme.

[53] Ibid, [29], [32].

Importantly, he did not regard achieving settlement at the FDR to be an absolute goal: "In the finely balanced case it [the FDR] is no substitute for trial and thus should not be used as a discouragement to either an applicant or respondent to go to trial in a case that can only be properly resolved by full and fair trial".[54]

New Best Practice Guidance for the conduct of FDRs, issued by the Family Justice Council and addressed to parties, practitioners (whom it assumes will be involved; contrast cases involving litigants in person) and judges, reflects much of Thorpe LJ's position in *Rose.* While acknowledging that both lawyers and clients complain about lack of "structured judicial intervention" at FDRs, it notes that "in some cases it may be positively disadvantageous for such intervention to be too robust, or too distinctly in favour of one party rather than the other". But an "early neutral evaluation followed by mediation in an attempt to bridge remaining gaps between the parties" is clearly the standard model:

> *Although the precise approach will differ from case to case, it is suggested that the following is likely to assist:*
>
> *(i) Provide a concise overview of the broad principles to be applied;*
>
> *(ii) Identify, if appropriate, any factual matters of a 'magnetic' importance and/or (if in dispute) the determination of which is likely to lead to a particular outcome at trial plus any matters in issue the determination of which is unlikely to impact on the outcome at trial;*
>
> *(iii) Identify and (where possible) comment upon any differences between the asset and income schedules produced on each side;*
>
> *(iv) Identify the remaining issues between the parties based upon consideration of their most recent offers;*
>
> *(v) When appropriate…, express an opinion as to the possible/probable outcomes on each of the remaining issues between the parties or give reasons why it is not possible (or, perhaps, desirable) to do so;*
>
> *(vi) Consider and express a view upon the proportionality of continuing litigation in light of the issues and amounts remaining in dispute.*

[54] Ibid, [32]. Contrast this with the observation by Davis et al (1994), 202 about the mediation appointments (so called) used in Bristol in the 1980s and the hybrid of full trial/settlement that could entail, giving parties "approximate trials".

Save in the most exceptional case, at this point it is suggested that the court should insist on further negotiations taking place. It is rarely appropriate (at this stage) simply to proceed by default to give directions [to prepare the case for full trial]. Before negotiations resume, specific reference ought sensibly to be made to the costs already spent on each side and to a realistic assessment of the costs likely to be spent if the matter proceeds to trial. Imprecise assertions that costs are likely to 'double' by the date of trial are probably not as effective as each solicitor being asked to provide an estimate of what each party is likely to have to spend (including, for example, on counsel's brief fee). The possibility and/or desirability of mediation should also be raised... [55]

Costs rules

The treatment of costs in financial remedy cases, a prominent issue for parties to consider at the FDR, with the aid of Form H, has relatively recently been reformed. Costs in ancillary relief cases used, as in civil cases, to "follow the event", so that the "losing" party was likely to have to pay the other side's costs. This basic principle was supported by the concept of *Calderbank* offers,[56] which involved parties making offers to settle the case "without prejudice save as to costs"; a party rejecting such an offer risked being ordered to pay the other side's costs if the adjudicated outcome did not exceed the rejected offer. This practice was intended to give parties an incentive to make and accept reasonable offers at an early stage. But the rules were changed for family cases in 2006,[57] following a fundamental change in the underlying substantive basis of financial remedy cases, introduced in *White v White*. Financial cases are no longer conceptualized in terms of the respondent providing for the economically weaker claimant (typically the wife), but rather involve a fair redistribution of assets between the parties, (from which it might be said

[55] Family Justice Council (2012), [19].

[56] *Calderbank v Calderbank* [1975] 3 All ER 333.

[57] First by r 2.71 of the Family Proceedings Rules 1991 (now FPR 2010, r 28), which introduced the 'no order for costs' principle. This excludes the general rule (r.44.3(2) CPR 1998) that the unsuccessful party will be ordered to pay the other party's costs.

implicitly to follow) the cost of which process should be shared between them.[58] The starting point is now one of "no order as to costs" (i.e. the parties cover their own legal costs from their own resources), but one party may be ordered to pay the other's costs because of that party's conduct in relation to the proceedings.[59] How best to take account of parties' legal costs when dividing the assets remains problematic.[60] Some have called for the return of *Calderbank* offers as an aid to settlement.[61] One question for researchers is whether and how this change in rules has affected settlement practice.

OTHER DISPUTE RESOLUTION SERVICES

The promotion of mediation as a dispute resolution service

For many years, government has promoted mediation as a preferable way of resolving all manner of private law family disputes, rather than resort to court and adjudication.[62] Since the late 1990s, parties eligible for legal aid for the resolution of their dispute have been ordinarily required to attend an assessment meeting to explore whether their case is suitable for mediation, in which case they receive funding to use that service along with funding for legal support through that process (including the conversion of a mediated agreement into a consent order application), rather than funding for legal representation.[63] The legal aid reforms introduced in April 2013 by the Legal Aid, Sentencing and

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[58] See *Norris v Norris* [2003] EWCA Civ 1084, for Butler-Sloss P's discussion of the difficulties maintaining the old costs rules in place post-*White*. The ARAG consultation exercise focused more on practical problems with the operation of the old rules in undermining carefully crafted settlements, encouraging gamesmanship and generating satellite litigation: see Harrop (2011).

[59] See now FPR 2010, r.28(3). For early comment, see Watson-Lee (2006), Hodson (2006), and more recently Harrop (2011). For recent judicial discussion, see *GS v L* [2011] EWHC 2116, *R v R* [2011] EWHC 3093.

[60] See Harrop (2011).

[61] E.g. Hodson (2011), Murray (2012).

[62] See most recently Norgrove (2011b).

[63] First through the Family Law Act 1996, s 29 and then from 1999 via the Legal Service Commission's Funding Code.

Punishment of Offenders Act 2012 ('LASPO') take this a step further, generally removing public funding for legal services in relation to most private family law matters, instead only funding mediation (with limited supporting legal advice and assistance), other than in certain cases.[64]

Since April 2011, privately funded clients and litigants in person have also been encouraged to consider mediation in preference to court, following the introduction of 'MIAMs' – mediation information and assessment meetings. A new Pre-Application Protocol accompanying the new Family Procedure Rules 2010 requires, or – as originally conceived – expects, applicants to attend a MIAM prior to issuing proceedings and/or to complete Form FM1 with their court application either to explain the reason for their failure to attend a MIAM or to explain why, having attended a MIAM, court proceedings are now being initiated.[65] The original protocol does not make attendance compulsory and most respondents to a survey conducted by family solicitors' organisation Resolution (between them able to report on practice in over 100 courts) reported that court staff were not requiring applicants to show evidence of having attended a MIAM.[66] The formal position is due to change once the Children and Families Bill 2013 is enacted, making attendance compulsory (other than where specific exceptions apply).[67]

The advent of collaborative law

A more recent arrival in the repertoire of dispute resolution services (for which public funding has never been provided) is collaborative law. In collaborative law, settlement is

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[64] Notably, funding will be provided for the victim of domestic violence in relation to all types of family proceedings provided the abuse can be evidenced via one of a set of specified types of material (SI 2012/3098, r 33); funding will not be provided for the alleged perpetrator: Sch 1, para 12; see also cases involving child abuse: Sch 1, para 13. So-called "exceptional funding" is also available under s 10 where funding for legal representation is necessary to provide breach (or possible breach) of the individual's rights under Article 6 ECHR: see Miles (2011a, 2011b).

[65] See Practice Direction 3A – Pre-Application Protocol for Mediation Information and Assessment, which supplements FPR 2010, Part 3.

[66] See news report available at www.familylawweek.co.uk/site.aspx?i=ed96933 [accessed 3 September 2013] and at (2012) *Family Law* 745.

[67] See clause 10 of the Bill as brought to the House of Lords from the Commons on 13.6.2013.

reached by both parties with their solicitors by their side throughout 'four-way' face-to-face discussions. The parties and their lawyers sign an agreement committing them to resolving the dispute through the collaborative process; in the event of the process breaking down, the agreement prevents the solicitors from representing their client in contested court proceedings. One benefit of collaborative law is the quick approval available for consent order applications which emerge from the process. Following a decision by Coleridge J to permit a collaborative agreement to be lodged for approval in the urgent 'without notice' applications list,[68] the President of the Family Division authorised this procedure to be used generally for agreements reached via collaborative law.[69]

PAST RESEARCH IN THIS FIELD

Financial remedy cases have had less research attention in the last decade or so than children cases. The last court file surveys were undertaken during,[70] or as part of the evaluation of,[71] the piloting of the new ancillary relief procedures. So there has been no court file survey in well over a decade and therefore, until very recently,[72] none since the new ancillary relief procedures were rolled out jurisdiction-wide in June 2000. There have since then been several fascinating, largely qualitative, studies examining issues relating to financial cases, but none concerned squarely with the legal process's handling of them.

Studies in this area have differed both in their research methods (often mixed): court file surveys, client file surveys, observational studies, interviews with judges, interviews with practitioners, interviews with lay parties (who may or may not be clients of lawyers), focus groups; and in their core research questions: whether focused on the formal procedures, the roles of key actors within the system and their relationships (e.g. between solicitor and

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[68] *S v P (settlement by collaborative law process)* [2008] 2 FLR 2040.

[69] See news report available at: http://www.solicitorsjournal.com/news/family/divorce/family-courts-fast-track-collaborative-agreements [accessed 29 October 2013]

[70] Davis et al (2000a).

[71] LCD (1998).

[72] Woodward, with Sefton (forthcoming).

client),[73] the substantive law and outcomes it produces,[74] the practical outcomes for parties following divorce and separation (with or without any court order having been obtained) in the shorter or longer term.[75]

Several studies have closely investigated the role of lawyers, particularly solicitors, in handling these cases. These studies consistently emphasize the settlement-orientation of much family law practice and the role of lawyers in managing client expectations to help the two parties find middle ground. Negotiating with one's own client is as important in this regard as negotiating with the other side, to the extent that researchers have questioned whether "settlement" can properly be equated with genuine "agreement", or whether the efforts of solicitors to bring their client "to heel" and to adopt a conciliatory rather than more partisan approach can have a disempowering effect.[76] Richard Ingleby's study (1992) monitored 60 client files of five solicitors over an 18 month period in the mid-80s with a view to understanding the nature of solicitors' out of court activity, particularly negotiation. Davis et al's panoramic study *Simple Quarrels* (1994) developed Ingleby's approach: they continuously monitored 80 cases in which an application for ancillary relief had been made (i.e. only initially contested cases), interviewing solicitors and some of the clients at various stages in the case, observing court appearances, reading the court file and discussing the case with the judge after hearings. Eekelaar et al (2000) spent 14 days observing solicitors in action in order to gain an impression of their daily activities and then, rather than monitor a file continuously themselves as Ingleby had done, conducted interviews with 40 solicitors in which they asked participants to talk through one recent client file in order to gain an in-depth view of their conduct of the case, from first client meeting through to conclusion. Some of the cases discussed in the course of that research had been conducted in pilot courts during the piloting of the new ancillary relief procedures. Kathryn Wright (2007)

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[73] See Maclean and Eekelaar (2009), Wright (2007), Eekelaar et al (2000) and Davis et al (1994).

[74] See in particular Davis et al (2000a), Hitchings (2009), and much earlier Jackson et al (1993).

[75] For this last type of study, see Eekelaar and Maclean (1986), Gregory and Foster (1990), Wasoff et al (1997) (see Wasoff (2005)), and more recently Douglas and Perry (2001), Arthur et al (2002). And for research based on population survey data, note Fisher and Low (2009) and Price (2009).

[76] See in particular Eekelaar et al (2000), Wasoff (2005), Wright (2007).

conducted an observational study of 40 clients of 10 solicitors (based in one location) through the divorce case, interviewing both solicitor and client at various stages with a view to examining the solicitor/client interaction and comparing the claimed benefits of lawyer-led as contrasted with mediated settlement. Most recently, Maclean and Eekelaar (2009) followed up their work on solicitors with a study of family law barristers, based on observations of barristers at work in the context of court attendances, crucially considering what went on in the consultation rooms and corridors, as well as in the court room itself; six of their observations related to financial cases.

Another group of projects has been based on, or included a substantial component based on, court files or interviews with judges. The earliest court-based study in the 'modern' era[77] was Baker et al's 1977 study of the matrimonial jurisdiction of registrars, which was concerned to discover (in the absence of reporting of first instance decisions which are quite properly made in chambers rather than in open court) how first instance judges were exercising the very wide discretion that financial remedy law affords them. The researchers undertook loosely structured interviews with over half of the 142 registrars jurisdiction-wide, exploring the substantive criteria being applied by the judges, their choice of orders, and the procedure adopted, including in cases involving litigants in person and for the approval of consent orders. Eekelaar replicated this study in 1991 in order to explore the impact of reforms to substantive financial remedy law in 1984,[78] interviewing 38 registrars from all over the country. Since 1977, the concept of "conciliation" had gained prominence, as evidenced by the proliferation of settlement-oriented in-court schemes discussed above, and so a key question to be examined was to understand what this meant for the role of the family courts: simply to enable parties to regularize their situation through private ordering following divorce or more actively to impel them towards doing so (a different form of regulation from traditional adjudication)? Ten years on came the two court-based projects that were undertaken during the piloting of the new procedures for

[77] I.e. since the Divorce Reform Act 1969 and the introduction of the financial remedies now contained in the MCA 1973.

[78] Effected by the Matrimonial and Family Proceedings Act 1984: repeal of the "minimal loss" principle, introduction of the clean break principle and requirement to give "first consideration" to the welfare of minor children of the family.

ancillary relief cases. First, the formal evaluation of the pilot undertaken by KPMG for the Lord Chancellor's Department (1998), which exclusively examined the progress of contested applications (i.e. no pure consent order applications, which were unaffected by the new procedures). This involved a court file survey of 1000 cases from 16 pilot courts and 16 control courts, combined with in-depth interviews principally with judges, court administrators, and solicitors on both sides in 40 cases. And secondly, Davis et al's study (2000a) of outcomes in ancillary relief, based on a court file survey undertaken in four courts, two of which were in the pilot programme; they surveyed all cases with a divorce petition from which they yielded a sample of just over 300 involving application for ancillary relief (including consent order applications). Whilst the project was principally concerned to examine the outcomes reached, the researchers also reported (in particular) their findings relating to the consent order approval process and generally on the quality of financial information available on file by which to evaluate (and understand the basic effect of) orders being made. That study did not particularly examine the settlement process itself, whether out of court or in court following the launch of contested proceedings.

The first steps in filling the data gap that has opened up over the last decade have been taken by Hilary Woodward's in-depth study of pensions on divorce (forthcoming). Woodward's methodology is similar to ours – a court file survey supplemented by interviews with family law professionals, and some focus groups. Given her focus on pensions and so on substantive outcomes, she – like Davis et al – did not particularly focus on the settlement process itself. Meanwhile, a recent project in Scotland by Mair et al (2013) has examined Scots law's nearest equivalent of the pure consent order case – the lodging of "minutes of agreement" – through a survey of those agreements and interviews with parties to them.

Mediation has also received limited research attention, until recently, particularly in relation to comparing outcomes between lawyer-led negotiation and mediation,[79] the outcomes of

[79] In her analysis of legal aid datasets, Quartermain (2011) noted that the data could not be used to compare the effectiveness of outcomes achieved through solicitor-negotiation and mediation: the study compared outcomes for clients who received public funding for mediation with those who had certified funding for legal representation in court, but not (it seems) those whose cases were settled by lawyers without the need for any certified funding; and in the case of those in receipt of funding for legal representation, it was not possible to distinguish clearly between clients achieving using

different kinds of mediation,[80] and its use and effectiveness in privately funded family law disputes.[81] Two of the last major studies were commissioned to evaluate the pilot programmes under the Family Law Act 1996. The first study, led by Janet Walker, evaluated pilot information meetings intended to give parties information about the divorce process and its consequences, including the option of mediation.[82] The second study, led by Gwynn Davis, monitored the impact of the new requirement that publicly funded clients' cases be assessed for their suitability for mediation before receiving funding for legal representation. Davis et al found that although mediation could be a cost-effective option in resolving some disputes, it could also increase overall costs by adding an extra step in the process; that timing was crucial; and that mediation required the engagement of both parties.[83] Two new studies are now exploring the impact of MIAMs[84] and comparing the current public awareness, use, experience and outcomes of solicitor negotiation, mediation and collaborative law as out of court dispute resolution mechanisms.[85]

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solicitors to settle prior to attending court and those who used the court process and adjudication. Quartermain also noted that there may be differences in the types of clients using mediation and legal representation: see generally 2.4.

[80] See Walker (2013), 7 for discussion of this data gap.

[81] There is currently data available on the number of publicly funded clients using mediation services in England and Wales, but the figures relating to privately funded clients are not known. See Quartermain (2011), 2-3.

[82] Walker et al (2001) and Walker et al (2004).

[83] Davis et al (2000b), 273-4.

[84] Barlow, Hunter and Sefton with TNS BMRM are currently undertaking research for MOJ into the use and client experience of MIAMs and mediation in private family law disputes.

[85] *Mapping Paths to Family Justice* is a 3 year ESRC-funded project; the first stage consisted of a national survey to gauge awareness, use and experiences of the three types of dispute resolution process: Barlow et al (2013); and socialsciences.exeter.ac.uk/law/research/frs/researchprojects/mappingpathstofamilyjustice/ [accessed 5 Nov 2013]

OUR CORE RESEARCH QUESTIONS AND DATA SOURCES

Having set the scene, we now introduce our research questions and data sources.[86] As we noted earlier, financial remedy cases which reach the courts – whether as a consent order application or as contested proceedings – come from only a sizeable minority (c 40%) of all divorces. Our study focuses on that sizeable minority.[87] Our core research questions may be summarized as "how", "when" and "why" settlement is reached (or not reached) in financial remedy cases.

When is settlement reached?

Settlement of the financial issues on divorce can be achieved at various stages. In most cases, agreement is achieved without contested proceedings, the parties managing to settle out of court either by themselves or with the aid of solicitors, mediators, and/or some other family justice professionals. Amongst those who do embark on contested legal proceedings, settlement can be reached at any point along the standard financial hearings pathway: before, at or immediately following the FDA; before, at or following the FDR; at the doors of the court, or at (or even following) a Final Hearing. While official statistics now[88] record the proportion of cases which settle following a contested application, they do not identify at which of these stages settlement is achieved. So one particular objective for our study was to use a court file survey to unpack the "contested but settled" category, mapping the various stages at which settlement is reached.

How and why is settlement reached (or not)?

Our principal interest is in parties' use of the legal process – specifically the consent order approval process and the progress of contested cases that embark on the standard

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[86] For fuller discussion of the data sources and methodology, see Appendix A.

[87] A broader perspective is offered by Barlow and Hunter's ongoing *Mapping Pathways to Family Justice* project: see note 85 above. Our study does not provide data regarding the settlement activities (if any) of those who make no contact with solicitors, mediators or the court.

[88] Compared with at the time of Eekelaar's study (1991), where data about consent orders and settlement rates were not available.

financial hearings pathway. Within that, we were interested to explore how parties are achieving settlement – what dispute resolution mechanisms they use. The court file survey would be able to cast further light on that. But exploring the "why" in depth necessitated semi-structured interviews with solicitors and mediators. This would give us some insight into these family justice professionals' perspectives on the factors that promote, delay or entirely prevent settlement of financial cases.

The court file survey data

Case selection

We drew our case file data from four courts located in different regions of England of varying sizes and socio-economic context. Two courts were located in large metropolitan areas, one in a mixed urban / rural catchment area, and one in a more predominantly rural area but featuring a number of small to large towns. Each court had at least the median throughput of financial order cases on divorce, compared with courts nationally, in the data released for 2011.[89]

From each court, we aimed to collect data from 100 files in which a financial order had been made disposing of an application for financial relief following divorce under the Matrimonial Causes Act 1973. More specifically, we aimed to collect data from 50 files in each court from each of two time periods: in the first tranche, the final order concluding each case was made prior to the introduction of the new Family Procedure Rules (so before the MIAM protocol and new statement of information form supporting consent order applications); in the second tranche, the final order was made some time after the new FPRs came into force, but prior to implementation of the legal aid reforms of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. We adopted this approach with a view to seeing whether we could observe any differences in the two time periods, particularly in light of the advent of MIAMs. For each court, HMCTS therefore provided us two lists of cases in which the financial order was recorded as having been made before a given date (one list for each tranche). We drew 50 files in reverse chronological order from each list,

[89] Court Statistics Quarterly figures for Q3 of 2011 re total number of disposals by court (family courts and mediation).

without targeting or over-sampling for specific types of case, simply taking files as they came in order to gain a snapshot of the financial order "business" of our four courts.[90]

In conducting our court file survey, we could not obtain a random sample of cases from a known population and so cannot claim that our selection of cases is statistically representative of all divorces with a financial order in England and Wales. We have instead sought to provide a reasonable spread of different court type/size and geographical location from which to report largely descriptive statistics regarding the cases that we found. A full discussion of our selection process (including the exclusion of various categories of file) and the representativeness or otherwise of our dataset of financial order cases in general, taking into account various problems identified at various stages with the selection process adopted, is provided in Appendix A to this report.

The profile of financial orders: contested or uncontested?

The following table shows the profile of the orders in our court file survey as compared with the official data for all financial orders made following matrimonial proceedings[91] in 2011 in England & Wales. The first two rows are cases concluded by consent orders: "pure consent order" denotes those cases where the original application to the court was for a consent order; "contested but settled" those in which the application for a consent order emerged following the initiated of contested proceedings. Our data broadly reflect the jurisdiction-wide picture:

[90] We have ended up with a dataset of 399, one file's ineligibility only having been noted once data collection had concluded.

[91] This includes the tiny number of nullity and judicial separation cases, as well as orders following the overwhelmingly larger number divorces. As we discuss in Appendix A, there is thought to be an under-count of all orders, and in particular of pure consent orders, in the official data, owing to recording practices in courts.

Table 1.1: Profile of financial orders in court file survey compared with jurisdiction-wide data

Category of order	Court file survey (N=399)	2011 jurisdiction-wide data[92]
Pure consent order	65% (260 cases)	68%
Contested but settled	30% (118 cases)	25%
Adjudicated	5% (19 cases) [+ 2 unclear][93]	7%

There has been a slight trend over the last few years (from 2006-11) towards a lower proportion of consent applications and correspondingly greater proportion of contested but settled and adjudicated cases: for example, the most "consensual" year in the MOJ data is 2007, when 73% of orders were made following pure consent order applications, 22% contested but settled and 5% adjudicated. In so far as we have a slightly higher proportion of contested but settled cases than the jurisdiction-wide picture, this in large part reflects the fact that the dataset for one of our four courts contains a considerably higher frequency of contested applications than the other courts for both periods. Taking all courts together, pure consent order applications were more frequent in the second tranche (70%) than in the first (61%), but this difference was not statistically significant to the level p=.05.

The interview data

We interviewed 32 practitioners: local solicitors[94] (16), mediators (10) and solicitors who also worked as mediators ("solicitor-mediators", 6) working in or around the four court areas (eight from each region). A full discussion of our selection process and problems encountered during this stage of the research is provided in Appendix A below. Given current promotion of mediation, specific attention to the practice of mediators in financial remedy cases is warranted. Interviews were semi-structured, combining general questions

[92] As we discuss in Appendix A the official data (MOJ 2013, table 2.9) and our data are affected by a known problem – c. 10-15% of cases are not recorded on the courts' case management system and so do not appear on the database; it is thought that most of these missing cases are pure consent order cases, so further reducing the overall proportion of contested but settled and adjudicated outcomes.

[93] These two further cases went to final hearing but it is unclear from the data collected whether the final order was made by consent or not.

[94] This included one Legal Executive

about practitioners' experience of handling these cases with more focused questions exploring two or three of their most recent cases. Interview schedules differed slightly for the different practice groups. In particular, the different nature of solicitors' and mediators' practices was reflected in the types of recent case that we asked each to discuss: with solicitors and solicitor-mediators we discussed "pure consent order", "contested but settled" and "adjudicated" cases, whilst mediators were asked to discuss cases where heads of agreement either were or were not reached following mediation. Interviewees were asked to comment on what factors, in their view, led to the case concluding as it did and whether these cases were atypical in any way. They were also asked questions on issues pertinent to their practice-type, such as experience of the consent order approval process, and handling cases involving a party acting without the support of a lawyer.

OUR FINDINGS

In chapters 2 to 5, we explore the how, when and why. Chapter 2 focuses on the experience of the majority of couples who have contact with the family court in financial cases: settling out of court and applying for a consent order. Most couples appear to reach settlement with the aid of solicitor negotiation. But avoidance of litigation does not mean avoidance of the judge: our data indicate that judicial intervention in the consent order approval process is common. We identify in chapter 2 the range of factors promoting settlement which characterise those cases, most of them non-legal in nature, and see in subsequent chapters how the flip-side of those factors can at least delay if not wholly prevent settlement being reached. Chapter 3 specifically addresses when contested cases settle: settlement is spread all the way along the standard financial hearings pathway, though concentrated around the FDR. Chapter 4 focuses on the factors which hinder settlement. Chapter 5 specifically examines the impact on a case's progress of one or both parties acting as a litigant in person (LIP), a matter of considerable current interest in the wake of the recent legal aid reforms. In the penultimate chapter, we reflect on the financial settlement process, which we liken to the assembling of a complex jigsaw puzzle by two people who may be more or less skilled, tutored, cooperative and engaged in the game. We then conclude in chapter 7 with discussion of some problems and policy implications: what more, if anything, can and should the family justice system do to make financial settlement happen more often and sooner for more couples on divorce?

CHAPTER 2: HOW AND WHY MOST CASES SETTLE WITHOUT CONTESTED COURT PROCEEDINGS

INTRODUCTION

There is considerable policy interest in the use of different types of out of court dispute resolution mechanism, whether solicitor negotiation, mediation, collaborative law or simply informal discussion between the parties. We have seen that the majority of divorcing couples (around 60%) appear not to formalise whatever financial arrangements that they come to in a consent order, but that the majority of those who do engage with the court do so by applying for a consent order to enshrine their settlement, rather than by litigating. This chapter explores both through court file survey and interview data how and why those cases manage to settle without the need to initiate contested court proceedings. The more recent court file data (in particular) cast light on the prevalence with which different settlement mechanisms are used by divorcing couples. Our interviews, particularly solicitors' reflections on their most recent pure consent order case and mediators' most recent heads of agreement case,[95] offer insight into the circumstances, party characteristics and other factors promoting settlement. The fact that there are no contested court proceedings does not, however, mean that judges are excluded from the process. We end this chapter by examining judicial intervention in consent order applications, reporting on the reasons for, and frequency and intensity of, judicial intervention identified in our court file survey and experienced by our solicitor interviewees, together with their perceptions of what factors affect judges' approach to consent applications.

[95] As we note below, mediators commonly do not know what happens to successfully mediated cases once they leave them – they may or may not be converted into consent orders; but mediators' perceptions of factors promoting settlement were similar to those reported by solicitors in our interviews, and so we report their reflections together in this chapter.

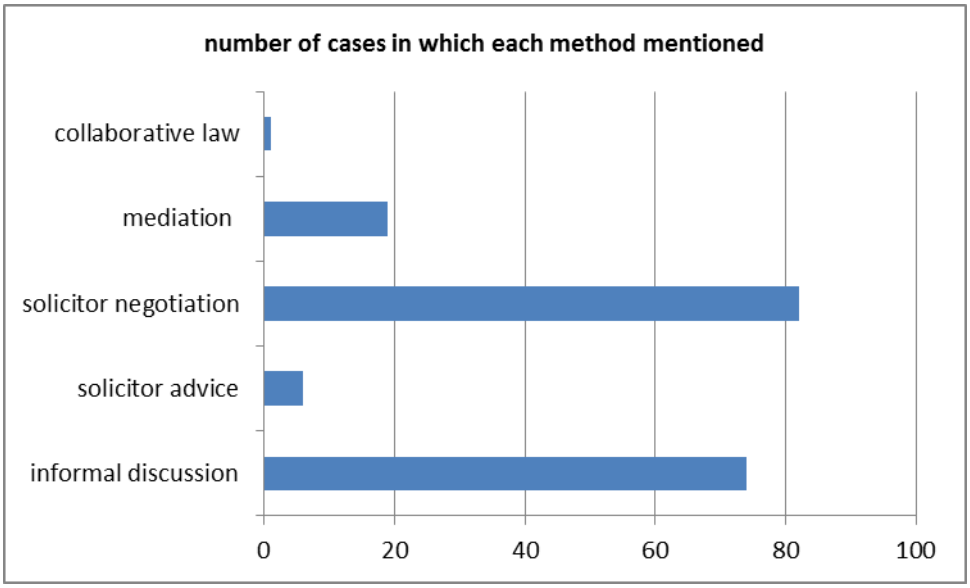
HOW IS SETTLEMENT REACHED?

Our court file survey yielded good evidence about the dispute resolution mechanism(s) used for 136 (out of 139) pure consent order cases in the second tranche of our data.[96] These all used the new version of Form D81 (Statement of information for a consent order in relation to a financial remedy), and answered question 6 which invites parties to

> "[S]tate how the attached proposed consent order was reached e.g. discussions between parties, negotiations through solicitors, Mediation, Collaborative Process or other out of court dispute resolution process".

The picture which emerges from responses to that question in our court file survey shows solicitor negotiation (and informal discussion) dominating the area:

Chart 2.1: Count of dispute resolution methods used: pure consent orders (second tranche)



[96] There are two cases in tranche 2 – both involving applications based on separation agreements negotiated earlier – where we have no direct evidence, but it is clear that one or both parties had independent legal advice; we noted no mention in either case of mediation having been used. In a third case, there is no evidence. In all three of these cases, solicitor negotiation seems the likeliest mechanism, but we have excluded them from this analysis. We have included here two cases where there is direct evidence from other paperwork on file of the mechanism used, rather than a qu 6 response.

The total number of methods reported to be used in chart 2.1 exceeds the total number of cases on which we report here (136), as parties often reported using more than one method or (for example), in completing their own forms, one spouse reported two methods and the other just one of those. Solicitor negotiation (total 82, 60%) and informal discussion (total 74, 54%) were *both* reported in 30 cases. Amongst the 19 (14%) cases of mediation, solicitor negotiation was also mentioned in 8 cases and informal discussion in 7. Five cases reported all three of those methods. We have only counted "solicitor advice" (total 6) as a supporting method in chart 2.1 where expressly mentioned in answer to question 6 (usually in support of cases settled by informal discussion), but it is to be expected that a large number of other cases will have benefited from legal advice on at least one side. We address the issue of parties acting without lawyer support fully in chapter 5, but for now note that we found evidence that nearly 80% of parties (more wives than husbands) in all pure consent order cases (from both tranches) had lawyer support, *both* parties having had lawyer support of some form in 64% of cases. We are reliant on the information available on the court file, and so have no sense, for example, of how many couples may have attempted mediation or collaborative law, and resorted to conventional solicitor negotiation only after that other method failed.[97]

So solicitor negotiation appears to be the principal formal mechanism for achieving financial settlements on divorce, in some cases supporting mediation, and a large number of couples do manage to discuss these issues themselves, often with solicitor support. Given government's promotion of mediation, we might have expected to find more cases in which mediation was the (or one of the) declared methods of dispute resolution, particularly in the second tranche (post-MIAM[98]) cases. However, the high rate of solicitor negotiation that we found in the second tranche was not unexpected, given the strong

[97] For the 121 cases from the first tranche of the survey, which pre-date the new form D81, we have direct evidence of the dispute resolution method(s) used for only 21 cases (where we found a cover letter, note on the old D81 or other document on file which happened to mention the point): 8 instances of informal discussion, 2 cases of supporting solicitor advice, 7 solicitor negotiations, 6 (possibly 7) mediations, and 4 collaborative cases.

[98] See chapter 1.

settlement culture which defines much family law practice.[99] Our data therefore add to the body of evidence[100] which cast doubt on the government's frequent equation of lawyer involvement with litigation, overlooking the extensive work done by family solicitors out of court.[101] We do not have good data on the legal aid status of parties to consent order applications in our survey, but at least some did have Legal Help or other non-certificated legal aid funding to help reach a settlement and obtain a consent order. We consider in chapter 7 what impact recent reforms[102] removing public funding for lawyers' out of court work (other than in support of mediation) in most private family law cases may have.

The very low number of collaborative cases found in the court file survey matches our interview findings: although 14 of our solicitor interviewees had trained collaboratively and were fully committed to the principles of collaborative law and its benefits for clients, only five had done any collaborative cases. They attributed the failure of collaborative law to take off in large numbers (or at all) to cost[103] and unpopularity in their area:

> *"Where I'm situated is not a wealthy area. I think collaborative is an expensive option for some people. I accept that it's a cheaper option than court but there's a lot of people out there who don't go to court and just let things sit anyway. So I think it would be quite expensive." (S15)*

A few lawyers reported that some cases that they had considered might be suitable for the collaborative process had failed to work out: (S13, S17 and S21) While it may be a useful

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[99] The Law Society's Family Law Protocol endorses the Resolution Code of Practice: "a commitment to resolve a dispute in a non-confrontation and constructive way to preserve people's dignity and to encourage agreements": Law Society (2010), 1. The Resolution Code of Practice is available at www.resolution.org.uk. See also Eekelaar et al (2000).

[100] See for example Ingleby (1992), Davis et al (1994), Eekelaar et al (2000).

[101] See for example the background to the legal aid reforms effected by LASPO 2012: MOJ (2010), discussed in chapter 7.

[102] LASPO 2012.

[103] Only one interviewee in the course of discussing their lack of collaborative law practice remarked that legal aid was not available for collaborative law.

and potentially constructive additional mechanism for financial settlement, collaborative law appears to remain a minority exercise.

WHY DO THESE CASES SETTLE OUT OF COURT?

It was apparent from information available to us from the case files that pure consent order cases were generally less conflicted than those in which contested proceedings were initiated: for example, we identified 21 files which had a Children Act 1989 dispute (for example, relating to contact or residence), only 3 of which were pure consent order cases. But beyond that sort of indication, court files give away little about the dynamics of cases which settle without contested proceedings. By contrast, our interviews with solicitors and mediators provide rich data on the dynamics of pure consent order cases / mediations which result in heads of agreement. The interview data suggest that the factors which contribute to settlement of these cases are rarely simple. A remark of one solicitor, in response to a question about the role of children in the settlement of their most recent case, exemplifies this well:

> *"I think that probably like all things it's never as black and white as that but I think there was a constellation of issues. The children were definitely one of them. The length of time it had taken anyway in making any progress with this guy who kind of flip-flopped between having a lawyer and not, and also because the period of separation had been quite lengthy. It wasn't a volatile relationship or separation. It was more benign and it just drifted and now she wanted an outcome and she wanted to move on … And even despite me very positively talking about what she could achieve and hope to achieve, I don't think she really thought it was worth the effort, the fight." (S25)*

In discussing the factors influencing settlement in this and subsequent chapters, we hope to show that the settlement process needs to be understood in a more sophisticated way than simple progress along a straightforward path from A to Z. As we will suggest in chapter 6, such an image of the settlement process may be misleading. Instead, as some of the quotations from interviews below suggest, a particular 'constellation of issues', an amassing of essential conditions relevant to the individual case, enables negotiation and discussion which leads to a (more or less gradual) accumulation of all factors necessary

for settlement to be achieved. Unless and until these essential features in each individual case are collated and assembled in the right way, settlement will either be delayed or not achieved at all. Many of them aided already by solicitors and/or mediators, the parties may need further support to achieve settlement from additional actors within the family justice system (barristers and judges). Crucially, many of the factors promoting settlement are 'non-legal' in nature. As Ingleby has suggested, in a discretionary area of family law such as this, non-legal factors have more room to express themselves and influence outcome than they may in other fields of law.[104]

Factors promoting settlement: emotional readiness

Many practitioners in this study (both mediators and solicitors) emphasised that parties only settle when they are ready to settle and, in particular, if they have moved on from the emotional distress surrounding the breakdown of the marriage:

> *"I think there's only ever one reason that people settle – and that's when they're ready to settle. I think they have to be sick of the fight. I think they have to be emotionally ready to move on. And at some level they have to have had an opportunity to say all the things that they want to say before they're ready for closure." (M9)*

> *"And if they are able to get over the emotional distress – not everybody's bitter when a marriage or a relationship breaks down – I think well everybody is distressed – if they can get over that, then they can get to an agreement very quickly." (S19)*

Most interviewees identified emotional readiness as a key factor to satisfactory progression of a case.[105] Emotional readiness is necessarily linked to the timing of settlement negotiations:.

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[104] Ingleby (1992), 144.

[105] See also the same finding in LCD (1998), [11.4]; that study only examined cases which involved contested proceedings.

"Timing is very important. … I think that they need to reach a certain point emotionally and psychologically where it's about working cooperatively together truly, not for any other reason than that it's the best thing to do." (M2)

Where settlement appeared relatively unproblematic, both parties had reached this emotional position by the time of or during negotiation:

"It settled, I believe, because they had separated so long ago and therefore had settled into a routine … I think in their case the emotions were out of the way, they just wanted to sort out, just cross the 't's, dot the 'i's, whatever. It was already sorted. It had been sorted a long time ago and they just wanted to formalise what had fallen into place." (S24)

Perhaps exemplifying this type of case, in the court file survey we observed some very well-choreographed two-year separation cases, involving separation deeds in which the parties had identified who would in due course petition for divorce and agreed on the terms of the consent order for which they would then apply.

But the two parties may need different amounts of time to adjust to their new circumstances and reach a mental space where they are able to settle. Some are ready upon separation, having been considering separation for many months or even years before finally committing to the process. For others, the breakdown of the relationship comes as a complete shock and they are "much further back in the recovery process" (M6), taking many months or even years to adjust. It may therefore be productive to take time before attempting negotiation of the financial issues, to give individuals space to become emotionally ready to participate in that process. One mediator interviewee reflects further on this, suggesting why it is important that both parties have completed the emotional journey and why, when only one party is emotionally ready, the journey to settlement is longer and more painful.

"There is always somebody who is going to be more unhappy than somebody else about the end. We talk about the leaver and the left. The leaver has probably spent … I mean, I've had one guy say to me, 'I've spent 30 years thinking about leaving' – so people have often spent a huge amount of time thinking about leaving. … So when I talk to trainees I talk about the leaver and the left, I'm saying that the leaver is

the person that's out there – they want to go at the speed of light, they've done their emotional journey, they're out there. The left is back here, they're wanting to know how they can pull this person back, how they can hang onto them for a bit longer, what can I do, how can I engage with them." (M3)

Factors promoting settlement: a shared aspiration to settle

This might be thought to go without saying, but another important factor promoting settlement identified by our interviewees was the parties' shared aspiration to settle: either wanting settlement or being predisposed towards it. There appear to be three (potentially inter-related) aspects to this, one, some or all of which may be relevant in an individual case.

i) Willingness by <u>both</u> parties to settle

Crucially, <u>both</u> parties must want to settle. If one party has not been able to 'move on' emotionally, the other party's aspiration to negotiate will be thwarted.

"I think where it's very difficult, or where it gets harder and harder to mediate a successful outcome, is where one party actually for whatever reason – and it could be an unconscious reason – actually just doesn't want to settle. You can have the most, on the outside, simple case but it's not going to settle because actually someone doesn't want to, doesn't want to end the relationship, wants to have some control over someone's life, or whatever…" (M7)

The parties' personalities are key components of this. Interviewees suggested that where one party was less willing to negotiate, settlement may still be achieved if the other party had a more compromising nature and greater willingness to consider settlement, even towards the lower end of their acceptable settlement range. In one interviewee's most recent pure consent order case, it was suggested that the wife was very compromising and agreed to an outcome rather different from that originally offered, owing to problems with sale of a property:

"… it was also her compromising nature to say, instead of receiving a nice neat lump sum payment … and then buying the properties that she wanted …, she was

prepared to completely change her perspective and accept this property that wasn't selling very well, accept that in lieu of it, and then have a much, much smaller lump sum which she would then use to purchase a far smaller property than she really wanted to live in but that way at least it closed the case, she could get on with her life." (S21)

ii) Benefits of the negotiation / mediation process

Another key ingredient to settlement is that the parties are specifically inclined towards the process of negotiation/mediation, rather than intent on adjudication. In some cases, the parties were clearly focused on the benefits of a conciliatory process as opposed to court-based resolution:

"I think these parties always wanted to settle. They'd no real stomach for going to court and I think the husband got sensible legal advice. The tenor of the correspondence is working towards a negotiated settlement. It's not aggressive correspondence." (SM27)

"I think, to be fair to them, the other reason they settled was because they were tenacious, they stuck at it. I think there would have been 2 or 3 occasions – in fact there were 2 or 3 occasions, when each of them felt that it was just too difficult to stay in the process, so that the stubbornness of each of them and the willingness to commit to it meant that they did conclude. … I think they'd also – if we're talking about factors that make people settle – they'd also had some experience of how much litigation could cost and I think they were aware that, although we weren't a cheap option, we were certainly a cheaper option than court." (M9)

iii) Parties sharing a substantive vision of what they want to achieve

Settlement will evidently also come more easily where the parties share a vision of the appropriate substantive outcome: i.e. both parties want x, or one party wants x and the other party wants y, but those outcomes are compatible and both achievable given the type and quantity of assets in the case. That shared substantive vision may correspond with an outcome that one might "typically" expect in a case like that; or it may be less obvious (or "fair"), but reflect shared preferences about how to deal with certain assets,

perhaps to ensure a particular benefit for the children or with an eye to discharging debts. Whatever the substantive vision may be, the fact that it is shared necessarily makes settlement easier, provided (at least) the legal advisors are content that any proposed consent order does not seem so out of the usual bounds that it may struggle to achieve judicial endorsement.[106]

Conversely, of course, there are cases where the parties do not share a view about how the case should settle, but one party is prepared to concede to the other party's preferences, for example in order to maintain good relations or through feelings of guilt. In some interview examples, the way in which settlement was achieved – and the particular outcome achieved – indicated some imbalance between the parties, rather than a mutual vision of the fair outcome. In one interviewee's most recent case, the husband eventually managed to persuade the wife to agree to his offer despite advice to the wife that she should have been more forthright about certain aspects of her case:

> *"And eventually he (husband) came on the phone, eff'ing and blinding and saying 'the key here is to pay off the debts. Why can't you see that? We've got to sell the house.' He eventually ground her down and she agreed to do that." (S20)*

However, although the negotiations appeared unbalanced in this case, with the wife 'caving in' (as the interviewee viewed it), the solicitor thought that she came out of the negotiations about as well as she could have and might not have got a much better deal from the court.

Factors promoting settlement: practical constraints and concerns about litigation

Another key non-legal factor promoting settlement identified in previous empirical research is the practical considerations within which parties must operate when seeking a workable settlement.[107] In "bargaining under the weight of additional considerations",[108] which may

[106] We discuss this further below, in relation to parties having realistic expectations.

[107] See Hitchings (2009), Ingleby (1992), Davis et al (1994).

[108] Hitchings, ibid, 195.

be unique to their case, the parties have to be conscious of a range of pragmatic reasons for settling at a certain level.

Interviewees described an array of practical constraints affecting settlement in their recent cases. Most simply, realisation that there is only a limited amount of money in the pot may lead parties to conclude that attempting to achieve more than what was being offered was not worth the prolonged fight (M2). One of the most common practical factors related to one or both parties' (re-)housing. Some parties were fortunate enough to be unconstrained in this area: for example, in the relatively straightforward case discussed by one mediator, both parties had accepted that their relationship was over, were in a place to deal with the practicalities and had an idea of what they wanted. Moreover, "[t]hey were fortunate because there was quite a lot of equity floating around which meant that they were both able to re-house themselves." (M6) However, slightly more commonly, one or both parties had to prioritise their requirements and invariably, housing need was prioritised.[109] For practitioner S22, for example, the husband was happy to accept a particular lump sum to be used as a down payment for housing. And in S25's most recent case, the wife accepted a slightly lower settlement than this practitioner would have ideally wanted as it met her priority to achieve a mortgage-free home. For less affluent clients, housing issues turned on affordability and (in particular, where the home was owner-occupied) which party (if either) could afford to buy out the other, sometimes with the help of family (S23):

> *"… he's earning about £[X]0,000 – say the mortgage was about [twice that] – it really is the parameters of what he could raise and keep him in the property … And for her, she's not working. The partner that she's living with, he's in his own house, purchased outright by him, so there's no immediate housing need – it is money in the bank for them." (S13)*

While a small number of practitioners suggested some clients' approach to settlement was unaffected by costs (e.g. M6 and S11), concerns around litigation, in particular its cost, were often a key factor encouraging parties to settle. But there was some slight difference of view about *when* costs become important. Some practitioners (e.g. S18 and S12) felt

[109] See also Douglas and Perry (2001).

that parties' uneasiness over potential costs could be influential early on, encouraging people to commit fully to negotiations prior to any court proceedings, particularly if clients were paying attention to their legal or ADR bills (S19). Another solicitor (who worked in a high-end firm) suggested that there may be a gendered element to the influence of costs, even though they interim bill every 3 months to keep their clients informed:

> *"The clients don't really think about it. It really amazes me … particularly the ladies we find don't think about it until the hammer's dropped and then they get a statement of account 'the bill is x, you've paid y, there's z to pay now'. 'What do you mean, you're taking £20,000 out of the settlement money? I've spent that on refurbishing the house.' Sorry. And that is perhaps ladies more that men – I'm not being sexist – don't think about that costs aspect because it doesn't necessarily occur to them." (S11)*

Others reported that costs had greater influence once proceedings had been initiated, rather than encourage parties to settle without court proceedings (see chapters 3 and 4).

One interviewee highlighted that using costs as a settlement 'tool' can be counter-productive with a particularly bitter client; in one case, the client suggested that they would rather pay the practitioner out of the 'familial financial pot' than pay their ex-spouse (S19).

In addition to the financial costs, solicitors suggested that *non-financial* costs of going to court pushed clients towards settlement or, perhaps more accurately, acted as a brake on parties rushing head-long into litigation. Such factors included the delay incurred issuing court proceedings (SM32), parties having no stomach for going to court (SM27), parties' apprehension over the emotional toll that litigation could take, especially if one party was in a fragile emotional state (S22 and SM31) and a combination of these associated hassles of litigating (SM29). The prospect of litigation can be intimidating for any party, not least those coping with depression.

Factors promoting settlement: realistic expectations about the settlement range

We had expected that the substantive law would be reported as a factor influencing settlement. Eekelaar et al found in their study of family solicitors' practice that the normative standards pertinent to the parties' case was one key element of the decisional

matrix (the interactions between solicitor and client "which leads to the adoption of a position" from which will follow either negotiation or adjudication).[110] These normative standards are the parties' entitlements which the solicitors are acting to protect (and the correlative obligations) but of which the parties are, in the main, unaware.[111] The vast majority of our interview data which explicitly concerned the substantive law and its impact on the settlement process did not emerge organically from the interviewees, i.e. the topic had to be introduced into discussion by the interviewer. Notably, in discussing their most recent cases, no practitioner suggested that the substantive law was a factor which had promoted or hindered settlement.

When we asked practitioners directly about the role of the substantive law in negotiations, there were mixed views about its importance. A couple of practitioners appeared unconvinced that the substantive law had a role here (S11 and S12), whereas others considered it important in terms of providing the legal benchmarks within which negotiation takes place and encouraging couples to settle (S21). Others suggested that in the standard case (Mr and Mrs Average, long marriage, relatively straightforward assets), the substantive law was a useful benchmark in negotiation, but that in the more complex/high value case, greater clarity was needed (SM31, M1 and SM32).

> *"It's two sides of the same coin in that it [substantive law] can only give you your parameters and your ball park and that can help … it's fine if you're looking at a straightforward marriage of 30 years – I've got a colleague at the moment who's got one with [large capital figure] in the bank because he's just sold his company and they've been married for 30 years … you've got your answer. But if you make them married for 15 years, put [large proportion] of that [large capital figure] as pre-acquired, put [smaller proportion] of it in a trust and then say, what's the answer? Actually I don't know … And that's where it starts getting difficult and then the law and process doesn't encourage settlement." (SM32)*

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[110] Eekelaar et al (2000), 89

[111] According to the authors, "the theme of failure of clients to appreciate their entitlements arose so frequently that it was a pervasive feature of our case study data": ibid (2000), 92-3.

The fact that the substantive law did not arise spontaneously and explicitly in interviewees' discussion of their cases does not mean that it is irrelevant. The substantive law is the source of the normative standards within which practitioners operate. The substantive law is part of the furniture, an essential element of practitioners' evaluation of what would constitute a realistic and appropriate settlement. It was clear from our interview data that it was an essential element of their client expectation management – perhaps so obvious and ingrained that it did not occur to practitioners to mention it explicitly as a factor. In a discretionary area of family law such as this, it is particularly important for the legal advisor to ensure that the parties have a realistic expectation about the range of plausible outcomes in their case, given the range, amount and type of assets that they have.[112] The legal advice delivered can promote settlement by simply clarifying entitlements, by raising expectations of parties who otherwise held an unduly pessimistic view of what they might achieve,[113] or by removing unrealistic aspirations about outcome.

Clarifying legal entitlements

In the context of mediation, acquiring legal advice part-way through the process can alter the dynamic in a positive way.

> *"Then towards the end of the case it seemed that he had eventually latterly had some legal advice and their final meeting – it was sort of like a different couple. They seemed quite, they seemed very conciliatory … some things were disclosed at the final meeting that I hadn't known about for the whole of the time that we'd been mediating but which had arisen again because of the legal advice that he's sought at the last minute" (M2)*

Legal advice can clarify issues that may previously have been a sticking point or give a fresh impetus to discussions. In particular, obtaining specialist legal advice in a complex

[112] Contrast the inability of mediators to provide legal advice to the parties and the desirability of each party in mediation seeking independent legal advice at various stages: Family Mediation Council (2010), para 5.3, 6.14-15; see generally Parkinson (2011), 1.11.3 on mediator impartiality.

[113] Eekelaar et al (2000) noted that this was particularly a function of advice given to wives: 93.

case can remove an impasse. Joint instruction of specialist counsel on a complex legal issue was vital in ensuring a swift resolution in one practitioner's most recent case:

> *"(W)hen the advice was produced it settled within days because the wife realised that what we had been saying and what her husband had been saying all along was gospel. … But it was extremely contentious for 18 months but then settled within a matter of days." (S11)*

Avoiding unrealistic expectations

There is little point in the practitioner offering unrealistic settlement possibilities as a carrot to their hopeful client: it is better to be realistic upfront and manage a client's expectations from the day they first walk through the door:

> *"… as a practice we don't try to offer unrealistic settlement because there is no point. Everybody knows what the rules are, roughly, and whilst you always try and start with a bit of your client's advantage, it's managing the client's expectations. It's pointless saying 'you're going to walk out of here in a year's time and you'll maintain all your assets', it's much better to say upfront, 'look, it's a long marriage, you've got children, you have certain responsibilities, the ballpark is 60/40' or whatever it is depending on the assets." (S11)*

Practitioners also highlight practical implications or requirements of certain (theoretically available) legal options. For example, there is no point in suggesting an option such as spousal maintenance or even a nominal maintenance order if the would-be payee is going to have great difficulty enforcing any payment:

> *"She (the client) wouldn't have got a much better deal than that with the court. She might have got a nominal maintenance order for herself but with a man like that it was never going to be of any use to her. And he would have fought her for that."* (S20)

Raising unduly pessimistic expectations

Of course, not all clients accept the legal advice that they are given, and even attempts to raise a client's expectations may not always meet with success. In one interviewee's most

recent case, the husband made a five-figure final offer in negotiations with the solicitor, failing which he said that he would issue proceedings. The solicitor had identified a power imbalance between the spouses (during the children hearing). The husband eventually made an increased offer (still within five-figures) directly to the wife, which she accepted:

> *"He telephoned her and asked for a meeting and I advised her that wasn't acceptable. I gave her a range of figures that I thought might be acceptable and she was able to go back and he agreed the figure of approximately three times what his initial offer was. So she felt ok. … It was probably at the bottom end of what I was hoping she might get but talking to her concerns about taking the legal process further, how she felt about being involved in that – very intimidating for her – and the likely costs involved … she decided that it was acceptable." (SM31)*

Where the advice being ignored is to 'hold out' for a better deal, this will have the effect of aiding settlement – though one may be concerned that the client is not achieving a fully fair outcome (in purely legal terms). In one solicitor-mediator's case, the client acted against such legal advice, taking what was on offer at that stage. The interviewee noted that this type of resolution is not unusual as people don't always *"go entirely on getting the most pounds, as it were, if there are other factors."* (SM28)

Factors promoting settlement: children

Children could be influential as a settlement factor both by virtue of the substantive law and from an emotional perspective. It was expected that settlements would be structured around dependent children's need for accommodation and maintenance, because by law the welfare of minor children is the court's "first consideration"[114] and their housing needs have been described as "paramount".[115] Practitioners' most recent cases yielded several examples of dependent children having a major impact in this way.

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[114] MCA 1973, s 25(1).

[115] *M v B (ancillary proceedings: lump sum)* [1998] 1 FCR 213, 220.

"I think, for the majority of parents who are sorting out finances, actually the settlements are focused around the children. It's very interesting how most couples are looking for a solution that allows the mother; let's call them the resident parent, to re-house themselves adequately with the children. The question is often whether that should be in the family home or in a smaller property, but you know, very rarely do I hear the father saying, well, I don't care about my children. The children are part of it inevitably." (M7)

"Where again you've got one house and parents and 2 or 3 children, where the children are going to be living completely and utterly affects the overall settlement." (SM30)

However, the emotional impact of the financial negotiations on children appears to be equally prevalent as a key factor encouraging financial settlement – both positively and negatively.

Practitioners drew attention to the fact that parents are aware of the emotional and practical disturbance that the financial negotiations can have on their children, whether or not still minors:

"A lot of them say, I just don't want to unsettle the children – and that's mothers and dads who say that. They want their children to be safe and secure and stable." (S16)

Parents did not want to prolong financial negotiations which could have a harmful impact on their children (S12) and this encouraged earlier resolution of the financial issues. The presence of minor children was also critical in ensuring that the parties maintained a constructive dialogue by keeping the peace (M8). This might involve entirely avoiding discussion about certain assets:

I just think that he didn't want to rock the boat, particularly because of the child. … I think it was just he wanted to keep on good terms with his wife and I think he thought that if he went for a share of her pension that might cause some difficulties." (S18)

The parties wanted to maintain a good relationship with each other as co-parents in order to ensure that contact would be as smooth as possible (S22) and future discussions about

the children would be done positively (S25) This could have a positive effect on the conduct of financial negotiations.

For others, however, keeping a civil relationship with their ex-spouse was based on *fear* of certain child contact consequences rather than a more positive desire to ensure that they have a good co-parenting relationship. For example, in practitioner SM31's most recent case, as the wife viewed it, the husband had control of the child and she was afraid that contact would be changed or he would become awkward if she rocked the boat too much in the financial negotiations. There were other less positive, even negative, examples of parents who attempted to use their children as a means to push their ex-spouse to settle either quickly or possibly on less favourable terms.

> *"I think that one thing that needs to be stressed – that just because a couple may have children over 18, adult children, that does not mean that the children are not hugely important within mediation because as a mediator, you need to be aware that the way in which the children are developing allegiances with one or other parent may be extremely important and you therefore can't leave them out." (M1)*

THE JUDGE'S ROLE: SCRUTINY OF CONSENT APPLICATIONS

The parties' settlement needs to pass muster with a judge if it is to become binding as a consent order.[116] And it would seem to be standard practice for this to be done. None of the solicitors interviewed suggested that the settlement in their most recent case would not be formalised through a consent order. Mediators typically do not know what happens once the mediation is concluded, a fact which many interviewees found frustrating, but six of the ten mediators indicated that their recent clients had intended to obtain a consent order. Only one mediator knew for sure what had happened: *"…we know that it passed muster with the court because we found out afterwards that it was turned into a consent order by his solicitor and it sailed through the court*." (M9)

[116] See discussion in chapter 1, above.

Prevalence of judicial intervention

Most consent order applications proceed entirely on paper. However, the judge may query some aspect of the proposed order or seek further information or explanation, and may require the parties to attend an approval hearing before the order is made. It has been doubted how much scrutiny of consent order applications judges actually provide in practice, not least given the relatively brief information regarding assets, income and other circumstances with which the judge is commonly presented on Form D81 (certainly as compared with the more elaborate Form E used for contested applications).[117] In their earlier survey, Davis et al (2000a) found that judges intervened in 17.5% of consent order applications that they surveyed,[118] but found no cases in which the judge's intervention resulted in any change to the order.[119] They concluded that judges largely relied on the legal practitioners involved to ensure that proposed orders were reasonable.[120]

We found a rather different picture in our court file survey and amongst our interviewees' experiences. Interviewees reported lots of judicial intervention (and their experience included courts which were not covered in our court file survey). In the court file survey, we identified an intervention by the judge in 32% of the 260 pure consent order cases, usually by way of correspondence only (25%) rather than requiring an approval hearing (7%). And we identified 39 cases (15% of all cases, nearly half of the cases with an intervention) in which this appeared to have resulted in some revision of the order before it was approved.[121]

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[117] See for example Cretney (1996), 277.

[118] Davis et al (2000a), table 1, at p 50: it appears that Davis et al only looked at judicial intervention in pure consent order cases; we also looked at internvention in contested cases which settled – see note below.

[119] Davis et al (2000a), 63.

[120] See also Ingleby's study where he encountered only two cases in two years in which the court refused to approve the consent order on the first time of asking: (1989). Baker et al (1977) found a wide disparity of practice regarding consent order approval, often depending on whether the parties were represented – again suggesting a degree of judicial reliance on solicitors to get it right.

[121] The 39 may include some cases where the order was updated by the parties following the intervention, the passage of time having rendered certain clauses redundant, rather than revised in

Reasons for judicial intervention

Many applications pass through the court straightforwardly with no query. Most obviously, where the proposed order is within the expected parameters for a case of that nature (given type and size of assets / length of marriage / presence of children) the judge will perceive no need to query the application, at least not on substantive grounds. By contrast, where the agreement appeared to be outside the normal range of settlement options, interviewees anticipated judicial intervention. Practitioner S13's most recent case involved an uneven split - 20:80 W:H: *"I guess, on the face of it, you may say that this was outside the parameters because that's exactly what the judge is saying. But one person's interpretation of what's outside the parameters compared to another – it's grey, isn't it?"* The judge queried whether the settlement was fair, particularly in relation to the wife and children's housing needs, and her income position and needs. Both parties' solicitors wrote to explain why the agreement was structured as it was (parties wanting a clean break, wife made limited contributions and now living with a new partner earning a decent salary sufficient to meet her needs / former matrimonial home pre-acquired with work done on it before the marriage). They were waiting to hear whether it had been approved. The solicitors' role in these cases is to ensure there is enough explanatory meat on the bones and, if required, to provide further detail about the settlement.

A number of practitioners suggested that when judicial queries were raised they related to relatively minor concerns, whether substantive or typographical. In S16's most recent case, for example, the judge inquired about the fate of surplus money; the solicitors wrote

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response to a point made by the judge; we have a separate record of such updating in a further 2 cases. We are missing data on this topic for one court file survey case. In a handful of other cases, no note was made at data collection of whether the judge's intervention resulted in any change to the proposed order, but save in one of these cases (involving compliance with PD33A) it is most likely (judging from the nature of the inquiry and our record of the terms of the order as made) that no change was made. In reporting on revision to proposed orders in this section, we report only those cases for which we have a record of a revised order (N=39). Taking our entire dataset, so including consent orders that followed contested applications, we still have a higher intervention rate than Davis et al (2000a), with interventions in around 28% of cases for which we have the information (we are missing data for 8 cases); in a further 10% of all our cases, the order was made or heads of agreement were approved at a hearing (e.g. at the FDR). We identified revisions in c.16% of the cases for which we have the information (14% of all cases). We have no data on this point for most of the 10% of cases where the order (or heads of agreement) was made at a hearing: see further chapter 3, p 71.

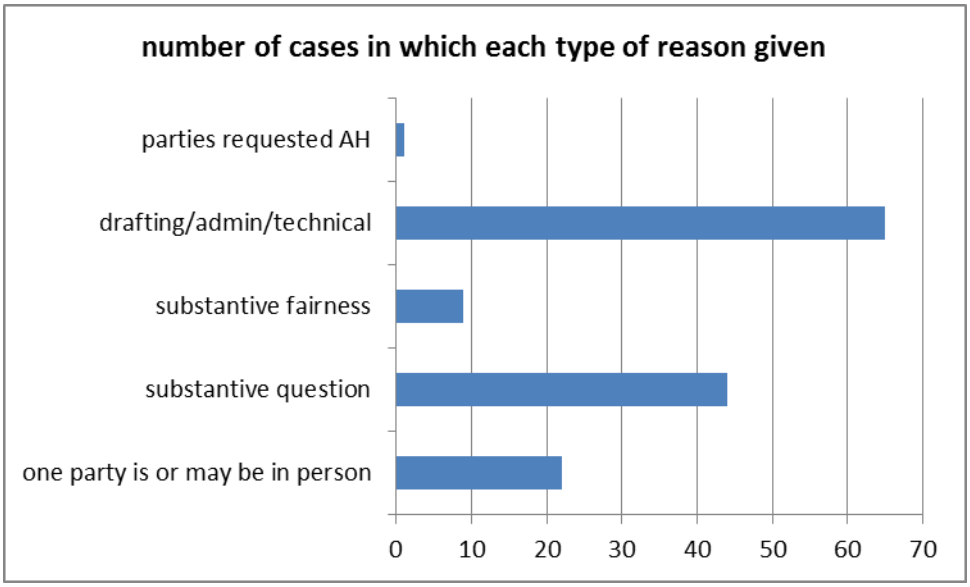
back with an explanation that the judge then put into the order and was happy to approve on that basis. Practitioner S11 suggested that both sets of DJs at their two local courts are quite pedantic, estimating that about 60% of the consent applications sent off come back with a comment:

> *"They're generally nothing major but it's almost like when you get an essay back, it's a spelling mistake rather than the content. … Occasionally you'll get a substantive issue where you've got the wrong reference to a section or whatever … kids' names spelt wrong, spelling difference between the wife's name at the start or the husband's name at the start and then in the body of the order." (S11)*

While practitioner SM30 also referred to a local DJ who would not let any untidy or slipshod drafting go past him, practitioner S19 suggested that they had never had any queries about drafting – it has always been on a substantive issue or fundamental question: *"Why is this happening? Why is the respondent only getting 20% of this, and what about pensions?"*

Our court file survey reflects the range of interviewees' experience. We noted various types of reasons given by judges for intervening, often more than one reason in a case (and so the total number of reasons counted here exceeds the number of cases):

Chart 2.2 Reasons given by judges for intervening in pure consent order applications



The most common category of reason for intervention was not related to any substantive aspect of the case but rather some formal or technical matter (49 cases), such as the drafting of a clause in the order or recitals (sometimes with substantive implications – e.g. clarifying the point at which periodical payments would cease), typographical errors, failure to lodge or properly complete required forms (including Form D81), checking notification of the mortgagee or pension provider, and policing failures to comply with Practice Direction 33A (which requires the inclusion of specific wording regarding the potential consequences of failing to comply with an undertaking and a statement from the affected party that he or she understands that). But almost as common were questions going to the substance of the case (total 44), where the judge either sought clarification of some aspect of the parties' financial or personal situation or the net effect of the proposed order (in some cases implicitly querying the fairness of what was being proposed), (35); and/or more or less directly questioning the fairness of the proposed order (9). In 20 cases, the judge's concern related to one party apparently being in person,[122] either requiring an approval

[122] In four of those cases, we identified both parties as having lawyer support, though that may only have become clear – or become the case – following the judge's inquiry.

hearing for that reason or inquiring whether that party had received independent legal advice.[123]

In many cases, reflecting the reason for the intervention, the revision was of a relatively minor or technical nature (e.g. relating to drafting, typographical errors or compliance with Practice Direction 33A), but we did identify cases where the substance of the order was modified in some way following the judge's intervention.[124]

Variations in judges' expectations and degree of scrutiny

Interviewees suggested that particular expectations about the paperwork dependent on the court or the particular judge. To some extent, this was something that practitioners could anticipate in order to try to ensure the smooth passage of their application. One solicitor gave an example where they had always used a particular precedent for consent orders without any difficulty, but a new judge had queried a certain procedural aspect of the drafting: *"So it's a case of amending that just to avoid that difficulty in case that particular judge is here again."* (S16) Another solicitor suggested that knowledge of the local court and of the local judge enabled their most recent consensual case to go through without a hitch: *"(W)hat he likes is a lovely long letter to go with the Statement of Information that says what's the logic behind this order."* (S15)

This practitioner also raised the issue of variation in the level of judicial scrutiny at different courts: *"You might as well toss a coin … I'm quite disillusioned at the inconsistency. That's a nice way of saying it."* (S15) One interviewee raised a concerning point in relation to an ongoing case where the husband was attempting to get the practitioner's client (the wife), to sign a draft consent order which he got online and which would give her nothing after a 30 year marriage. The wife's new partner insisted that she see a solicitor before signing

[123] The general pattern of reasons we find here is evident in interventions in all consent order applications, i.e. including those which followed a contested application: one party being (or thought to be) in person was raised in 22 cases, substantive questions in 44, substantive fairness in 9, drafting/admin/technical issue in 65, and in one case the parties pre-emptively requested the approval hearing so that they could explain the background to the order to the judge.

[124] We did not systematically collect data regarding the nature of the revision made.

the document. If the wife had signed the draft consent order, then the solicitor suggested that the application would have gone through *"some court in [region name] – they all seem to be issuing in [region name], these DIY things – I don't know why and I don't know how much scrutiny they get".* (S19)

When explaining possible inconsistencies in approach to clients, practitioner S14 suggested that they explain to clients that, on one day, one judge will look at the consent application and give you a tick, and another judge will say that *"there's absolutely no way I'm agreeing to this"*. This solicitor suggested that this disparity in approach reflected differing levels of experience amongst the judiciary in family law (without elaborating on what level of experience yielded a more inquisitive and challenging approach).

The approval process and litigants in person

In our court file survey, approval hearings were not only required in cases where one or both parties appeared not to have the support of a lawyer (we refer to such parties in this report as "LIPs" – litigants in person: see further chapter 5). But in 13 of the 19 cases where an approval hearing was required in a pure consent order application, one or both parties having no apparent support was the reason (or one of the reasons) given for requiring the hearing, and in a further 2 cases that seems likely to have been the reason (no note of the reason having been found on file).[125] On the other hand, the fact that a case features one or more LIPs was not automatically a reason to require an approval hearing. Such hearings were not invariably required (in any of our courts) wherever one or both parties had no lawyer support: in fact, they were required in only 16% of such cases for which we have the relevant data (15 out of 91).[126]

[125] In one of the four remaining cases of the 19 approval hearings, the judge requested an approval hearing but the matter was settled by correspondence. There was one other case where the judge would have requested an approval hearing because one party was in person but did not do so as that spouse lived outside the area.

[126] There are six cases for which one or both parties' situation regarding lawyer support was unclear, and so they do not feature in this analysis.

Our interviewees' experience was that certain courts will ask to see the parties for a short approval hearing in cases involving a LIP so that the judge can be satisfied that the LIP(s) understand the consequences of the agreement they have signed. Practitioner S13 remarked that their local court had done this more frequently in the past than is happening now, suggesting that the change might reflect the increasing number of LIPs and the lack of time to investigate every consent application. Practitioner S18 was surprised that the consent application in their most recent case was not queried as the other party was self-represented, remarking that the local court will usually list it for a hearing in such circumstances. However, the lack of hearing in that case might have reflected the fact that the settlement was very favourable towards the LIP. We consider in chapter 7 what the anticipated increase in LIPs post-LASPO might mean for the consent order process.

Overall, in our court file survey judges intervened (by correspondence or requiring a hearing) in a slightly smaller proportion of cases where both parties had lawyer support (31%) than those where one or both lacked lawyer support (36%). But we found queries raised in correspondence more frequently in cases where both parties had lawyer support: 28% of cases (46) as compared with 20% of cases where one or both had no lawyer support (18). We cannot draw clear conclusions from our data about why there might be more queries where both parties had lawyers acting for them, not least given our relatively small sample. It may have been a reflection of orders made in cases involving two lawyers tending to be more complicated. Most of the orders simply dismissing all claims that we identified were made in cases where one or both parties had no apparent lawyer support, and there is evidently less scope for drafting difficulty with such orders: 34 of the 49 cases with drafting or technical reasons for intervention were in cases where both parties had lawyer support.

Room for party autonomy

If a court is satisfied that an agreement provides for the parties' needs and has been reached after disclosure and legal advice, then it may approve the order even if it is not the order that the judge would have made had he or she been adjudicating on the case. In one solicitor's most recent case, the husband obtained a very good deal through mediation:

"I did say to him [husband], if I was acting for the wife, I wouldn't be advising this. She got a clean break which, with 4 small children and no income, I thought it wouldn't even get past the court, and I said to him and warned him, 'you know, your danger is this isn't going to get past. It did. She did get a significant proportion of the capital upfront to be able to re-house herself. … It was listed for a hearing and it did go before the court. And I think the wife … was trying to see what the court would say, and our view was, 'no, you've got a binding agreement, you've agreed this, you've had legal advice, you've had disclosure', and I think on those bases the court said, 'well, there you go' – because she'd had all the information, she's had the disclosure, she's had the legal advice." (S14)

Examples such as these suggest that the consent order process does afford parties some autonomy to reach bespoke agreements shaped to a greater or lesser extent by "non-legal" factors or particular preferences which might not otherwise have been taken into account.

A more interventionist judiciary?

The picture that our court file and interview data provide of the consent order process is somewhat different from that depicted by Davis et al, who remarked that "Provided lawyers were involved, it seemed that district judges were generally prepared to take the reasonableness of the proposed order on trust". They also expressed concern that in some cases judges were doing so despite being given paperwork which, in the researchers' view, did not supply sufficient information to enable the judge properly to evaluate the fairness of the proposed order,[127] even in the light-touch way generally expected in consent order cases.[128] By contrast, we seem to have encountered some rather more interventionist judges in our court file survey.[129] Indeed, some of them were persistent: whilst most cases reached a conclusion after just one intervention by the judge,

[127] Davis et al (2000a), 63-64.

[128] See discussion of case law in chapter 1, above.

[129] So too did Woodward with Sefton (forthcoming) in their recent study, chapter 7, who also recorded a higher proportion of uncontested cases with judicial intervention than Davis et al found.

in 19 cases we identified the judge intervening at least twice (in one case, four times) before being satisfied (in that one case, the proposed order having been substantively amended to increase the lump sum award). Either we happened to collect data from courts or individual judges[130] and to interview solicitors practising in areas which have a stronger culture of intervention than those which Davis et al visited (or Davis et al happened to visit unusually non-interventionist courts), or our data reflect a wider cultural change amongst family judges which was not prevalent in the late 1990s when Davis et al collected their data.[131]

KEY FINDINGS

- Our court file data suggest that:
    - Solicitor negotiation is the principal professional mechanism for financial settlement on divorce
    - Mediation is reported as a settlement mechanism in a relatively small minority of cases, despite continuing government promotion of mediation as a method of dispute resolution.
- A number of essential conditions need to coalesce at the same time in order for settlement to be achieved.
- Several of the key factors promoting settlement are non-legal in nature, including:
    - The parties both being emotionally ready and willing to settle
    - Practical and pragmatic reasons, such as housing need, avoidance of litigation costs, and parties having no appetite for going to court.

[130] We did not collect data by reference to specific judges so cannot say whether intervention was coming from particular individuals.

[131] Interestingly, completion of a specific form of "statement of information" (currently Form D81) did not become compulsory until the FPR 2010 came into operation: r. 9.26(1)(b) and PD5A; contrast FPR 1991, r 2.61 which required a statement of information in support of consent order applications, but not use of any particular format.

- Client expectation management, including realistic legal advice, is the key “legal” factor in encouraging settlement.

- Our court file and interview data suggest that judicial intervention in consent order applications is more prevalent than has been found by previous researchers, notably, Davis et al (2000a). In our court file survey, we found interventions in 32% of all pure consent order cases (around 28% of all cases concluded by consent order for which we have information about the approval stage), compared with 17.5% in the earlier study, and 15% of all pure consent orders were revised in some way (often minor) consequent on that intervention.

- Both sets of data indicate that judges intervene for various reasons, principally with drafting or technical queries, but also in relation to substantive issues and the overall fairness of proposed orders.

- Lawyers’ involvement in a case does not rule out judicial intervention, again, in contrast with Davis et al’s finding (2000a).

CHAPTER 3: WHEN AND HOW CONTESTED CASES SETTLE (IF THEY DO)

INTRODUCTION

The next two chapters consider the progress of cases in which contested court proceedings are launched. Most of these cases settle with a consent order at some point sooner or later along the 'standard financial hearings pathway' described in chapter 1. The main task of this chapter is to address one of our key research questions – when is settlement reached in such cases? – through analysis of the court file survey data and our solicitor and solicitor-mediator[132] interviewees' most recent cases in which proceedings were issued, particularly those that settled. We then begin to consider what our interview data indicate about why different cases settle at the various stages identified. The next chapter more generally explores the array of factors which may delay or entirely prevent successful mediation or negotiated settlement.

WHEN AND HOW DO CONTESTED CASES SETTLE: COURT FILE DATA

There were 139 cases in our court file survey which were not pure consent order applications. Of those, 118 were initially contested but clearly settled with a consent order at some point along the standard financial hearings pathway described in chapter 1; 19 clearly resulted in an adjudicated outcome.[133] Of the 129 contested applications for which

[132] Our mediators generally had no knowledge of what happened to cases which left them, whether they were apparently resolved at that point or not. We draw on their views about factors which delay or prevent successful outcomes in mediation in the next chapter.

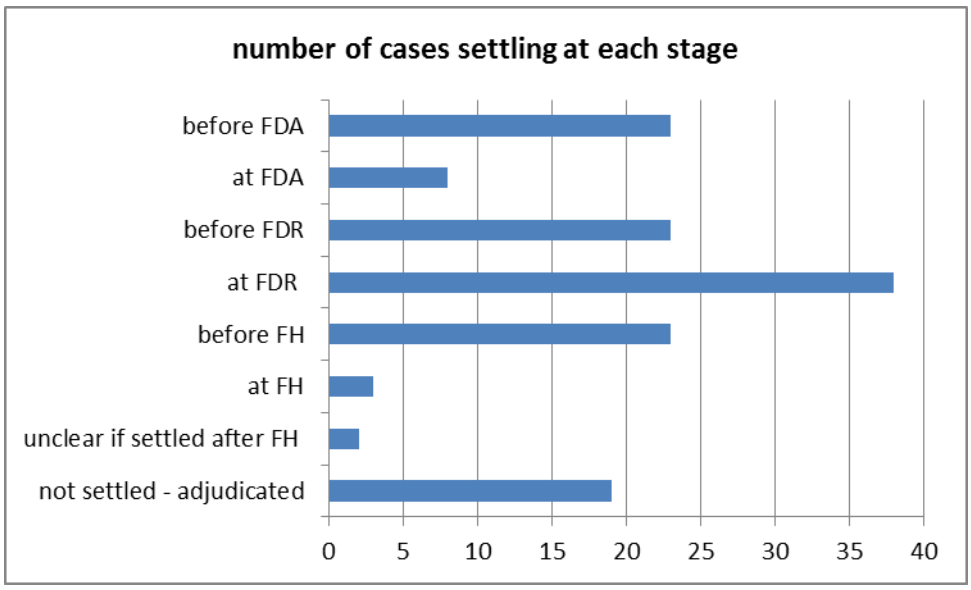
[133] There are two cases which had a final hearing in relation to which it is not clear from the information we collected whether the final order was adjudicated or made by consent: in one case, there was correspondence on file which suggested that a consent order application was forthcoming but the order on file was not expressed to be by consent; in another, a draft judgment was handed down for comment and it is not clear from the data recorded whether the order itself was ultimately adjudicated or agreed. We have included as "contested but settled" a case where the order was not expressed to be made "by consent" but included a recital suggesting agreement and was made at the FDA at which both parties were represented. We have categorised as "adjudicated" one case in which part of the provision made was ordered by consent but the remainder was adjudicated and one case in which we have inferred from the data collected that the

we have the information,[134] 70% were brought by wives and 29% by husbands, the remainder being cross-applications.

Stage at which settlement reached

As Chart 3.1 depicts, the large 'contested but settled' group is an eclectic one, containing (at one end of the spectrum) a sub-group which in fact settled before even the FDA and so before any attendance at the court, and (at the other extreme) a sub-group of cases which settled at or even after a Final Hearing had taken place.[135]

Chart 3.1: Stage at which settlement reached (or not) in court file survey



order made at the final hearing was adjudicated. Note discussion in Appendix A that we may not have captured all adjudicated orders made in our courts in the relevant period in our survey.

[134] In ten cases, we know that the application was contested but do not have a note of the applicant's identity. It is likely that most of these were wives.

[135] The stage of settlement was generally clear from information on file, though in a few cases we had to exercise judgement in deciding how to classify. The dataset includes one case commenced with a Form D11 application (for an agreement to be converted into a consent order) that was settled before its listed hearing: we have treated this as a case settled pre-FDA.

A large proportion of the cases in our court file survey settled before the FDR (54, 46% of the 118 contested but settled cases), and within that 23 cases (19% of all contested but settled cases) settled even before the FDA. Those that settled at the FDA (8, 7% of all contested but settled) may have been not far off settlement prior to that appointment. For those that settled before the FDR (23, 19%), many of them communicated to the court just days before the FDR appointment that settlement had been reached. The 38 (32%) cases which settled at the FDR included 4 cases in which the FDA appointment was treated as an FDR. Twenty three cases settled before the FH and 3 clearly settled at it.[136] Our interview data, discussed below, cast light on the range of factors which influence parties in these types of cases to settle (or not settle) at the different stages observed here.

The contested but settled cases took more or less predictable journeys along the standard financial hearings pathway, given the stage at which settlement was reached, with fewer or more hearings accordingly. We classified them as follows:[137]

- 19 cases (16%) as having no hearings at all;
- 79 cases (two thirds) with just one (35) or two (44) hearings.
- 22 cases (19%) with three or more hearings, four of which apparently involved six or more hearings.

Adjournments[138] were quite common: while 52 cases had no adjournments, we identified 25 cases in which there was one adjournment, 17 with two, and 26 with three or more (up

[136] The KPMG pilot project evaluation (LCD (1998)) recorded the stage by which the order was made (see table 34). This is slightly different from our measure of when settlement was achieved (as the resulting consent order often came later). KPMG recorded the final order as made by (i.e. before or at) the FDA in 34% of cases, and by the FDR in 71%. We recorded 22% of all contested cases as settled by the FDA (26% of all contested but settled cases), and 66% by the FDR. In the KPMG pilot, 55% of cases using the FDR obtained the final order at the FDR. We identified 38 cases settling at FDR, with only 26 cases (or 28 – see the uncertainty noted above re two cases) settling later, so over 55% of cases in our study which used an FDR and which *settled* did so at FDR, 46% of all cases with an FDR (this excludes the 3 cases in which it is clear no FDR was held).

[137] It was not always possible from the court files to determine with confidence whether apparently listed hearings (particularly mentions) had actually taken place, and so we have had to make some assumptions about hearings in a few cases – the tallies above should therefore be taken as approximations only; mention hearings are generally not included but approval hearings are included. The median number of hearings that we recorded on this basis was 2, the mean 1.75, SD=1.373. We have included here the two unclear cases which may or may not have been settled.

to as many as six). We noted a huge variety of reasons for adjournments, including: ongoing attempts to negotiate or mediate an outcome; delay caused by external factors such as failure of pension providers to release CETV information, and delays in valuations, provision of actuarial advice and correspondence with mortgagees; third party interventions; delays with public funding or difficulties with private funding causing a hiatus in one party's legal representation; party illness (including stress and depression) causing absence; delays / recalcitrance with disclosure by one party and party absence / non-participation, sometimes resulting in penal notices being attached to further directions;[139] fresh information or other supervening circumstances; impact of other ongoing, related proceedings (e.g. regarding children or domestic abuse); attempted reconciliation; and mundane issues such as diary clashes for legal representatives.

Of the 19 adjudicated cases, most essentially followed the standard hearings pathway, though nearly half had more than the three standard hearings that one would expect (a few cases having five or more hearings), and over two-thirds of the cases involved one or more adjournments. The FDR stage was dispensed with in three cases, in all instances because one spouse was failing entirely to participate in either the divorce or financial order process so holding an FDR would have been futile. An adjudicated outcome is inevitable in such situations, but the court can at least expedite matters by simply by-passing the FDR and listing the case for a final hearing.

Method of dispute resolution used in cases which settled

Where settlement is achieved at some point along the financial hearings pathway, the court process itself may have served as part of the "dispute resolution method". But as in chapter 2, we also have direct evidence of the out of court mechanisms used to settle 33

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[138] We had some difficulty in distinguishing between adjournments and cases merely being vacated/set out of the list. We did not systematically record reasons for adjournments, but the discussion above gives a flavour of the types of reasons noted. Some of these adjournments post-dated settlement in principle having been reached and were required because of various factors delaying finalisation of the proposed consent order.

[139] We noted no instances of action being taken to enforce penal notices when directions were once again not complied with.

of the contested but settled cases, where new Form D81 (with its question 6) accompanied a consent order application. As might have been expected since these are all cases in which formal litigation had – to a greater or lesser extent – been embarked on, solicitor/lawyer negotiation led the way (reported in 29 cases, in some cases involving counsel), before informal discussion (15 cases, supported in two cases by solicitor advice), and two cases in which mediation was cited.[140] Taking account of other sources of evidence of dispute resolution methods in all 118 settled cases, we counted only four definite instances of mediation being used to resolve the case and two further possible cases.[141] Given the involvement of lawyers in most of these litigated cases and the settlement mechanisms reported amongst the new D81 cases, it seems fair to suppose that lawyer negotiation played at least a role in settling most cases in which one or both parties were represented; there is no reason to think that the introduction of new D81 will have changed the types of mechanism being used. The more robust D81 data, both for these contested but settled cases and the pure consent order cases discussed in chapter 2, suggest that mediation remains relatively low impact in this area.

Related to the prevalence of mediation is the Mediation Information and Assessment Meetings protocol, described in chapter 1. Parties issuing proceedings after April 2011 should have attended a MIAM or explained why they had not done so/why mediation was not being used to resolve their case. We collected data relating to MIAMs in 33 cases[142] in which contested financial proceedings were launched following the advent of MIAMs. Our small numbers necessarily limit what we can say about MIAMs, so we simply describe what we found. Of the 33 contested cases for which we have data, we found no FM1 on file in 11, though in three of these other evidence on file suggested that a MIAM had in fact

[140] One further case reported use of another form of ADR. We found no collaborative law cases in this group, but this is to be expected: collaborative law practice is wholly at odds with contested litigation and would have to have been undertaken by lawyers other than those conducting the court proceedings. As in chapter 2, these numbers are for all mentions by one or both parties across the 33 cases, so exceed 33.

[141] In one case, one spouse mentioned in paperwork that they had a mediator for the financial issues; on another case, mediation had been attempted, unsuccessfully, though it may have helped narrow or clarify the issues between the parties.

[142] We are missing data for a 34th case which commenced in the MIAMs era.

(or had very probably) been attended. Overall, we have evidence that four applicants had attended a MIAM, and a record of reasons offered for failure to attend a MIAM in 22 cases. These included:

- the mediator having assessed the case as not suitable
- the other party's unwillingness to attend a MIAM or consider mediation
- attempts to negotiate having failed so court assistance required
- no basis for mediation given the other party's refusing to give any disclosure / ignoring all documents / having not kept to past agreements
- serious financial imbalance between the parties
- concerns regarding the disposal of assets
- desire for a swift and effective conclusion, including because of the applicant's stress
- one or other party's living outside the area (including overseas) making attendance impractical, and
- concerns regarding domestic violence making mediation unsuitable.

We found a higher proportion of consent orders in our second tranche of cases (orders made in a period post-dating the introduction of MIAMs) than in our first, but it is not possible to attach any significance to this,[143] not least because nearly half of the contested applications on which second tranche orders were based were made before the MIAMs protocol had been introduced. Nor do we know, in the vast majority of cases, whether any of the parties to consent orders in tranche 2 had attended a MIAM. So we cannot conclude one way or another whether the higher proportion of consent applications in the second tranche is a product of the introduction of MIAMs. A large-scale study specifically addressing the impact of MIAMs is currently underway for the Ministry of Justice.[144]

[143] On a Chi Sq test (with continuity correction=2.951, df=1), the difference was not statistically significant at the .05 level (p=.086).

[144] See note 84 in chapter 1.

Reflecting the findings of Resolution's earlier survey,[145] our interviewees reported variable practice relating to MIAMs in their local courts, which did not appear to be requiring evidence of the FM1 in order to proceed with an application.

> *"At present, none of the courts in our area are in any way interested in sending clients back to do MIAMs before issue. They're just not concerned." (M1)*

> *"… the courts aren't that strict about it, not in [place name]. I think they are in different parts of [the county]. But they will issue without it." (S16)*

Some practitioners suggested that the FM1 requirement was yielding more referrals. Clients were reported to be more willing to consider mediation, (M6 and S21) often on the basis of perceived cost advantage (SM31) or because having spoken to someone face-to-face about mediation (rather than just being aware of the idea of mediation) made it more attractive (SM28). MIAMs introduced mediation to parties who might not otherwise have thought about it (SM27), and (as intended) could incentivise them to mediate instead of initiating court proceedings at that juncture (S23). MIAMs were also said to help reduce tension for the client where a late solicitor referral[146] was successfully converted into a mediation (M1). MIAMs could also signpost parties to sources of other information, as well as mediation information (M2). One solicitor reported that although the MIAMs process and any subsequent mediation has not resulted in very many cases returning with *"nice Heads of Agreement",* there were some positive indications that they had an impact, particularly in cases where the issues seem to be streamlined. (S25)

However, alongside these positive messages, our interviewees also reported difficulties in encouraging both parties to use the MIAM as a springboard for out of court dispute resolution (S24, M3, M6 and S23). Previous research has emphasised that timing is critical to getting both parties to engage in mediation.[147] Likewise, our mediator interviewees

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[145] See news report available at www.familylawweek.co.uk/site.aspx?i=ed96933 [accessed 3 September 2013] and at (2012) *Family Law* 745.

[146] It appears that this mediator classified late solicitor referrals as referrals that occurred after some attempt at solicitor negotiation had taken place. Specific timescales were not given.

[147] Davis et al, (2000b), 273-4.

suggested that one of the difficulties is that the MIAM comes too late in the process to have an impact: *"once people get into the adversarial nature of the legal process, there's less likelihood they're going to be able to engage with this sort of conciliation process."* (M2). It is perhaps unsurprising that mediators viewed the MIAM as being *"too far down the line"*, not least as *"the clients are completely polarised at that point."* (M1) Some solicitor interviewees felt the MIAM requirement overlooked the fact that the solicitor will, in the vast majority of cases, have been attempting to settle already and may well already have advised mediation.[148] One solicitor suggested that MIAMs' impact was limited because they are not issuing contested proceedings everyday: the bulk of their cases are negotiated (S23). Viewed from this perspective, the MIAM comes at a very strange point in the process and therefore becomes a *"chore … The idea that in order to issue proceedings, I need to make sure my client has spoken to someone – well, I've already done that part of it and got them to a mediator if they can get to a mediator already."* (SM32) Moreover, as we discuss below, solicitors view the commencement of the contested application as a galvanising framework; initiating proceedings may encourage and provide a framework for negotiation between individuals who had previously failed to settle.[149]

Solicitors' and mediators' views of MIAMs may be seen as reflecting the professionals' experiences, the clients they are used to working with and their approach to settlement. It may also be that solicitor negotiation, fully aided by each party's partisan legal representative, is more appealing for parties who have embarked on litigation than mediation at this stage would be. Given all this, it is perhaps unsurprising that many of our interviewees regarded the FM1 as a tick-box exercise (eg. M1, M6, S12): *"I think most lawyers when they think of you [to conduct] a MIAM, they want you to do the form, they don't want you to mediate."* (SM32) However, another solicitor-mediator viewed the solicitor's task when forwarding a client to a MIAM as crucial. The client's view of the

[148] The main protocol of The Law Society's Family Law Protocol encourages solicitors to make a commitment to resolve disputes in a non-confrontational and constructive way, and to consider the use of other methods of dispute resolution: Law Society (2010), 1-3. See also Maclean (2010) 106.

[149] See also the Law Society's Family Law Protocol: Law Society (2010), 122.

process will be coloured by the solicitor's attitude. If a solicitor refers to the MIAM negatively, the mediator is put on the back-foot from the start: *"I get the feeling that some solicitors say, you have to do this, you're jumping through a hoop, so that we can start proceedings, and the mediator then has to try and unravel before going forward."* (SM30)

Judicial involvement in settlement process

Where contested cases settle by consent order made at a scheduled hearing, it is impossible to know from the court file what, if any, influence the judge had over the terms of the order: particularly in relation to orders made at the FDR or FH, if any part of the scheduled hearing had taken place, the judge may well have given some indication of his or her view of the case before the parties reached agreement. In other cases, however, the consent order application emerges between hearings and so a distinct approval process is observable, as in the pure consent order cases discussed in chapter 2. Amongst the contested but settled cases for which we have data (total 111),[150] one third of orders (40) appeared to have been made at hearings or based on agreements reached at a hearing: 30 orders were made at hearings (a mix of FDAs, FDRs, FHs, mention hearings or scheduled hearing dates used as impromptu approval hearings), six were based on *Rose* agreements[151] and four on other heads of agreement reached at a hearing (which may or may not have been *Rose* agreements). Where we observed a distinct approval process (71 cases),[152] we identified queries raised in correspondence in 18 cases and approval hearings required in 1.[153] As in chapter 2, most of these judicial interventions

[150] We are missing data on this point for 7 cases; in one case, we have inferred that there was no intervention from the fact that the application arrived by letter dated the day before the order was made.

[151] I.e. detailed heads of agreement approved by the judge at a hearing without a formal consent order being made at that stage – the *Rose* agreement then forms the basis of the later consent order: *Rose v Rose* [2002] EWCA Civ 208.

[152] We did not usually collect this data for cases where the order was based on heads of agreement, but it is likely that lack of data on this point signals lack of further judicial intervention.

[153] In two further cases, the parties themselves requested the approval hearing to explain the order to the judge.

related to drafting/administrative/technical matters (16), with substantive queries being raised in 9 cases; we recorded revisions instigated by the judge in 13 cases.

So here, as in chapter 2, we found evidence of an interventionist judiciary quite prepared to get involved in the consent order process – irrespective of whether the parties were represented – and so again we have a picture different from earlier research.

EXPLORING WHY CASES SETTLE WHEN THEY DO: THE INTERVIEW DATA

Our interview data enabled us to explore the dynamics of cases which settle at different stages along the standard financial hearings pathway (and those that fail to settle), offering explanations for why cases settle when they do. We asked our solicitor and solicitor-mediator interviewees to talk to us about their most recent "contested but settled" case, and the cases they discussed were spread along the standard pathway in a similar way to our court files. Of the 21 cases for which we have the information, all bar three settled either prior to the FDA (four cases), around the FDR (nine cases) or in the run-up to the FH (five cases).[154]

Table 3.2: Stage of settlement for solicitors' most recent 'contested but settled' case

Stage at which case settled	Number of cases described
After issue but before FDA	4
At FDA	1
Between FDA and FDR	1
In the period around and at the FDR	9
In the run-up to and at the FH	5
Other[155]	1

[154] Of the other three, one settled at FDA, one between FDA and FDR, and the last was complex: following the FDA, the case was then listed for a two day trial on a key preliminary legal point; the parties settled about two and a half months before that trial. Solicitors chose cases they described, although they were asked to pick their *most recent* 'initially contested but settled' case. Although the researchers were not able to ask practitioners for examples which reflected the pattern observed in the court file survey, a similar pattern in stage of settlement emerged organically from the solicitors' chosen cases.

[155] This was a complex, high value case which settled a number of months before trial of a preliminary issue.

In discussing our interview data, we group these experiences into larger "slices": pre-FDA, between FDA and FH, and those that settled only at the doors of the court.

Cases that settled before the First Directions Appointment

Cases which settle even before the FDA might be viewed as a sort of hybrid of the pure consent order case: agreement is reached without any prior judicial input, no court appearance is generally required and the costs of representation in court (and associated preparation) have yet to be incurred. Indeed, some practitioners use the prospect of additional costs as a lever to encourage parties to settle at this early stage:

> *"…it's not until we say, look, we've had enough, we're going to court, let's just get there because you've spent far too much money on this case already. They say, oh right, I better find out what my actual options will be when I get to court? What will the judge say? And that's when they realise that actually it's best to get it settled as quickly as possible." (S16)*

The contested application acts as a prompt to encourage settlement. In S19's recent case, the wife had issued proceedings in order to try and move things along, which encouraged the husband to re-focus and settlement was reached quickly through direct discussions. As in many other cases discussed by our interviewees, it appeared that more than one issue had been delaying settlement prior to that point. The wife had not moved on emotionally before issuing and *"had started off being incredibly bitter and angry and not prepared to do anything"*; meanwhile, the husband had been dragging his feet, focusing on his business rather than the divorce, and so had not been forthcoming with instructions.

Another of the four cases which settled prior to the FDA had very similar dynamics. The reflection below related to a very high wealth case, but again, prior to issuing proceedings, the wife dragged out the process for emotional reasons: she did not want closure on the relationship, not wanting the marriage to end at all. The husband issued after year-long solicitor negotiations. The solicitor suggested that the case settled so quickly after issuing because the wife did not want to go to court:

> *"It kind of brought things to a head. We didn't want to do … which was why we didn't do it for the first year … we wanted to negotiate it, we knew she was in a bad place,*

we knew she was …, we knew she wasn't just being bloody minded, we knew she was genuinely finding it very difficult, but we thought she needed an impetus, so we tried and tried to avoid doing it with court proceedings. And having suggested collaborative, having suggested round table meetings, none of that was happening, we said, look we've got no choice, we're going to go to court because we need a timetable. And then it settled immediately afterwards." (S23)

Practitioners felt it was useful to have a court-imposed timetable as an impetus to settle. It can kick-start (or restart) negotiation, and help to encourage swifter resolution of essential elements of the process, such the requirement to give full and frank disclosure:

"I mean the only problem was the lack of the other side's disclosure. And that was going to be our difficulty at court – which was one of the reasons why she settled. Because it was tracing down the pensions, and finding that information, and the offshore account and finding all of that. … Because we'd raised the issue of the pension continuously. And we'd said that he's got to give us forms of authority. If he didn't want to pursue it, we would pursue it, just give us the authorities. And we would pay for it. And I think that kind of spurred him into settling as well." (S16)

Another major dynamic behind early settlement is fear of the court. Practitioners suggested that fear of attending a hearing at any stage along the standard financial hearing pathway, fear of "being exposed" to the other side and to the judge, and the emotional and financial costs associated with launching and pursuing a contested case, can be more than enough to encourage settlement:

"They were both terrified of going to court – which is a good thing. I think that's the way it should be. I think you should think: this is the last resort … And I think they were both adamant they didn't want to go and that's how I think we got a settlement in the end." (S26)

It might be easy to under-estimate how emotionally-charged the FDA can be for the parties: after all, it is "just" a procedural, case management appointment. But this characterisation fails to appreciate the potential impact of attendance in court on the parties, however formally benign the occasion may be. This is summed up very nicely by

one interviewee, whose personal experience of divorce helped them adopt an empathetic approach to the sometimes traumatic prospect of court hearings:

> *"…having been through a good divorce and a bad divorce, I can say to you from personal experience that it's emotionally charged and having had the bad divorce, I think it's helped me to be a better lawyer, to be honest, because historically I would have said … it's just a straightforward hearing. But it isn't to them. It's a major event." (S17)*

Cases that settled in the middle stage (between FDA and pre Final Hearing)

Baron J has observed that in pure consent order cases, "save for the necessary forms and draft order, the court will have little information as to the objective or the true underlying structure of the deal". However, "in contrast, if a case is settled at a Financial Dispute Resolution hearing, then the Judge may well have a direct input with the result that the essential causal matrix of the agreement will be known and understood".[156] The importance of the FDR as an encouragement to settle cannot be over-emphasised. Indeed, simply the prospect of the FDR may prompt settlement just days before the appointment.[157] The following observation was typical of solicitor interviewees describing cases which went beyond the FDA stage:

> *"It's not unusual to settle around the FDR. I have very few contested final hearings. And when you asked me for one, I was really struggling to find one. They tend to stick out. But the FDR hearings for ones that are issued in the court, I think, are absolutely valuable … If they haven't settled by FDR, they'll settle on the FDR." (S13)*

The settlement period around the FDR encompasses not only the day of the FDR itself, but the weeks leading up to and following the hearing. The parties' solicitors may have been working on the case for months, exchanging various offers, but the reality (or mere

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[156] *Hamilton v Hamilton* [2013] EWCA Civ 13, [29].

[157] This was also commonly observed in the court file survey, where letters indicating that settlement had been achieved often came in just days before the FDR date.

prospect) of being in court before a judge and hearing a substantive judicial indication is something the parties remember. Even if they cannot settle on the day of the hearing, the FDR can get the parties talking.

Our interview data offer several reasons which account for the centrality of the FDR in encouraging settlement.

First, the FDR is a reality-check for the parties. The hearing makes the process even more real, no longer merely a matter of solicitor correspondence. The impact of having a judge give an indication is crucial:

> *"You go into a room and a judge either gives directions or tells you, if he was deciding the case – some judges I know are quite happy to sit there and say, well, if I was deciding this today, I'd do this, this and this in layman terms. And I think that's great, I think that's to be encouraged." (S11)*

The FDR can also serve as a reality-check by giving the parties more experience of the court process and what will be expected of them at the next hearing. In one interviewee's most recent case, the prospect of being cross-examined at a final hearing was a major factor in persuading the client to make every attempt at settlement during the FDR; settlement was ultimately achieved just afterwards: *"She didn't want to be exposed. You know, her weaknesses were clear to her and she didn't want that to be examined too closely."* (S25).

Secondly, the FDR concentrates the minds of all involved, parties and representatives: you "*can get more done in an FDR than you do in 6 months of letters flying because you're just to the crux of what's happening."* (S13) Where one or both sides have stuck to an unrealistic position or been prevaricating, a good FDR indication can encourage settlement.

Thirdly, FDRs work where both parties are represented because at that stage everybody is (usually) *"complying with the directions, so replies to questionnaires, valuations in, parties coming to court with their offers, schedule of assets for the judge, and letting the judges know where we're at."* (S18) The parties' lawyers have (usually) been pushing things along in the background, trying to encourage settlement at all stages of the standard financial

hearings pathway. So when the parties turn up at the FDR, the expectation of continued negotiation is not a shock. As we explore further in chapter 5, the difficulty arises where one or both parties are unrepresented: progress at the FDR may then be hampered as there may not only be a lack of background paperwork for the judge to rely upon, but the LIP may not understand the expectation that the parties attempt to settle the case there and then.

Finally, FDRs prompt settlement for perhaps a more prosaic reason: by the time the parties have gone through the process, *"people get ground down – financially and emotionally"* (S19) and become *"just sick of it"* (S25). Several practitioners suggested that the potential increase in costs is definitely a substantial factor in the run-up to the FDR. *"People realise if they're going on a FDR then it's probably another £1000/£1500 gone from their assets. And it's not just the finance. Some people genuinely don't want the experience of sitting in a courtroom."* (S13)

However, practitioners did not view FDRs to be unproblematic. The most common difficulty was receiving what was regarded as a weak/poor judicial indication which made the FDR less effective than it should have been. All practitioners who regarded this as the main problem with FDRs would have preferred to see a robust judicial opinion (even if not in their favour), rather than one that sat on the fence. Instead of calming the parties' *"ruffled feathers"* (S20), an indication which fails to give a strong steer as to outcome can increase the parties' uncertainty:

> *"FDRs just need to be better. There needs to be a more proactive judiciary. I've lost count of the amount of times that I would say there's a cop out. They say, 'oh, well, I couldn't give guidance on this. It's better if you agree it yourselves'. You end up saying, 'why are we here? What is your role? You're here, we're all prepared, we've all filed our position, we've considered where we are, we've made our offers, and you won't put your neck on the line.' And when judges do put their neck on the line, it settles, and it settles there and then." (S14)*

Indications which just focused on the expense associated with court proceedings were also considered unhelpful:

> *"But [what] I find typically is FDR is where you settle. It's the get it before FDR – we've got some good judges who tell you what they think, whereas in the past, I've had judges who basically tell you that the costs will be a lot and let you rehearse silly arguments. … You might not necessarily agree with them but I'd rather have an indication I don't agree with to talk to the client about." (S15)*

Robust judicial intervention at the FDR stage therefore appears to be key. "Robust", in this sense, is an indication which involves the judge stating unequivocally what they think should happen in terms of outcome, rather than *"fudg[ing] the issue"* (SM29) by either referring to costs or delivering a general lecture on the benefits of settlement. As far as our interviewees are concerned, the raison d'être of the FDR is to focus parties' minds on the likely outcome so that it encourages them to come to a reasonable and fair settlement themselves. The recent Best Practice Guidance for the conduct of FDRs issued by the Family Justice Council[158] cautions against too robust an intervention in some cases. But our interviewees clearly felt that some judges were reluctant to give strong indications in some cases where it was warranted.

Settlement at the 'doors of the court' (at Final Hearing)

Weak judicial indication at the FDR was one reason why some of the five cases discussed by our interviewees that reached the doors of the court had failed to settle earlier. In one case, there was an imbalance in the parties' willingness to discuss settlement – one side was open to negotiation whilst the other side was prevaricating[159] – and the judicial indication did little to help:

> *"The judge, who I'd always liked was rather lazy in that hearing. He just simply said: 'husband's offer is too high' – which we knew; 'wife's offer is too low' – and that literally is it really. He didn't say an awful lot more than that, even though I'd told the client how wonderful that particular judge in [town x] was and I'd issued it in [town x]*

[158] FJC (2012), and see chapter 1, p 21.

[159] Disclosure was also disputed by the side that was unwilling to enter into negotiations at the FDR appointment.

because the judges were quite objective there … I'd built it up that it was going to be a really good hearing and that we'd have this barrister there to deal with everything – and it turned out to be pretty useless really." (S21)

But cases may also fail to settle at FDR for other reasons. For example, in another case, despite a helpful judicial indication close to one party's offer, the case failed to settle at the FDR because of other, more practical issues: *"it wasn't so much the global differences as difficulties about how to do things really."* (SM28). A property had been sold and there was a substantial five-figure sum on deposit which the husband intended to use to meet a liability, whilst the wife wanted it to be put towards a new property for her.

Party emotion can, of course, still be an obstacle. Another interviewee suggested that their case failed to settle at FDR because the parties needed more time emotionally. Neither party was quite ready to settle at that stage, although the practitioner felt that the FDR appointment was still helpful as *"I think they both needed the judge to say to them, look, this is what I think's fair."* (S16)

Strong judicial involvement remained key to settlement even at the late stage of the final hearing. In S16's case, settlement had almost been achieved but *"a very, very heavy indication of 'go and decide this, or I will decide it for you'"* was enough to get the parties to agree without the need to go through the full final hearing. Having well-briefed counsel present to persuade a client to accept a realistic offer can also be important.[160] In S11's case, counsel *"got hold of the wife"* and explained to her that the offer that had been made by the husband was reasonable; that she had not been able to prove that there were *"any shenanigans going on in the company"* and that she should accept the offer being made. The case had been listed for a 2-day final hearing but the consent order was signed by midday of the first day. The clients in SM28's case had a similar experience. Counsel got involved in the run-up to the final hearing and during this period the parties were able to narrow the issues and generate some slightly different proposals to try to reach settlement. Issues had been narrowed further by the time of the final hearing, *"but not sufficient to get*

[160] See Maclean and Eekelaar (2009), 118-21.

a complete agreement. … On the day they asked for time and the two barristers were able to draw up an order that dealt with all the issues and which the clients ultimately agreed."

As at earlier stages, a dominant factor in encouraging settlement (even at the eleventh hour) is the daunting prospect of the legal process itself, the expectation of having to engage with the court procedures and legal personnel, the prospect of cross-examination at a final hearing, and the fear of costs:

> *"Interviewer: Why do you think it ultimately settled when it did?*
>
> *S12: I think from my client's point of view it was the costs. And from the wife's point of view, it was the prospect of having to represent herself at a final hearing and be cross-examined."*

Moreover, fear of court may not be generated by the parties alone. It may emanate from the practitioner to the client, particularly if worried about being allocated a particular judge (for example, because that judge is perceived to be "pro-wife" or "pro-husband"); this was a factor which ultimately spurred the parties in S21's case to settle.[161]

KEY FINDINGS

- Commencement of litigation is *not* an automatic route to adjudication: the majority of initially contested cases settle and practitioners make ongoing attempts to settle all the way along the standard financial hearings pathway.

- While there were some positive reports of MIAMs yielding more mediation referrals, interviewees identified three main problems: the low-level (if any) policing of the MIAM expectation; the late stage in the process at which the MIAM comes, in many instances following failed attempts to negotiate a settlement; and the difficulty of getting both parties engaged in the process.

[161] Judicial inconsistency between and within courts has been reported previously: Hitchings (2009), 198-204 for substantive differences; Davis et al (1994), 154 for procedural variations.

- Once proceedings have been issued, a substantial minority of cases settle even before FDA, although the bulk of settlement activity occurs around the FDR. A substantial minority of cases settle before or even at FH.

- Factors which influence settlement around the FDA stage include:
    - The contested application itself prompting settlement by focusing the parties' minds and getting things moving by providing a court timetable that can kick-start or re-start negotiations
    - One or both parties not wanting to go to court for emotional and/or financial reasons.

- The FDR is central to settlement in the middle of the standard financial hearings pathway because of:
    - The FDR and prior paperwork requirements (in theory) ensuring that all the required information has been shared and prompting further negotiation
    - The immediacy of being in front of a judge and receiving a judicial indication regarding outcome providing a reality check for one or both parties
    - The attrition effect of ongoing litigation on the parties, both emotionally and financially.

- But FDR appointments are not always regarded by solicitors as successful, particularly if the judge fails to give a robust indication regarding outcome.

- Where cases settle at the doors of the court, they often do so owing to emotional and financial concerns over the cost of a final hearing. In some cases, different professional involvement at this stage (whether a second judge, or counsel) is also a factor: they provide further independent benchmarking about what constitutes a reasonable outcome and may otherwise prompt parties to settle.

CHAPTER 4: WHY CONTESTED CASES DO (OR DO NOT) SETTLE

INTRODUCTION

In this chapter, we complement our discussion of factors promoting settlement in chapter 2 and build on our findings in chapter 3 by considering in greater depth the key factors which may delay or prevent settlement in contested cases or prevent settlement in mediation.[162] The limitations of court file data mean that we know relatively little about the dynamics of the contested cases in our survey: we cannot tell why they ultimately settled or failed to do so. By contrast, the interview data naturally offer a more in-depth view of the contested cases, offering the practitioner's perspective on key issues of party emotions, character, motivations and interaction, permitting a more comprehensive and sophisticated analysis of factors promoting, delaying and preventing settlement.

While the complexity of achieving settlement varies substantially, the common feature is that settlement or not depends on successfully amassing simultaneously a set of conditions essential to the individual case. As we suggest in chapter 6, a useful analogy can be drawn between the settlement process and doing a complicated jigsaw puzzle, with the parties as the players trying to fit the pieces together. Within this process, particular problems may delay or ultimately prevent completion of the jigsaw through settlement.

[162] Failure to settle a case through mediation cannot be equated with adjudication of a case that comes to court. As noted already, mediators do not generally know what happens to any of their cases once they leave them, agreed or not agreed. Moreover, some cases that fail to settle (or to settle entirely) in mediation may, for all sorts of reasons, then be settled by solicitors or some other dispute resolution mechanism, with or without court proceedings. Despite obvious differences in the nature of their practices, solicitor and mediator interviewees identified similar issues regarding factors delaying and preventing settlement, and so we treat them together here, as in chapter 2.

THE DYNAMICS OF CONTESTED CASES

Continuing attempts at settlement

A popular perception of the legal process in financial remedy cases is that once issued, case progression is almost like a runaway train – that it is difficult to stop the train from ending up at the final hearing destination.[163] At least where one or both parties are represented, this perception is wholly incorrect.[164] The standard financial hearings pathway is geared towards negotiation. Practitioners in our study commented time and again that their focus prior to court is on achieving settlement.[165] We noticed in our court file survey that even ultimately adjudicated cases were not all impossibly conflicted from the off: there was sometimes evidence of settlement having been attempted at an early stage, for example through voluntary exchange of Forms E or through mediation.[166]

Adjudicated cases constitute only a very small proportion of many practitioners' caseload:

> *"We always try and avoid court. Especially as Resolution members, we always try and avoid court. It's a case of dealing with it in a non-confrontational approach, so negotiation is a much better way of dealing with it … we all want to get the best outcome for the clients as quickly as possible and with the least acrimony possible because these people have got to live with this decision for the rest of their lives." (S16)*

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[163] See Eekelaar at al (2000), 6-9

[164] Ingleby (1992), Davis et al (1994) and Eekelaar et al (2000) all found that lawyers are disposed towards early settlement, not litigation: see generally Eekelaar et al (2000), 13-18 and their own findings of solicitors' pro-settlement approach.

[165] See also findings from many of the earlier studies discussed in chapter 1.

[166] Only two of these cases had started in the MIAMs era: in one, the legally aided applicant had very probably attended a MIAM; the other, in a case where the respondent entirely failed to participate, had not on the basis that, given the respondent's stance, attendance would merely delay the case's resolution.

Indeed, some solicitor interviewees were unable to discuss a recent adjudicated case with us as it had either been so long ago or they had never had one. In reflecting on why this was, they suggested that it may be due to clients becoming "*litigation weary and … very aware of their spiralling costs*" (S22); their own conciliatory approach (S24); and clients not having huge amounts of money (SM27 and S24). One interviewee reported that in their experience, TOLATA hearings[167] were much more likely to go to a contested final hearing "*because it can be black or white whereas in ancillary relief you've got to decide which shade of grey you're on … whereas on the TOLATAs which go to trial, it's: 'am I entitled to all or nothing?'"* (SM32)

The Law Society's Family Law Protocol states that the issuing of proceedings in a financial case (using Form A) should not be seen as a hostile step,[168] and our interview data on contested but settled cases support this. Issuing proceedings can be used in order to get parties to the table (S17, S19, SM29), particularly where a swift conclusion is wanted (SM29); it can help parties to refocus if negotiations have broken down (S12); it can advance disclosure (S18, SM31 and S26); and it can provide a timetable within which negotiations can be concentrated (S17 and S12). As one interviewee said, *"There may be an argument to say that they would settle and have settled sooner because proceedings were issued, potentially more cost effectively than having a year's worth of negotiation backwards and forwards."* (SM29)

Negotiation after issuing can take various forms: round-table negotiation; correspondence between solicitors (SM32); telephone conversations between solicitors or directly with the other party (if a LIP) (SM31); and face-to-face negotiation between the parties without their solicitors present (S19). As one practitioner suggested:

[167] Proceedings under ss 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA), commonly used where a previously cohabiting couple have a dispute over the beneficial ownership of the home in which they lived and regarding whether the property should be sold.

[168] The Law Society, (2010), 122.

"if we do court, it doesn't mean you have to have a final hearing – we can negotiate, we have a twin-track approach and I am a great supporter of the timetable and structure that you get from the court system – it's really helpful." (S17)

Cases which did end up being adjudicated seemed more often to have involved difficulties in getting the other side to negotiate or engage with the process, particularly where the other party was a LIP:

"Interviewer: Had there been any negotiations at that point?

SM31: No negotiations whatsoever. He was in person, very angry, very aggressive man. He didn't turn up at the first appointment. The judge made a direction for each to file a Form E. He didn't do so, didn't turn up at the second appointment. … I think there were 11 or 12 (court appearances) where the husband failed to comply with almost everything." (SM31)

However, difficulties with out of court negotiation were not confined to cases involving a LIP. Solicitors reported that other firms of solicitors could be intransigent. One practitioner described how, in one recently adjudicated case, questionnaires and schedules of deficiencies proliferated but that this simply delayed matters, with no time being spent on discussing potential settlement options: *"We answered, then they'd answer with another questionnaire … we provided everything they needed but where we provided they would just want more … we organised a round table meeting, they cancelled it." (S26)* Even in cases where parties did engage with the process and some negotiation appeared to be taking place, offers might be made that were clearly unacceptable: *"He was making offers that we felt were just ludicrous – like he wanted half the value of the property without thinking where the wife and children were going to be."* (S19)

Factors influencing settlement of contested cases

As we have already seen in chapter 3, once contested proceedings have been started, several of the factors influencing when settlement occurs derive from the legal process itself and its financial and emotional impact on the parties, along with solicitors' case-handling. A combination of what may broadly be categorised as personal and legal / process-related factors (often closely inter-related) may influence whether and when

settlement is achieved in any case. Many of these factors are two sides of the same coin: for example, a judicial indication at the FDR can lead to delay (if weak) or settlement (if robust). We summarise these factors, drawing on data from chapters 2-5 in table 4.1 below.

Table 4.1: Factors influencing settlement in contested cases

FACTORS PROMOTING SETTLEMENT	**FACTORS DELAYING SETTLEMENT**	**FACTORS PRECLUDING SETTLEMENT**
Personal characteristics		
Parties emotionally ready to settle	Parties still have some emotional baggage/fallout from the relationship and experience difficulties in disentangling themselves from each other	Parties are still emotionally embroiled in the relationship; the focus is the 'fight' rather than any attempt at settlement
Parties engaging with each other, legal representatives and the legal process	One or both parties dragging their feet, limiting engagement with each other, legal representatives and the legal process	One party chooses not to engage
Parties increasingly concerned about effect the ongoing case is having on their children	No children / grown-up children so no need to settle for their sake, or neither party are able to agree on what would be best for the children which can cause a delay to financial settlement	Children used as a metaphorical stick to beat the other party, parties becoming focused on their own battle to the neglect of children's interests
Third parties helping parties to achieve settlement, emotionally or practically	Third party issues delaying settlement, e.g. owing to ownership disputes regarding assets or emotional impact	Third party issues precluding settlement, e.g. parties being wound up emotionally by family and friends

Legal and process-related issues		
Sensible legal advice and realistic expectations	One or both parties have unrealistic expectations, whether or not as a consequence of variable and/or unhelpful, or simply no, legal advice	Unhelpful legal advice maintaining parties' polarised positions / hostile and litigious approach to correspondence and negotiation by some solicitors / lack of any legal advice or other expectation management of a LIP
Various reports and disclosure completed	Delayed pension reports / valuations / disclosure	Lack of trust or understanding over disclosure leads one party to believe the other has hidden assets. In the case of LIPs, reports/bundles and full disclosure not completed and/or associated problems in ensuring full disclosure
Court date approaching; court timetable focusing the mind - prompting fear of court attendance	One or both parties wanting their "day in court"	Parties determined to have their "day in court"
Strong case management, robust FDR indication; no other ongoing proceedings	Normal effect of court timetable and paperwork requirements; weak or ineffective FDR indication; awaiting outcome of related proceedings	Weak FDR indication; highly conflicted case with other ongoing proceedings; both parties LIPs, lack of understanding of purpose of the FDR and any judicial indication/instruction
Cost (or fear of costs) for a party who is paying for legal representation	Costs become more relevant as the case progresses. Form H may have an impact on some parties	Costs irrelevant and Form H has limited impact - possibly due to high level of assets / limited appreciation of costs issue / LIP) or regarded as 'worth a punt'

Elements of non-participation, difficult behaviour, disclosure issues and factual or financial complexity could be found in cases which settled as well as those which adjudicated (both in interview and court file data). It was the combination of some of these characteristics and / or their particularly extreme or complex manifestation that required adjudication of some cases.[169] Practitioner S23's summation of their most recent adjudicated case describes this perfectly:

> *"the law was difficult, the assets were very complicated – we had lots of complicated tax things – and the personalities – there were major personality issues with the husband. So it was a kind of perfect storm." (S23)*

In the following sections, we explore various of these personal and legal-process related issues more closely.

Personal characteristics delaying or preventing settlement

Our interviewees' reports of demanding cases exhibited a diverse range of party characteristics. One case required adjudication owing to complete non-participation on one side (SM31). Some involved one party displaying particularly aggressive, insensitive and bullying behaviour (M1, SM31, S13 and S25). Some cases were inhibited by ongoing feelings of betrayal, hurt and anger over the separation (M9, S15 and S17), whilst others involved one side harbouring completely unrealistic expectations (M9), severe mental health issues (S23 and SM28), parties who simply failed to listen to any legal advice (S11), one party being particularly vengeful (S23), one party having nothing to lose by going all the way to final hearing (SM28) and parties being worked up by family and friends (M2). While our court files necessarily yielded little clear evidence of factors delaying and preventing settlement, there were sometimes clues that corresponded with the types of experiences reported by our interviewees.

[169] Maclean and Eekelaar (2009) found that solicitors tended to be able to resolve cases where parties' lives and the factual matrix of their cases were less complex; barristers tended to become involved in more difficult cases, whilst those cases that required adjudication were the most complex.

Factors delaying or preventing settlement: party emotions, underlying motives and tensions

One of the reasons most often given by our interviewees amongst factors delaying and preventing settlement in their most recent contested cases (contested but settled, adjudicated and unsettled through mediation) was the parties' emotions, underlying motives and tensions. Given the centrality of parties' emotions as a factor *promoting* settlement (as explored in chapter 2), it was to be expected that they can also seriously *delay* and even *prevent* settlement:

> *"…it's almost always the people's emotional issues that cause us to get to a contest. It's not usually the legal issues because you can walk around those, can't you? If people know what they want or what they think might be appropriate, then you work it through and you come out the other end. It's not the law that's going to cause huge problems." (S19)*

Emotions having these effects – including anger (M4), betrayal (M9), bitterness (S19), resentment (M3) and even hatred (S23) of the other spouse – have various sources. In discussing factors that had prevented settlement, some practitioners considered that the negotiation process had been coloured by some parties' ongoing wish to punish or hurt an ex-spouse (M2 and S16), or inability to let go of the past (M6), or resentment that the other spouse had ended the marriage (S23). Sometimes, the feeling of hurt and betrayal was caused by an affair, leading the party who had been 'left' wanting the court to punish the ex-spouse through the financial order. For example, in practitioner S17's recently adjudicated case, the wife was determined to raise conduct as an issue, insisting throughout that the husband should receive nothing. The final hearing lasted several days, well in excess of the solicitor's estimation of how long it would have taken had conduct not been raised.

In other adjudicated/unsettled cases, the problematic emotions stemmed from one party's perception that the other party had not made the effort to look after themselves financially during the marriage. This resentment manifested itself into either the view that certain assets (pensions) should not be shared or a reluctance to accept the need for any ongoing financial links between the parties (through spousal periodical payments) (M3)

Several mediators discussed parties to cases which had failed to settle through mediation who could not accept that the relationship was over (M3, M7, M9 and M10). One party might seek to maintain continuing control over the other person's life:

> *"You can have the most, on the outside, simple case but it's not going to settle because actually someone doesn't want to, doesn't want to end the relationship, wants to have some control over someone's life, or you can have a really complicated case with lots of millions and all sorts but where people want to find a solution." (M7)*

In particularly bad cases, this desire for continuing control or an ongoing wish to hurt or punish an ex-spouse could also manifest itself in other areas of dispute, aside from the financial issues, for example in relation to children: *"The worst case you can get is where you've got [contested] Children Act proceedings, you've got your financial and you've got everything across the board."* (S18) We discuss the issue of children further below.

These sorts of emotions would sometimes simply delay settlement, rather than prevent it entirely. In practitioner S13's most recent case, for example, the parties were at different places on their emotional journey: one party wanted reconciliation and was not convinced that the marriage had broken down, whilst the other party was ready to discuss settlement. As discussed in chapter 2, once both parties are able to "move on" emotionally, they can then concentrate on the issues necessary to settle the case. In these sorts of cases, delay in achieving settlement should not necessarily be viewed negatively: delay may be necessary to enable both parties to reach the point where settlement is psychologically possible.

A second group of interviewees, in discussing cases where settlement was delayed, highlighted the problem of one party choosing not to engage, persistently dragging their feet or even burying their head in the sand: *"I think he was just a classic example of 'I'm going to ignore this, I'm going to put my head in the sand and I hope it will just go away'".* (SM29). One interviewee said in relation to their recent contested but settled case that:

> *"On reflection, if I had dealt with the case from the beginning, I would never have let it go on for as long as it had at the negotiation stage because it was very clear to me when I took the case on that the personalities of the parties were such that it was*

very unlikely than an agreement was going to be reached because the agreement that was eventually agreed was actually the same as, if not less than an offer that had been put to the wife over a year prior, so I think that was always going to be a case that went through the court process." (S12)

Where emotions are particularly heightened, any chance of settlement may be prevented. Such parties may either fail to bring in their documentation for disclosure at all or (conversely) bring in *"a suitcase full of absolute crap so they're paying lip service to the idea of financial disclosure."* (M9) Solicitors may experience difficulties in obtaining instructions from such clients (S23). Parties' views may become entrenched on certain points (S18) so that the parties become polarised (S12), leaving less room for manoeuvre. Parties may not explore options properly because they find it too painful, or are unwilling to compromise because they are too emotionally bound up in the fight (S25). Where one party (the "leaver")[170] has moved on but the other (the "left") has not, the latter may be unable to choose between a range of equally fair options for settlement because the process of choosing (and so ending the case) brings about the end point that they do not want to happen (M9). It is very difficult to talk about practicalities if one or both of the parties has not let go of the past (M6).

Ultimately, it is incredibly hard to mediate or negotiate successfully with *"too much emotion flapping around what should be a negotiation"* (M9)

"The most difficult cases are where you've got one party who has not accepted that the marriage has broken down – whilst it clearly has broken down. They will … if you like – and I truly believe this is right … to perpetuate the fight perpetuates the relationship. So long as there's something to argue about it means that he or she is still in their life. It's very sad but even a letter from his solicitors or her solicitor will do. It means there's still something going on." (SM27)

[170] See chapter 2, p 41.

Factors delaying or preventing settlement: parties' unwillingness to engage in negotiation

We saw in chapter 2 that both parties' willingness to settle is essential.[171] The interview data relating to all categories of the contested case (adjudicated /unsettled and contested but ultimately settled cases) suggests that the reasons for clients' *lack* of shared aspiration to settle in these cases are a mirror-image of the reasons why other clients share the aspiration to settle. As practitioner S23 suggested, not everyone wants to settle: some parties want to maintain the fight, perceiving this to be more necessary and cathartic than reaching agreement. Table 4.2 below provides an overview of both sides of this settlement coin.

As explored above, an unwillingness to settle will sometimes lie in parties' ongoing, deep-seated emotions. In one mediator's most recent case, the effect of one party's failure to recognise the relationship was over was their declaration at the start of the third mediation session "*I want everything*", despite a 50/50 split being the most likely outcome:

> *"… she possibly thought a good tactic was to say, 'I want everything', in the vain hope that he might throw his hands in the air and say, I don't know, 'alright, we'll just stay together'." (M9)*

This was one of several examples of parties who retained an entrenched view about what the outcome should be, notwithstanding mediator and/or solicitor involvement and advice. Underlying power imbalances can also have an impact. Where there is a dominant and/or controlling party on one side, with a (usually) submissive party on the other, negotiation may lead to further conflict between them should the more submissive party – contrary to the other's expectations – become more assertive, and this can hinder settlement:[172]

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[171] Chapter 2, p 42.

[172] Davis et al (1994), 60-2, described a similar case, noting the gendered nature of expectation management, in which wives' expectations are commonly raised while husbands' have to be lowered, with the result that a husband may be unnerved by a wife being able for the first time to assert her legal rights.

"When you have that situation and then the person who was the submissive one is actually having the temerity to express an opinion and to challenge, that's when it can … that's when you see conflict and that's when you think, this is a case that could go all the way." (S17)

Table 4.2: Aspiring to settle or not?

'Willing' characteristics of parties aspiring to settlement:	***'Unwilling' characteristics of parties who are hindering settlement***
Parties have moved on emotionally from their relationship	Parties have failed to move on emotionally and may fail to accept that the relationship is over
Parties are able, or appreciate the need, to compromise; parties accept that there is a realistic range of outcomes appropriate in the parties' circumstances	Parties fail to consider any other viable options for settlement, for example, holding unreasonable / unrealistic views about the value of particular assets
Parties wanting to settle and focused on the benefits of a conciliatory approach	Parties still engaged in the fight and unwilling to focus on any conciliatory process. One party may have no incentive to settle either from a financial or emotional perspective and has very little to gain and/or everything to lose by engaging in negotiations
Mutual substantive vision of what parties want to achieve	Lack of mutuality over outcome / parties have entrenched, opposing views of what the outcome should be

This was exemplified in the most recent adjudicated case of S19, which involved a very dominant husband and a wife who was not prepared to cooperate with his demands but was not quite able to stand up to him either. So it was all very messy and difficult. The interviewee remarked that *"I don't think it was ever going to resolve at FDR. I think he was determined to have his way and it didn't really matter what the judge said at any step"*. (S19)

Settlement can also be precluded if parties' initial negotiating stance is too far outside the range of reasonable outcomes, so that they would need to make a much greater concession than would otherwise have been required in order to reach settlement. That large concession may be more than they can stomach:

> *"you tend to find if they start off unrealistically low, for them to then move to where they perhaps really ought to have been in the first place, it can be too great a shift for them psychologically to do that and that's the sort of cases that do end up at a final hearing." (SM29)*

In other cases, simple lack of awareness of the legal position owing to lack of legal advice or representation can be the stumbling block:

> *"…if you've got a litigant in person or somebody just not cooperating, head in the sand, final hearing because they've decided they're not getting anything from the house – they just don't engage in the process at all." (S13)*

Factors delaying or preventing settlement: third parties, including family members

Finally, the impact of third parties, such as other family members, could be important in influencing settlement. In some cases, the influence could facilitate settlement, for example through family assistance and inheritances. One practitioner's most recent contested but settled case was able to make progress thanks to the wife being assisted financially by a relative:

> *"I think what came to my client's assistance was her wealthy brother. And though it wasn't actually disclosed, it was my understanding that her brother would help her and effectively probably come in place of the husband and become a joint owner of that property in order to get the husband removed, because my client was desperate to keep the home." (S25)*

Similarly, in S24's most recent case, a parent was able to advance one spouse an inheritance which enabled that spouse to buy out the other and keep the marital home. These additional considerations underline Hitchings' previous finding about how practical issues can determine how a case will settle: parties are not only bargaining in the shadow

of the law,[173] but also 'bargaining under the weight of additional considerations'.[174] Conversely, the impact of family and friends might be less beneficial, exacerbating the situation in one case that failed to settle in mediation (M2). In this case, not only had the parties been wound up (emotionally) by family and friends, but there were an array of "other issues" complicating the settlement jigsaw; emotions, third party involvement and complex finances:

> *"(S)he was very, very emotional and I think had been worked up by other parties – family, friends – to believe that this man had literally stripped her of everything that she had and was completely abandoning her … so the sessions were hugely difficult, not only because of those dynamics but because of the complexity of the finances." (M2)*

Legal and process-related issues delaying and preventing settlement

The law and legal process themselves may generate several factors that can both promote or delay settlement. Some of these may interact with party characteristics in shaping the progress (or not) of the case: for example, parties' expectations may flow from a combination of the advice received, and – crucially – their understanding of that advice and what it means for their case, or emotional problems may manifest in (or be exacerbated by) lack of disclosure.

Our adjudicated court files hinted at possible or probable factors contributing to adjudication being required. In several cases, there were problems relating to one or both parties' financial position, for example: delays or other difficulties/distrust relating to disclosure;[175] one or other party's financial position appearing to be complex (requiring difficult valuations) or obscure (including claims that a third party has beneficial ownership

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[173] Mnookin and Kornhauser, (1979).

[174] Hitchings (2009) 195.

[175] Despite spotting a number of penal notices being attached (more than once) to directions made against dilatory litigants, we identified no cases in which those were enforced with contempt proceedings.

of assets held in the spouse's name); one or other party's position being compromised by bankruptcy or other debt-related problems, or dispute relating to responsibility for debt; allegations of other financial misconduct, such as deliberately running down income streams or dissipating assets in an attempt to minimise any order. Delay (at least) could also be caused by parties chopping and changing their legal representation between hearings, potentially disrupting public funding arrangements. In only five adjudicated cases in our court file survey did both parties clearly have the benefit of legal representation throughout. In five others,[176] both parties lacked representation at some stage of the case (or throughout), and in nine, one party was without a lawyer at some stage (or throughout).[177] We explore the significance of the representation profile of our court file survey cases in chapter 5, but it is worth noting here that lack of representation at key hearings – and in some instances, simple failure to attend some hearings at all – appeared in some of the adjudicated cases to be a factor that stymied the possibility of settlement, just as total non-participation necessarily did.

Our interviewees' adjudicated cases / cases which failed to settle in mediation involved a number of legal and process-related issues. Some were hampered by complex points relating to inheritance, gifts and jurisdiction (S23); tax (S23) or pension issues (M1), or more generally, the financial or other matrix of the case (M2, S26, SM30). Others had problems around disclosure (M1, S12 and S19). Some cases involved other ongoing legal disputes, such as private Children Act and injunction proceedings (M8, S12 and S14), or other contentious issues that were not being litigated but were an obvious undercurrent to the financial negotiations (M7).

Factors delaying or preventing settlement: legal advice

As discussed in chapter 2, the substantive law – in particular, the normative standards around which solicitors encourage clients to adopt a realistic negotiating position – were

[176] Including here the non-participating parties.

[177] In relation to one of these cases the position is not wholly clear, but it seems likely from the data collected that one spouse was represented throughout while the other (who was initially non-responsive) may have lacked representation at the start of the financial case.

not mentioned spontaneously as factors which had hindered settlement in interviewees' most recent cases. However, two features that did emerge from the data were the importance placed by mediators and solicitors on parties having some understanding of their legal rights and duties, and some of the difficulties parties had in this regard. Only two practitioners (1 mediator and 1 solicitor) made an unprompted direct (as opposed to indirect) reference to the significance of the substantive law in their interviews: they felt that the substantive law could hinder settlement and suggested that greater clarity was desirable to aid negotiation (M2 and S23).

Both mediators and solicitors considered that settlement could be hindered by the variable legal advice given to clients. A couple of mediators were particularly troubled by what they regarded as unhelpful legal advice, noting that this hampered mediation by leaving parties too far apart in their positions (M2). "Unhelpful" in this sense could be inappropriate legal advice, or limited (or no) legal advice on issues which were important for the mediation to progress.

However, what we (and the mediators making these comments) cannot know is exactly what question(s) the clients were asking their solicitors and whether they were absorbing and then accurately reporting the advice received. One mediator identified "fairness" in financial remedy discourse as a problematic concept that can lead to unhelpful legal advice. Legal practitioners may be comfortable with the concept, having day-to-day experience of dealing with it and understanding its particular (possibly local) meaning. But the concept is rather slippery in a way that can be unhelpful for a client in mediation, who may misunderstand the range of legally available and appropriate options for settlement. The following example highlights the potential difficulty, given a highly discretionary financial remedy law, in asking a client to enquire as to the "fairness" of an agreement proposed in mediation with their solicitor:

> *"…there's no point in asking your solicitor, what's a fair outcome? Because on the face of it, that sounds like a sensible question but of course father's solicitor is looking at it through father's eyes and what's fair to that solicitor is going to be very different to what is fair [*doesn't finish sentence*]. … you're not going to get a realistic picture and so we've sort of boiled it down to: if this went to court, what does my best case scenario look like? Thank you very much. Now what's my worst case scenario*

look like? – in order to try and get a range of what might happen. … Because that does actually then give the couple, each of the individuals, hopefully a more realistic picture so that when they come to their next mediation session, and someone puts a proposal on the table, they can assess it – does it fall within that range of what might happen?" (M7)

M7's approach to the issue of fairness and how to encourage clients to ask the most appropriate questions of their solicitors is an excellent example of good practice, and it demonstrates an appreciation of the complexity associated with the legal concepts used in this area.

Some solicitors identified other lawyers who were not open to settlement because they had formed and / or maintained a "ridiculous view" of the case. (S13) This was sometimes the result of their approach to the substantive issues, but for others, the most common criticism of other solicitors related to their *approach* to negotiation, for example, in the use of "inappropriate tone and language" in correspondence, which was perceived as hostile (S14). Solicitors of this ilk were regarded as particularly difficult to deal with and had a reputation for litigating rather negotiating (reported by S14, S16 and S17 for example). It was suggested that one reason for this approach might be an attempt to escalate costs. Practitioner S26 suggested of their most recent case that *"the solicitors that the wife had, their interests were in pushing this on and on and on to seek more costs than to resolve it"*, perhaps because of speculation that there were undisclosed assets. These "hostile" solicitors could have been acting in their clients' interests by pressing for full disclosure, but from S26's perspective, the wife's solicitors were not acting in a settlement-orientated manner. Despite the pervasive settlement culture in the family justice system, evident amongst all practitioners whom we interviewed, remnants of a "litigious" approach, were reported:

"As bad as this sounds – perhaps I shouldn't say it – there are certain solicitors that you know if you've got them on the other side you'll probably end up in court. And there's one big firm in [place name] who will inflate your cases, no matter what they can do. And they will get you to court and they will drag it out as long as possible and settle at the court door. It can be frustrating." (S16)

Factors delaying or preventing settlement: disclosure

Difficulty securing voluntary disclosure is a common reason for issuing court proceedings. Continuing problems with disclosure can prevent settlement. Although this was not always a factor impeding settlement in our interviewees' recent unsettled cases, where it was a factor, it could be the real stumbling block to any productive mediation or solicitor-based negotiation.

Lack of disclosure can arise from various motives and in this respect, manifest itself as a symptom of other difficulties in the relationship breakdown: the non-discloser may be trying to deceive the other party and to control the outcome, or may feel that they have earned the asset in question: it is theirs, so why should they have to disclose it?

> *"The issue was disclosure … particularly in relation to the pension. So if I paraphrase husband, husband would say something along the lines of: I have earned the pension, I have bought the tools – they are mine. She has decided to move out with her new relationship. I don't see why I should give anything to or contribute to her current situation and her new partner." (M4)*

Both solicitors and mediators identified how problems with disclosure could also be a cause of further problems, not least lack of trust. (S12) This proliferation of problems is a familiar theme in the adjudicated case. In some cases, lack of trust over disclosure could lead to one party being adamant that assets were hidden or declared income inaccurate (S26), perhaps where the other's lifestyle did not appear to match the disclosure provided.

For mediators, difficulties with disclosure would mean mediation having to end, leaving the parties to progress their issues via solicitors or otherwise. Some interviewees anticipated difficulties in this area once LASPO came into force. Where one party is funded, should mediation fail for want of disclosure, that party – who will probably receive no funding for legal advice, assistance and representation to handle the case outside mediation – will be left in a very difficult position. Most LIPs will be unable to dig up concealed assets.[178] Solicitors have recourse to experts practised in the difficulties of obtaining disclosure (as

[178] Self-help in this area is now precluded: *Tchenguiz v Imerman* [2010] EWCA Civ 908.

S12 had done in their recent case), though even this may not always be successful. But the cost of accountants' and solicitors' fees to deal with non-disclosure may be prohibitive, leaving the formerly-funded party with the unpalatable choice of either having to press ahead (somehow privately funding their case) in the hope that the threat of court action will prompt disclosure, or simply failing to get the order that they should. One interviewee described this predicament as being *"between the devil and the deep blue sea." (M8).*

Factors delaying or preventing settlement: the court timetable and gathering evidence

We have seen how the court timetable appears to encourage settlement to coalesce around hearing dates. But court timetables and associated requirements can also delay settlement. For one interviewee, the negotiation itself was relatively quick; what took time was the completion of Form E, exchanging questionnaires and obtaining pension confirmation:

> *"I'd say the negotiation part probably lasted two to three weeks, if that. It's this whole frontloading part where we have to get the disclosure done and we have to be satisfied what the assets are. It takes one little point, like we're waiting for [name] pension confirmation – that takes an extra month and again that's delaying us negotiating." (S26)*

Practitioners reported varying instances of prompt and protracted case timetabling:

> *"… locally the process is quite good. I've issued in other courts and been amazed at the delays, as in, my word, you might as well issue as soon as they come in, just in case you need the courts to adjudicate in nine months' time. So having a quick system aids you in that it gives you confidence to negotiate and to try to settle, knowing that you've got a system that you can fall back on that's quite quick." (S15)*

One interviewee felt that judges could be too ready to accept at face value what they are told about the time required for certain enquiries to be made: *"if you go to a forensic accountant and say, 'this has to be done in a month', they will do it in a month rather than 'let's give them four months' and they don't do it in four months."* (S11) However, as already noted, while delay can be irksome to one or both parties, it is not always a bad

thing: some parties will require the extra time between court hearings to assist them in their emotional journey post relationship breakdown.

Factors delaying or preventing settlement: conflict on other issues

The following quotation emphasises the number of features in a contested case which coalesce to make financial settlement almost impossible to achieve:

> *"Again, I think that was a combination of factors. There were issues of trust – I think that was one of the main things – that the wife didn't trust the husband in relation to his disclosure, and the husband … there were incidents that occurred where he lost his temper as a result of which the harassment and the occupation orders were obtained. And that all led to an atmosphere of, you know, sort of a battle between them, and then there were issues of trust over the birth of the second child which caused the wife, obviously, to be very upset to think that he would deny that that was his child. So I think it was all those factors and the CA [Children Act] proceedings." (S12)*

The contested cases in our court file survey, whether settled or not, more commonly exhibited other areas of conflict than pure consent order cases, whether in the form of Children Act proceedings (21 cases in total, 15 of which were in our contested but settled category for the financial case, 3 adjudicated); disagreement regarding the Statement of Arrangements for children (43 cases in total, 29 contested but settled and four adjudicated); domestic violence related proceedings or interventions (e.g. Family Law Act application, police involvement: 33 in total, 19 contested but settled, 8 adjudicated); or other issues (for which numbers are small), such as applications for freezing injunctions under s 37 MCA, problems with enforcement (evident on file in a few cases post-order), cross-petitions for divorce, and so on. Alleged conduct described in the divorce paperwork which we classified as domestic violence (either physical or non-physical)[179] was also

[179] This is necessarily tentative, as the latter category required subjective judgements about the classification of cases, where the petitioner (or respondent) complained, for example, of being "belittled" or "demeaned" by their spouse – in some such cases, the details collected appeared to warrant designation as non-physical abuse, but not in others. Cases classified as physical abuse ranged from allegations of apparently isolated incidents to allegations of repeated and serious, even life-threatening, violence. Note also the point in the text below regarding negotiated petitions.

more common in contested cases than pure consent order cases: petitions in 25% of pure consent order cases described such conduct, as compared with 38% of petitions related to contested financial applications. However, given the best practice of negotiating the terms of the divorce petition in advance, this difference between consent order and contested cases may be as much a product of that negotiation process as an accurate account of the parties' conduct during the marriage. We found more conduct allegations on Form E or during proceedings in adjudicated cases than was evident in contested but settled cases. Only two or three adjudicated cases could perhaps be classed as highly conflicted on several fronts, but one of those (involving two parties who both lacked full time legal representation but were barred by non-molestation order from communicating with each other for at least part of the case) was probably the most difficult and procedurally complex financial case that we encountered – adjudication seemed inevitable (even though the eventual substantive outcome in the case also seemed inevitable).

Ongoing issues could be contentious even if not (yet) the subject of separate legal proceedings; in M7's most recent non-settled case, child support payments and contact were two parallel issues, at least initially contact was not being litigated, but both issues were a problematic undercurrent to the mediation sessions. But the interviews revealed two main types of ongoing legal dispute hampering settlement of the financial case: private Children Act and Family Law Act injunction proceedings (M8, S12 and S14), which may impact negotiation of the financial issues. From a positive perspective, settlement of those other disputes can assist the financial case. This is particularly pertinent where issues over children's living arrangements could influence the outcome of the financial case, if only at the expense of delay until those other issues had been resolved:

> *"There was only one Children Act hearing and eventually it was agreed through correspondence and with the assistance of the judge at the hearing that the children could live in a shared care environment. That really helped to sort out the finances because up until that point because one person was saying here is where the children are going to be and the other one saying here is where the children are going to be – if you're at odds there as is the case in most of these, it just means that the finances tend to drag and drag until you sort out what's happening with the children." (S22)*

The primary point to make here is that financial issues can be brought into focus once any outstanding children issues have been resolved. However, the secondary issue is the topic of shared care. Another interviewee, MA1, was less then enthused about the benefits of shared care in terms of the influence that the issue already has on some clients attempting to settle their finances through mediation.

> *"We've got far more people coming in saying it's shared care which is incredibly difficult because if there's one child, you can't share the child benefit, only one party's going to get tax credits. … And of course you've got to decide the kids before you can address the finances because you've got to know where they're going to be … and who needs 3 bedrooms and who needs 2 and all the rest of it." (M1)*

Given planned amendment of the Children Act concerning parental involvement in children's lives post-separation,[180] and the associated concerns about shared care,[181] it would be unfortunate if increased dispute regarding children's arrangements in turn generated more conflict in finance cases. More focused research on the impact of the reforms on financial settlement will be needed once the Children and Families Bill amendment has had time to bed down.[182]

The following quotation emphasises the number of features in a contested case which coalesce to make financial settlement almost impossible to achieve:

> *"Again, I think that was a combination of factors. There were issues of trust – I think that was one of the main things – that the wife didn't trust the husband in relation to his disclosure, and the husband … there were incidents that occurred where he lost his temper as a result of which the harassment and the occupation orders were obtained. And that all led to an atmosphere of, you know, sort of a battle between them, and then there were issues of trust over the birth of the second child which*

[180] Children and Families Bill 2013, cl 11.

[181] Trinder, 2010 and Trinder, Hunt and Masson, 2009

[182] Contrast the work of Fehlberg et al (2013) addressing the impact of shared care on financial settlements in Australia.

caused the wife, obviously, to be very upset to think that he would deny that that was his child. So I think it was all those factors and the CA [Children Act] proceedings." (S12)

Factors delaying or preventing settlement: costs, Form H and the end of Calderbank offers

As we have seen in chapter 3, the prospect of escalating costs looms large at all stages along the standard financial hearings pathway. Depending on the parties' financial position and representation status, it can operate as a brake on the case or as an impetus to press on.[183]

"I think it's the costs – they get to a point where the costs reach a certain stage and they realise that if it goes to a Final Hearing, the costs are going to escalate to such an extent and the amount that they're arguing isn't much more than the amount of costs, so that obviously focuses their minds to reach an agreement. … Despite the fact that you tell people about the costs at the beginning and we provide constant updates, I don't think they appreciate the situation until it gets to the court stage and then they realise exactly how much they've spent and how much they're going to spend." (S12)

Solicitors are required to update their clients about legal costs incurred so far, and to provide costs estimates and inform clients about the potential costs of litigation.[184] Form H provides a mechanism to record the costs incurred after proceedings have been issued, and both parties are required to file and serve Form H at each hearing.[185] It is intended to

[183] Only one practitioner noted the impact of legal aid as a factor hindering settlement. In this instance, although S26 no longer did legal aid at the time of the interview, they suggested that fighting the case to trial because of the availability of funding was a factor which could influence settlement: That "*was always my frustration when I did Legal Aid. I think it's wrong that it's going but I think it was being abused by a lot of people and that's not their fault because you think, if it's being paid for, why don't I go to court and see who gets it. But if you're paying for it, you think, let her stay there, I'll go rent."*

[184] The SRA Code of Conduct 2011. See the Legal Ombudsman's report into divorce related legal complaints, with the biggest area of complaints being cost: Legal Ombudsman (2013) 3.

[185] FPR 2010, r 9.27(1). See also Family Justice Council (2012), 13. We did not consistently find up to date Forms H on the court files, and so our data on costs from the court file survey is not robust.

act as a type of taxi-meter ticking away, reminding the parties about the costs implications of pursuing their case.

Interviewees had mixed views about the effectiveness of Form H. Some were sceptical, suggesting that clients do not really appreciate what it means (S11); some suggested that despite Form H clients do not take on board the issue of costs at all (S14 and S16).[186] Others thought that Form H made little difference as they gave regular costs updates to their clients anyway (S19). Another suggested that while the information on Form H was useful, it was not shared often enough with clients and was to some extent just being kept as an administrative aspect of the lawyer's job (S25).

Even where the Forms have been completed, served and filed, it was suggested that they are not always used in the way that they were intended, and there appears to be some inconsistency in judges' use of Form H, three practitioners commented that the judiciary do not always ask for them (S13, SM31 and SM32), whilst two others suggested that judges always want to see the Forms H (S17 and S18). Reflecting on the lack of impact that the Forms H had had in one case, this interviewee argued that judges need to make more use of costs information:

> *"But in terms of their significance, I can think of a case here that was very modest assets, less than £160,000, long duration marriage, and he's instructed a city centre (firm). … My client's fees were about £3500, something like that. His fees were £23,000, and they're on a Form H, and the judge made no adverse comment about them at all, and to me that's crying out, somebody should be saying, how on earth can this be justified?" (S13)*

By contrast, one practitioner felt that judges needed to be more careful about this: even if a *"judge takes umbrage or takes issue and says, well, your costs are too high, he doesn't*

[186] The Legal Ombudsman (2013) reported that family practice attracts the most complaints, and that around a quarter of those complaints relate to cost, but also noted that the costs were incurred as a result of the client ignoring clear advice from the solicitor: "In those instances, the client has to take responsibility for the outcome": at p 6. Moreover, in line with our findings, one reason reported for costs spiralling out of control is "the emotional rawness of many of those going through divorce proceedings": at p 5.

know, he has no idea and cannot have any idea without reading my file as to how those costs have been incurred." (S17).

Meanwhile, other practitioners felt that Form H was useful for everybody involved, particularly clients: it not only focuses the parties' minds on costs (S12, S23 and S24) but is a useful tool where

> *"your client's getting a bit difficult and you want them to settle and they're wasting time and money … but generally it is quite an effective tool to say, look, here's how much you're spending on these court proceedings collectively – that's going to come straight out of the left over pot, so let's focus on reaching settlement." (S22)*

Moreover, in contrast with practitioner S17's view about the judge's role in commenting on costs, three practitioners suggested that one real benefit lay in having a judge at the FDA or FDR give the parties a lecture about the reality of costs in light of their Forms H:

> *"I think Form Hs are very important and I think it does help settle because people can see how expensive costs are. And it's particularly good when … you get a judge that actually sits there with these two Form Hs going, especially if one party's costs are double the others, and if they can point this out and say, how absurd is this, that your costs are now £50,000 at this stage – what are they going to be at trial?" (S26)*

Another costs issue that elicited a mixed response amongst interviewees was the demise of Calderbank offers.[187] There was a noticeable difference in the type of solicitors that missed Calderbank offers (considering that their loss had had a negative impact on settlement culture), and those who felt that their removal had had no or very little impact, the former comprising most of the solicitors dealing with higher-value cases. One solicitor, who commented on this division of view spontaneously, reflected on their experience with legal aid compared with private practice:

> *"The general divide is that you have privately funded solicitors who have no experience of legal aid and will threaten costs orders at every step of the way,*

[187] See chapter 1.

whether you've got a legally aided client or not. … If you're acting with legal aid lawyers or privately funded lawyers who have experience of legal aid, they tend not to push the costs point. Privately funded and pushy [place name] solicitors still will at every opportunity." (S22)

Various reasons were offered to explain why the demise of Calderbank offers has had a detrimental impact on settlement: interviewees believed that Calderbank offers were a good incentive for settlement (S23) as they focused people's minds, (S12 and S26) whereas now more people are prepared to go to court as they *"haven't got the question of the comeback on whether [they have] beaten the offer or not."* (SM32) S14 suggested that if there is a threat that a client will be paying for someone else's lawyer, they think a lot more carefully about the offers that come in. As another practitioner observed:

"I understand the arguments put forward for not having Calderbank offers, but I don't think it makes sense. You've given away the main tool that people had to try and get things settled." (S26)

This solicitor also suggested that Calderbank offers were a "huge persuasive argument" to get a client to think about the costs implications of taking the case to a Final Hearing, suggesting that now there is no reason not to try your luck at trial. This argument would work if both parties were being advised by solicitors and had been warned of the consequences of failing to settle. However, if the other party is a LIP (whose own costs in taking the case to trial may be relatively low), that party may not appreciate how the costs rules might impact on the final outcome.

By contrast, S21 suggested that it is better for clients not having Calderbank offers as it takes the pressure off them, whilst S11 felt that clients do not fully appreciate the changes. Individuals might be expected to rely on their lawyers to explain the costs rules and the current approach is, perhaps in one sense at least, more straightforward than the Calderbank rules. SM27 did not think that the abandonment of the Calderbank principle had affected settlement culture: their view was that solicitors should not be advising in terms of tripping the other party up over costs, but should instead be trying to work towards a properly negotiated settlement. This view appeared to be shared by S19: *"I think most of us found those costs rules completely crazy anyway. They were a good tool for*

trying to batter somebody into submission, as it were, into playing brinkmanship but I don't think they actually achieved a result."

This inevitability that the costs almost always have to come from the parties' assets was addressed by S22, who suggested that it was broadly accepted in the profession that the costs position *"is as it is and the court isn't readily going to want to make costs orders against anybody."* In our court file survey, we found only 19 orders requiring one party to pay all or part of the other party's costs incurred in the financial case; nine of these were in pure consent orders and only four were made in adjudicated orders

One interviewee suggested that the advantages of Calderbank offers were really felt by the solicitors involved rather than the clients:

> *"I think as a lawyer you'd feel very confined [with the Calderbank rules] because you'd be too worried and then I'm not sure the client will get the best advice because it just reflects the worry of the lawyer who thinks, actually, we may not get better than this, let's agree to this. … I find that 80%, if not more of my clients actually do listen to what I say, so ultimately, I'm driving the case." (S25)*

This reflection emphasises again importance of the lawyer's approach to the case.[188] It also reflects the findings from previous research that *"it is solicitors' case handling (rather than judicially enunciated principle) which largely determines outcome".*[189]

[188] See chapters 2 and 3 for discussion of benchmarking of legal expectations.

[189] Davis et al (1994), 1.

KEY FINDINGS

- Adjudicated cases are, by their nature, atypical. The factors which delay or prevent settlement are, to a large extent, the “other side of the coin” to those identified as promoting settlement in chapter 2. Where they prevent settlement, they are manifested in a particularly extreme and/or complex way.

- A wide range of factors influence whether or not settlement is achieved in contested cases, loosely falling into two categories: those that are personal to the parties, and those of a legal or process-related nature: see table 4.1.

- Given the idiosyncratic features making many of the adjudicated cases apparently intractable (particularly for personal reasons), it is doubtful what if any intervention from the legal system could have led to a settled outcome, e.g. in the face of non-participation by one party.

- Some contested but settled and adjudicated cases exhibited other areas of conflict such as Children Act proceedings, domestic violence, freezing injunctions and enforcement issues.

- The impact and effectiveness of Forms H and the impact of the new costs rules, with the loss of Calderbank offers, are unclear. Practitioners had mixed views about the importance of these two factors as influences on settlement practice.

CHAPTER 5: SETTLING CASES INVOLVING LITIGANTS IN PERSON

INTRODUCTION

This chapter addresses one of the key emerging research questions in the light of recent legal aid reforms effected by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO): the experience of litigants in person (LIPs) in financial remedy proceedings.[190] Throughout this report, we use the convenient acronym LIPs to refer not only to those acting in person (without legal representation) in contested legal proceedings, in particular in conducting hearings alone, but also more broadly to those acting without lawyer support (for example in presenting an application for a pure consent order, or in mediation). LIPs are not a new phenomenon post-LASPO, but the withdrawal of public funding for lawyers' services for most private family law cases is expected to lead to an increase in numbers of LIPs as clients who would formerly have benefited from legal aid attempt to bring cases themselves.[191] While our project did not specifically focus on LIPs, we have data from the court file survey regarding parties' representation status (or receipt of legal advice and assistance short of full representation) in the financial remedy case, and interview data regarding practitioners' experience of cases involving a LIP or (in the case of mediators) LIPs.[192] The existing literature suggests that family law cases (generally) involving LIPs are less likely to settle and tend to go through more procedural stages with more hearings than those where both parties are represented.[193] Our data

[190] We use the convenient acronym "LIPs" throughout this chapter to include those acting without lawyer support in out-of-court dispute resolution stages as well, acknowledging that the concept of a "litigant" in person is inapt in that context.

[191] See generally MOJ (2011a), para 36; Hickinbottom (2013), 6.

[192] Solicitor interviewees obviously could not reflect on cases where both parties had been LIPs throughout, but the material collected provides insight into cases where there was LIP involvement on one side. Some mediators had had experience of two-LIP cases, but it is not always clear from some potentially pertinent remarks whether they were discussing cases involving one or both parties as LIPs.

[193] Moorhead and Sefton (2005), 257-8.

support this view. Cases involving parties who had been LIPs at any stage in our court file survey appeared to be less likely to settle and if settled, to settle at a later stage in proceedings than cases with no LIP involvement. And we found that LIPs encounter difficulties hindering settlement during both the usual pre-court and court-based phases of financial remedy cases.

THE PREVALENCE AND IMPACT OF LIPS: COURT FILE SURVEY DATA

Consent applications

The vast majority of pure consent order cases – those in which the initial application to court in the financial case was for a consent order – proceed entirely on paper. Parties to pure consent order applications may each have a lawyer from whom they are receiving substantial support (including correspondence with the court in response to judicial queries). Where no approval hearing is required, this may be regarded as functionally equivalent to representation, even though that lawyer is not technically acting for him or her. Only where an approval hearing is required by the judge does representation in court in pure consent order cases become crucial. As we saw in chapter 2, LIP involvement was a common reason for approval hearings in our court file survey. We identified 21 parties (11 wives and 10 husbands) who appeared in person at such hearings (5 hearings involving both spouses). Eight of these had had lawyer support for the consent application but appeared in person at the approval hearing, either because their public funding did not cover representation in court or as privately paying clients.

Approval hearings aside, in analysing the court file survey data, we have treated a party as having “lawyer involvement” wherever solicitor support for that party at or around the consent order application stage was apparent. This covers widely varying levels of involvement – e.g. in some instances, only limited (including free) advice and/or drafting assistance was supplied; in others, the solicitor was fully involved until after the consent order had been drafted. But it is not possible on the basis of the data available from court files to distinguish clearly between different levels of lawyer support. Where a party completed all the paperwork him- or herself, no solicitor details were evident, and we

found no positive indication that the party had received advice relating to the consent order application, we treat that party as acting without lawyer involvement.[194] For the purposes of table 5.1 below, we also include as "without lawyer involvement" spouses who were apparently alone in preparing and making the application, although legal advice or assistance had been provided at an earlier or later stage. In 71% of cases where only one party had a lawyer, the party with the lawyer was the wife and in 29% the husband.

Table 5.1: Representation profile of consent order application cases

Representation	Number	Percentage
Both parties with lawyer involvement	163	64%
Only one party with lawyer involvement	83	33%
Neither party with lawyer involvement	8	3%
Total	**254[195]**	**100%**

For the most part, we cannot exclude the possibility that those whom we have treated as having no lawyer involvement (107 parties, 36 wives, 71 husbands) had in fact received some legal advice or assistance at some point; for example, if they had a lawyer for the divorce itself who may have advised them in general terms about the money case. However, 25 of these parties (5 wives, 20 husbands) had made an express declaration that they had received no independent advice on the consent order application; even then it seems conceivable (even probable) in some of these cases that advice on the money issues (albeit not specifically on the proposed order) had been received at some point. At the other end of the scale, nine parties clearly were advised at some stage, in some cases when concluding a separation deed on which the consent order application was based, in others having sought advice when the judge queried the proposed order.[196]

[194] We have treated as having lawyer support one case where the wife signed in person but had solicitors who sent in the paperwork, writing to the court to say that they had advised against the proposed order.

[195] In 6 cases (7 spouses) the position was unclear; these cases have been excluded from this analysis.

[196] In the ninth case, the spouse negotiated in person with the other side's lawyer, who then appeared to assist both spouses in putting the paperwork before the court.

Contested applications

As we saw in chapter 3, of the cases which started as a contested application, 23 cases (17% of all contested cases, settled or not) settled before the FDA and a consent order application was sent in, so representation in court was not required.[197] Lawyer involvement was prevalent amongst these cases: of the 45 parties for whom we have data,[198] all bar two clearly had a lawyer or some other advisor[199] involved in their case.

The profile of LIPs in cases that proceeded to FDA or beyond

Table 5.2 below shows the representation status of the remaining 116 contested applications which embarked on the standard financial hearings pathway, over 80% of which settled.[200] In analysing these cases, we have categorised individual parties as "represented" if they were represented throughout the case (save for the very early stages and very late stages of the case)[201] and "unrepresented" if they acted in person at any point during the case.[202] We have then used that information to classify cases as either

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[197] Only in a handful of these cases can we say confidently from the data collected that one or both spouses would have been represented had the matter proceeded to FDA stage and beyond; for most cases, the nature of the known solicitor's involvement is unclear. In two of these cases, there had been hearings on applications for maintenance pending suit at which one party appeared in person.

[198] One spouse's lawyer involvement status was unclear.

[199] In two cases, the husband appears to have received advice (and, in one of those cases, assistance) from an organisation other than a solicitor.

[200] See chapter 3.

[201] E.g. issuing proceedings without a lawyer but solicitor then very quickly comes on board; case settled and consent order application fully prepared, but party attended a routine approval hearing alone.

[202] We have treated parties as "unrepresented" where they appeared in person at a hearing, and also in cases of non-participation and non-attendance (including cases where a lawyer was present in the party's absence but expressly not on the record as acting for the party in question). In six cases where we are missing data for part of the attendance record at key hearings (FDA, FDR, FH), we have inferred each party's overall representation profile based on the data available; this is chiefly relevant to the decision to classify some parties as being represented throughout. Data regarding extra directions hearings was not always clear.

fully represented (where both parties were represented throughout), semi-represented (where one party was represented throughout, but the other not) and neither party represented throughout.

Table 5.2: Representation profile of contested applications that went to FDA or beyond

Representation	Number	Percentage
Fully represented	75	65%
Semi-represented	33	28%
Neither party represented	8	7%
Total	**116**	**100%**

In the 33 cases in which one party was not represented throughout, 11 of those parties were wives and 22 husbands; and in the cases for which we have the information,[203] 8 of those acting in person at any stage were applicants and 23 respondents.

Our data suggest that being a litigant in person is not a homogenous experience – there is considerable variation in the nature and timing of LIPs' acting alone. Amongst the 49 parties who acted in person at any point:

- 20 were in person throughout (8 wives and 12 husbands) and appeared in person at all hearings;[204]
- 24 were represented at some point (10 wives and 14 husbands); and
- 5 parties either did not participate at all or very nearly so.

While 22 parties appeared in person at some hearings, they experienced different trajectories of partial representation:

- some started out alone (or were absent) but acquired representation later;
- others started with representation but later acted in person; and
- and others moved in and out of representation more than once.

[203] In one case, we know that the application was contested, but do not have data on the applicant's identity. In two cases, there were cross-applications.

[204] For which we have data: see n 202 above; in one further case, one party was entirely absent for the first hearing but represented thereafter.

Five parties failed to attend (in one case, after having acted in person at some early hearings). And in two cases, the party was represented at all hearings but acted in person in between.

There was also evidence that 32 of the 49 parties acting in person at any point had received some legal advice. We include in that count parties who were represented at some stage. Where the party was represented before acting in person, that earlier advice may have helped them when later acting in person. However, where representation was obtained later or intermittently, we do not know whether the party had access to advice throughout their time acting in person.

Settlement of cases involving LIPs

Amongst cases that went to the FDA or beyond, fully represented cases in our survey were more likely to settle (93%) than those involving one party who was acting in person at any stage (72%) or those where both parties were in person at any stage (38%).[205] While there appears to be an association between legal representation and settlement, we cannot say whether lawyer involvement (or not) itself is necessarily causally related to settlement being achieved (though it might be); it may be that the types of parties or cases involving LIPs are systematically different in some way from those in which parties are represented. Table 5.3 reports <u>when</u> the 92 cases which settled before the Final Hearing did so. We have excluded the three cases that settled at the final hearing; these had a mixed profile, although none – for good reason – had had an FDR.[206] Since there were only a small number of cases in which neither party was represented throughout, we have combined these with semi-represented cases for the purposes of statistical comparison

[205] A Chi square test suggests that this finding is significant: Chi sq =20.913, df=2, p=<0.001, though we note this with some caution given the various limitations of our dataset discussed in Appendix A. It is important also to bear in mind that our coding of a case as involving a LIP or LIPs does include cases where there was some lawyer input (at some hearings and/or out of court), so we may be under-estimating the difference between fully represented cases and what might be called “pure” LIP cases.

[206] Note also the two cases mentioned above which went to a final hearing but in relation to which it is unclear from the data collected whether the final order was made by consent: in both of these, both parties were represented and present at the final hearing, but the earlier profiles had been mixed.

with fully represented cases. We have used two broad categories to identify stage of settlement: pre-FDR, and at FDR or before a final hearing (i.e. usually[207] following the input of an FDR[208]). Cases in our survey involving one or two parties acting in person at any stage were more likely to settle at a later stage of proceedings (at or after the FDR) than cases where both parties were represented throughout, which were more likely to settle before the FDR.[209]

Table 5.3: Stage at which case settled by representation profile

Representation	When did case settle		Total
	At FDA/before FDR	At FDR/before FH	
Fully represented	29 (43%)	39 (57%)	68 (100%)
One/both in person at some stage	2 (8%)	22 (92%)	24 (100%)
Total	**31**	**61**	**92**

WHY MAY LIP CASES BE LESS LIKELY TO SETTLE?

In order to explore why it is that cases involving LIPs may be less likely to settle, we turn to the interview data to explore solicitors' and mediators' experience of handling these cases.

The need for expectation management and the effects of its absence

The preceding chapters have highlighted the importance of solicitors' management of their clients' expectations as a factor promoting settlement.[210] That expectation management

[207] Though not always: we include here three cases in which no FDR was due to take place – or had apparently been abandoned – because it was not expected to be productive; in a fourth case it was unclear whether the FDR took place.

[208] Including four cases in which the FDA was used as an FDR.

[209] Again, a Chi square test (with continuity correction) suggests significance: Chi square (with continuity correction) =7.876, df=1, p=0.005; using Fisher's Exact Test (given low expected cell counts) also gives a significant result: p=0.002. But we express the same cautions as at n 205 above. Again, this apparent association of lawyer involvement with earlier settlement is not necessarily indicative of a causal connection.

[210] See also Sarat and Felstiner (1986), Moorhead and Sefton (2005), 173, Ingleby (1992), Davis et al (1994), Eekelaar et al (2000).

commonly covers three broad areas: what can be achieved as a matter of substantive law (legal benchmarking); the practical constraints which may make parties' preferred substantive outcomes difficult or impossible to achieve; and the procedures through which the parties will have to go to achieve what they want. The obvious question that arises for LIPs is how, if at all, the unrepresented party's expectations are managed in the absence of a lawyer. Moorhead & Sefton found that LIPs struggle with both substantive law and procedure, particularly in translating their issues into a legally relevant form. They have difficulty in identifying legally relevant matters, understanding the purpose of litigation, and may confuse law with moral notions of "justice".[211] These problems may result in confusion for the LIP and difficulties for family justice system professionals attempting to settle their cases.

Our interviewees reported a very similar picture. LIPs who have had no tailored (or no) legal advice have not had anyone evaluate the strength of their case or indicate the range of outcomes within which settlement might reasonably be reached: there will have been no "legal benchmarking". LIPs' difficulties in understanding the legal landscape of their case may be elementary, for example not understanding what the different types of orders entail (e.g. a property adjustment order, pension sharing order or nominal maintenance order) (S13).[212] Such basic problems of understanding may impede the settlement process, not least as the LIP will not know if the other side's offer is a good one that should be accepted (M1, S21 and S23). This may delay or entirely prevent settlement. Without a lawyer, the first occasion on which the LIP gets any legal benchmarking if proceedings are issued may be the FDR. However, as discussed below, it is debatable how effective the FDR can be where one party is a LIP.

Our interviewees also touched on how the problem of LIPs' tendency to confuse law with moral notions of justice can influence their approach to settlement. For example, personal hurt over an affair or an ex-spouse's "unreasonable behaviour" may impede the LIP's emotional readiness to settle and colour their view of what outcome is substantively fair.

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[211] Moorhead and Sefton (2005), 256.

[212] Ibid, 166-8.

There may be a wide gulf between the legally reasonable range of outcomes and the outcome perceived by the LIP to be reasonable:

> *"The person that's represented will be saying, this is what we're proposing, but they [the LIP] will be saying, that's not a good deal because of these issues that I've got in my mind about this, that and the other, so they just won't settle. (S26)*

However, a few practitioners suggested that some LIPs can be very constructive and willing to engage. LIPs' ability to engage positively with the negotiation process may depend on the character of the individual LIP: *"I've got two or three (mediations) on at the moment. Often they're really nice people who have said, we would like to sort this out without getting lawyers involved … we can communicate, we need some guidance."* (SM31)

LIP difficulties in the solicitor negotiation process

> *"…[W]e're quite used to working with LIPs – it's not that that's a new thing. It's recognising that that is much harder generally speaking than working with another solicitor." (S23)*

Solicitors suggested that LIPs' limited knowledge of both law and process contributed to their general reluctance to settle. For example, they might worry that they are settling at too low a level and surrendering further rights, or they may be nervous about negotiating alone with the partisan legal expert acting for their ex-spouse:

> *"I think without independent legal advice and guidance people are far more likely to take a defensive and hard-line approach through fear of being pushed into agreement, especially if they know the other side has got a solicitor cos they'll think, they'll try and weasel me out of as much money as possible, so I'm not going to agree to anything more on paper." (S22)*

Previous research has highlighted how LIPs' completion of key court documents can be poor.[213] The weakness of LIPs' paperwork can also impact on negotiation, drawing out the

[213] Ibid, 149.

process whilst questions go back and forth. In some cases, poor paperwork may seem to be a deliberate tactic: one practitioner suggested that it can be strategically quite good for the LIP to conceal information during pre-court negotiation on the innocent basis that *"'I don't know what to provide, I didn't realise how to do it'."* (S25) But LIPs' difficulties in this area are understandable, given the realities of everyday life. Correspondence takes longer because LIPs have to fit in a reply to a solicitor's letter around their working lives: *"they've got to speak to someone about it. Or they just take the initial defensive approach and they won't agree to anything you say because you're a lawyer and you're slippery."* (S22)

The solicitor with no counterpart on the other side may find that the LIP views them either with disapproval or as a lifeline.

As an example of the former, one solicitor reported having had to approach the judge to explain that they were having serious difficulties in negotiating with a LIP (various accusations of bullying and intimidation were being made against the solicitor) and the legal adviser was not prepared to negotiate further without someone else being present: *"And the judge has actually sat there and negotiated with us because they've understood what the other side can be like."* (S16)

Conversely, the LIP may disproportionately rely on the other party's legal advisor to assist them, for instance with the paperwork or general legal advice. But our solicitor interviewees reiterated that although they do not want to be advising the LIP because they are not their clients, you do *"want to provide them with some kind of guidance"* (S12). Having boundaries in place appears to be vital for the one legal representative involved. But this is difficult balancing act for the solicitor who has to be very careful that they treat both the LIP and their own client fairly and, crucially, the solicitor also has to make sure that their client does not think that the solicitor is unduly assisting the LIP (SM27).

> *"you have to be careful that you don't take an unfair advantage, that they understand the process without giving them legal advice, and it ha(s) the knock-on effect that your client is saying, "'well, hold on a minute, I'm paying you this, yet we're bending over backwards to make sure he understands the process – how can that be fair'?" (S14)*

The issue of the represented party incurring higher costs as a consequence of the other party being a LIP came up recurrently in interviews. The represented party may be left feeling particularly aggrieved if they end up paying for additional time and work incurred by their legal representative supporting the other side. It was suggested that when cases involving a LIP proceed to a final hearing, the onus is placed on the represented party to deal with bundles and other essential court documentation, inevitably raising the represented parties' costs (S22 and S23). This is particularly frustrating when the represented party is the respondent, as this effectively reverses the ordinary expectation that the applicant will take the lead. This sudden shift in the ordinary costs burden is something about which the solicitor has to be careful (SM29).[214]

The LIP may be content to persist with the contested case on the basis that their ex-spouse is incurring the legal expenses, possibly unaware or indifferent to the fact that the legal costs incurred by that spouse will eventually come out of the finite matrimonial pot. Practitioner S26 emphasised the limited costs impact on a LIP: *"you know, maybe they've not even paid the court fee to issue, so they could go right through to a final 4-day trial and it won't cost them a penny, so what incentive is there for them to settle?"* Indeed, it was suggested that some LIPs enjoy dragging their feet (and causing delay) precisely because they are aware that their ex-spouse will be incurring legal fees:

> *"There is this feeling, when people are getting divorced, they generally don't like each other very much, and if you feel that you're incurring no costs at all but your husband or wife is wasting money on lawyers, the fact that that might impact on you in the end because they'll be less to divide up quite often doesn't really have much of an impact at the time." (S23)*

Another interviewee recalled a case where one very educated and informed LIP played what the solicitor regarded as a calculated game of being as awkward as possible until

[214] As do judges: the Draft Guidance for judges conducting hearings involving LIPs in family proceedings (see Hickinbottom (2013), Annex B) notes that the duty of a legal representative of another party in the case "does not extend to providing cover for the deficiencies or lack of facilities of the [LIP] in presenting his or her case; nor can they be expected to do so in a way that is onerous or allows them to bear a disproportionate cost": para 27.

they got to court, particularly by failing to give full disclosure. He then presented a persona of *"being a reasonable man, intelligent, look at me, I'm a [professional person], but knowing that she had limited funds and (they) would run out, and she did, so … he wasn't interested in settling."* (S24) Another solicitor gave an example of where costs doubled because their client's LIP husband was being so difficult; *"Didn't listen to the judge, didn't listen to anybody."* (S20).

Negotiation with LIPs at the FDR

As explored in chapter 4, a key stage in contested cases is the FDR. A positive FDR requires:

> *"Everybody complying with the directions, so replies to questionnaires, valuations in, parties coming to court with their offers, schedule of assets for the judge, and letting the judges know where we're at." (S18)*

However, in cases involving a LIP, one or more of these aspects is invariably missing and the judge is left to sort out the mess, likely to be all the greater where both parties are unrepresented and have had to navigate the procedural paperwork unaided.[215] The District Judge will therefore enter the melee with crucial information missing, misapprehensions of law and process needing correction, and issues probably not as clearly defined or as narrowed as they might have been had the case had lawyers on both sides. The 'usual' settlement focus of the FDR is compromised by these additional burdens on the judge:

> *"The FDR is a really great way of getting cases settled … it's only when they get to FDR that they hear both from their lawyers and then usually from the judge that some compromise is going to be sensible that then so many cases settle, either at FDR or very soon afterwards. But they do that when they've got lawyers on both sides. It's almost impossible to do that if one of the parties is a litigant in person*

[215] We identified only three cases in our court file survey in which neither party was represented at the FDR – none of them settled at that stage. We found no statistical significance in settlement rates at FDR depending on whether both parties were represented at that hearing.

because what's happening at the FDR is not – let's say it's 50/50 the lawyers and the judge - the judge doesn't know enough about the detail of the case." (S23)

Preparation for an FDR is demanding. All bar the most able and informed LIP will find it challenging to complete Form E,[216] prepare and respond to questionnaires, comply with directions and even understand the basic nature of the FDR as a hearing aimed at settlement. Where only one party is a LIP, particularly if the LIP is the respondent, there may be greater chance of a successful FDR as more of the required information will be to hand and at least one legal representative present to encourage negotiation. One interviewee reflected on an FDR case where

"it settled very amicably with both parties being – I wouldn't say pleased with the result but content with the result is probably a better word because the litigant in person felt that he's had a fair crack of the whip and our client felt that we'd handled it sensitively and hadn't tried to bully him." (S11)

However, comments from various solicitor interviewees appear to suggest that achieving settlement at an FDR with a LIP on the other side can be challenging, especially where the LIP is reluctant to talk to the other side's legal representative. There were thought to be various reasons for this: mistrust of the lawyer; unwillingness to negotiate due to a misunderstanding or lack of knowledge about the nature of the FDR; and a natural hesitation in concluding matters where the LIP is not confident about what they are entitled to.[217]

"What I do find generally if you've got a litigant in person that it doesn't settle at FDR. I think it's much harder for a litigant in person to speak to the lawyer on the other side and actually feel that they're able to negotiate and that they're not missing out

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[216] Moorhead and Sefton (2005), 151, identified Form E as one of the two documents which stood out as "causing particular problems" to LIPs in first instance civil and family cases.

[217] Elsewhere, LIPs have reported a reluctance to speak to lawyers because of the perception that the represented side will take advantage of them and their situation and therefore the only person the LIP trusts is the judge: see Moorhead and Sefton (2005), 172-3.

on something – I think there's that natural suspicion and so they're very hesitant in concluding things." (SM29)

"… trying to negotiate on a finance FDR is just impossible. I'm trying to think if I can recall one where we have negotiated a settlement – and I can't think of one because they [LIPs] just don't get it." (S13)

The success of an FDR may also be compromised by the difficulty that LIPs may have in understanding what the judge is saying. Unlike the represented client, the LIP has to try to understand the nature and content of proceedings as well as the judicial indication and its implications without any assistance (unless, perhaps, he or she has a good McKenzie Friend[218] on hand). One interviewee highlighted this potential problem when discussing their own clients' difficulties in understanding judicial indications:

I think actually with FDR judges, it's also my view that the clients don't actually understand what an FDR judge is saying. I mean that quite earnestly. I think the client is listening to the lawyers – the solicitor and the barrister – and so we're very much the conduit of what the FDR judge is actually saying." (S25)

S25 illustrated this difficulty with their most recent initially contested but settled case. The indication was primarily concerned with spousal maintenance, and in particular, the question of the sharing principle applying to bonuses.[219] The solicitor suggested that the client wanted the other side's bonuses to be taken into account, *"but of course the case law really shows that bonuses are only taken into account for 2 or 3 years at most and not beyond that. … And I think that's very hard for a client to deal with. And as a lawyer, I find that quite difficult."* (S25) If the lawyer finds this complex issue tricky, a LIP is highly unlikely to be able to deal with it, never mind interpret a judge's indication on the issue.

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[218] A McKenzie Friend is a lay person who provides support to a litigant in person before and/or during the court hearing. See the 2010 Practice Guidance: McKenzie Friends (Civil and Family Courts).

[219] See for example *H v H* [2007] EWHC 459.

A number of solicitors suggested that the role of the judge at the FDR and their approach to the LIP is essential to reaching settlement. As seen in chapter 3, judicial approaches to the FDR vary (regardless of whether LIPs are involved) and practitioners similarly reported varying judicial approaches to FDRs including LIPs. (S15 and S17) Practitioner S11 applauded the approach of the district judge in one case. Having allowed the LIP to vent his frustrations about the case in the courtroom for about 20 minutes, the judge was then able to introduce gradually the concept of how the FDR works and in particular to emphasise that its purpose is not to determine who is right and wrong. This approach *"made (the LIP) think and we had some very constructive calls from him after the (FDR) and it settled within probably 6 to 8 weeks."* (S11)

Some practitioners reported that certain judges expected that where there was a LIP in a case, the lone solicitor would be expected *"to go the extra mile for them (LIPs), but that's not fair on your client, … so then you have to balance it – is it better for my client for me to explain to (LIP) why I'm doing it, than it is to just let him get it wrong?"* (S15) However, other practitioners appreciated that the judge is involved in the same balancing act: encouraging the LIP to negotiate with the other side while trying to steer the parties in the direction of settlement, but without giving advice to the LIP.

LIP difficulties in mediation

We asked mediators about their experiences of mediating cases where one or both parties do not have the support of a lawyer. Although not all LIP mediations were reported to be problematic or complex (SM31), mediator interviewees identified several difficulties similar to those encountered by solicitors.

Mediators reported that it was harder to mediate in a case where only one party has solicitor advice in the background. One mediator suggested that such clients feel disadvantaged, and they demonstrate that by expecting the other person's solicitor to work for both of them or by scuppering any deal reached *"because they go away and think that they've been somehow stitched up – because why wouldn't they, because the other person had a solicitor".* (M9) Another mediator suggested that if neither party has lawyer

support, that too affects the LIPs' approach to settlement as neither of them is getting any legal benchmarking (outside the mediation):[220]

> *"I think that if you catch people that have had a discussion at home and have not had any legal advice at all, then quite often their ideas can be different, to put it kindly. Some will be totally unbelievable and you'll think – you do have to say to them, 'look, it's got to be workable'." (M3)*

Consequently, mediators consistently emphasised how important it was to have a solicitor in the background during the course of finance mediation, in particular:

> *"I think for finance you need a solicitor." (M10)*

> *"Mediation works best if they've got access to legal advice." (SM27)*

Mediators also reported that LIPs tend either to be too rigid or too flexible in their approach to settlement, either of which can cause problems. Rigidity can involve a LIP going into mediation with a fixed idea about what the outcome should be – perhaps acquired from a misunderstanding or lack of knowledge of the law – and nothing that the mediator can say will shift them from that idea. Flexibility is also problematic, particularly when the LIP has no sense of what they are in principle broadly speaking entitled to, as this may mean that *"they will perhaps settle for completely inadequate arrangements".* (M1)

The imbalance created by the presence of one LIP in mediation may be manageable, but it was said that this depended on the LIP's level of knowledge, research and willingness to cooperate. (M2) Consequently, one mediator suggested that there was a need to give LIPs as much information as possible: they suggested that the mediator needed to provide that information using material such as an information pack that outlines key aspects of the substantive law as well as information about gathering documents (and why they are needed). However, this mediator was also very aware that other mediators disagreed with that basic position as to the provision of information to clients:

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[220] On the inability of the mediator to provide legal advice, see note 112, in chapter 2 above.

"If I get irritated with mediators, it's when I go to things and people say to me, our job is about empowerment, it's not to give anybody information, it's empowerment for them to go out and get it. Why make their life more difficult than it is?" (M3)

CONSENT ORDER AND OUT OF COURT SETTLEMENT IN LIP CASES

Judicial intervention

We saw in chapter 2 that there are various reasons for judicial intervention in pure consent order applications. In particular, where it appears to the court that one party is acting in person, our interviewees suggested that certain judges/courts will ask to see the parties for a short approval hearing so that the judge can be satisfied that the parties, especially the LIP, understand the consequences of the order that they are asking the court to make.

"I think it's an automatic protectionist approach, protect this poor person from being exploited. And I think it sort of sets the antennae going a bit when they see that they're not represented. I had one case where I think we were ending up with 90% of the assets and he had 10% and the judge called us in on that one, and point blank told the husband that he should not agree to the order, but he still wanted to, so she adjourned it, and having adjourned it, we went back and he still wanted to do it – she was adamant that he shouldn't but we managed to get it through." (S17)

We discuss further in chapter 7 the possibility that use of approval hearings for this reason may become more common post-LASPO, if more cases come through involving LIPs.

Drafting orders

A number of the solicitors to whom we spoke expressed concerns (looking ahead to LASPO) about who will draft a consent order where both parties are LIPs, and where one party only is a LIP, how the LIP will deal with the negotiation surrounding the wording of the consent order. Where two LIPs are involved in a contested but settled case, it will invariably fall to the judge to draft an order if settlement occurs at one of the court hearings, but who will draft the order where parties agree outside of court? The parties themselves? One interviewee was scathing about a lay person's ability to draft a consent order:

"an intelligent person can't do a consent order, full stop…. What will happen with self-represented people, I do not know. They'll be making applications to court and the judge will be sitting there trying to draft a document that's 4 or 5 pages long." (S15)

Or no orders at all?

On the other hand, concerns about drafting in such cases may be beside the point: parties negotiating without lawyer support who reach their own agreement may simply be unaware of the benefits of obtaining a consent order – or of the possibility of doing so. Several practitioners suggested that without legal advice some people just will not seek orders, a number expressing particular concern about the disproportionate impact that this may have on women. For example, wives (and husbands) without lawyer support may be entirely unaware of the possibility to obtain a share of their ex-spouse's pension and may be *"fobbed off with 50/50 settlements or something akin to that because they can't really afford the lawyers and it's all terribly complicated about pursuing a pension claim."* (S21) This is consistent with previous research that has highlighted lack of legal representation as a major problem for women, in particular, especially in relation to the risk that they will surrender (unknown) legal entitlements in order to resolve the dispute quickly.[221] Likewise, another practitioner suggested that:

"we're going to have another generation of old ladies with no pensions. And they (the judiciary) are saying, no, no, no, if I get those consent orders, I'll be checking on pensions. And I'm thinking, yeah, but you won't be getting the consent orders through, because people don't go down that route, they make the agreement between themselves, they think that's it and that's all they do, and people don't really think about the pensions. And I don't know anybody who's a litigant in person really knows how to implement the pension sharing order or to actually consider whether that's appropriate." (S19)

[221] Grillo (1991), Smart (1995) and Hunter (2003).

This same concern was exemplified by another practitioner's comments when discussing clients with lower means whose legal aid eligibility would cease in April 2013:

> *"A lot of them, especially when they have very minimal assets, they aren't going to be too concerned about consent orders – because we find that already – that they don't really mind if they haven't got a clean break agreement … They just say, oh, we're not too bothered about that, we'll sort it out between ourselves. And obviously we've got other clients that come back 15 years later who have had problems." (S16)*

It will be important to monitor numbers of consent orders in future years to see whether LASPO does prompt a drop in the number of orders being made.

Self-negotiated agreements

Private ordering has long been a norm of family law practice and a policy priority. Since financial orders appear to be made following only around 40% of divorces, tens of thousands of divorcing couples in England and Wales obtain no formal resolution to their financial and property affairs.[222] Our research design (relying on family justice system sources) inevitably meant that we did not collect any data on parties who remain totally outside the system (i.e. neither going to mediation nor approaching a solicitor for a formalisation of their financial agreement). However, our interviewees did have examples of cases where clients approached them with agreements that they had negotiated without mediator or solicitor input.

Some parties had come to the lawyer with a ready-made agreement. In one interviewee's example, the agreement had been reached not through mediation but by direct informal discussions:

> *"…it was a kitchen table agreement, to be honest. They were both very sensible, pragmatic people. The breakdown of the relationship was consensual … I think they felt that it was just a case of they'd both contributed to the marriage, there wasn't any*

[222] See sources referred to in chapter 1; Pleasence et al (2010).

children and they thought it would just be an equal division … I think they had just decided that they felt that was fair for them." (S12)

An equal split of the capital assets in this case appears perfectly legitimate both from an 'objective' legal perspective and from the point of the view of the parties. This approach, however, requires parties to understand their own finances, and have an appreciation of what range of outcomes is feasible and practical for them. In some cases, a (theoretically appealing) equal split of capital assets on a clean break basis may not be legally viable or appropriate (and so may be queried by the judge on a consent order application): e.g. a needs case with limited capital assets but high income, or a long marriage yielding only the former matrimonial home and one spouse's pension scheme. In these situations, it is essential that both parties understand the range of possible outcomes (in light of full disclosure) if a fair outcome is to be achieved.

Our interviewees' experience of this practice appeared to be mixed.[223] Four solicitors[224] indicated that it was unusual or relatively rare for them to be approached to convert a self-negotiated agreement into a consent order: *"It doesn't happen very often that people self present and say, we've agreed a, b and c, can you implement it?"* (S13) One solicitor had had some experience of this, but not often (S25) while two others suggested that such cases are becoming more frequent.[225] By contrast, six solicitors[226] (the largest grouping) reported that such cases occurred relatively frequently:

"We get that quite often, especially if you've got divorce proceedings live, we always mention the finances at the beginning and then a lot of clients come back to me and say, right, I've spoken to my ex, this is what we're doing for the finances – can you sort that out for us?" (S16)

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[223] Obviously our data on this is limited and not statistically representative in any way, but it does give a flavour of the diversity of practitioner experience in this area, which may merit further research, particularly if such cases become more frequent.

[224] S16, S11, S22 and S13.

[225] S14 and S21.

[226] S16, S18, S19, S21, S23 and S26.

Finally, one solicitor[227] suggested that whilst it is not uncommon for parties to come in with a self-negotiated agreement, more commonly they have already managed to agree some things but the more tricky or thorny issues remain unresolved. The difficult question for the solicitor at that point is whether to unravel it all and start again, or whether (potentially problematically) to focus only on what has not been sorted out. As we discuss below, piecemeal negotiation of this sort can cause difficulty in so far as ideally one needs to take a holistic view and ensure that the whole package is fair.

One of the obvious advantages of a self-negotiated agreement (assuming that neither party has been subjected to undue influence or pressure to agree) is that having agreed its terms themselves, the parties may have a greater incentive to make it work.

> *"So if the court says: you've got to pay child maintenance or spousal maintenance of £500/month, your husband will spit feathers about it. But if you've agreed it between the two of you, he's much more likely to stick to it, and that's my experience of how orders work. So if there's any scope for the two of you to sit down with a pen and paper – you know, this is not rocket science, you work out how much you've got, and then it's usually common sense." (S20)*

Practitioners also felt that self-negotiated agreements could be affordable and realistic (S16 and S20), reduced cost (S14), and enhanced prospects of maintaining good ongoing relations with the ex-spouse (S16). Of course, parties who negotiate directly are a self-selecting group: the benefits associated with these cases may therefore be a reflection of those parties' personal characteristics and relationship quality, rather than a product of the fact that they have reached agreement by themselves.

Solicitor S20 remarked above that reaching a workable agreement can be a matter of "common sense". However, "common sense" outcomes may come at the expense of (and be reached in ignorance of) the parties' legal entitlements. Self-negotiated agreements again raise the problem that LIPs may have in legally benchmarking their own case. When the lawyer is approached, he or she may need to upset the "common sense" agreement by

[227] SM29.

drawing attention to entitlements which have been overlooked, in light of which the "common sense" agreement is unfair. A related difficulty for the practitioner in this situation is disclosure, particularly where a client wants an agreement made into a consent order and the solicitor has to say that they cannot advise the client whether it is reasonable until financial information has been exchanged. (S22 and S25) One solicitor suggested that this difficulty can sometimes be manoeuvred around: *"they [the client will] have a good understanding through being in the marriage as to what exists and what doesn't exist."* (S25)

The dangers of relying on common sense without any awareness of parties' legal entitlements are illustrated by the following case. On being approached with a self-negotiated agreement, the solicitor realised that the wife had not considered the husband's "fantastic" pension and, crucially, had not realised that she could make a claim on it. This omission was mentioned to the wife who then wanted to renegotiate the agreement in order to claim some of the pension. The husband, in response, was reported to be prevaricating and *"holding her to ransom with numerous things, including the house sale."* (S16) By contrast, in a more recent case, the content of the self-negotiated agreement was fine because the solicitor had already looked at the assets with the wife: *"we went through everything and I said, well, this is what you'd be looking at if we went to court, so she knew exactly what would be fair."* (S16)

These cases show how self-negotiation without up-front legal input can be a wasted effort. With some awareness of each other's legal rights and obligations, both to each other and to children, the latter couple were able to agree a fair and workable settlement, whereas the other couple's agreement unravelled because a major asset had not been considered, putting the wife at risk of making a decision which could compromise her long term financial position. However, even where initial legal advice has been given, it may not always lead to a realistic settlement:

> *Interviewer: "Do you have much experience of clients coming to you with self-negotiated agreements?"*
>
> *S19: "Yes. Sometimes those work, sometimes they don't. We often find … that people come in and take some advice, go away and start negotiating and come*

back. Sometimes they come in with an agreement. Sometimes they are workable. Sometimes they're not. It's the usual thing where they've decided it's all going to be split 50/50 and you say, well, is this really workable?" (S19)

One practitioner suggested that more online information services would assist people negotiating their own financial settlements. Such services might give a broad sense of what parties might be entitled to and may enable parties to appreciate the value of getting their agreement formalised as a consent order. However, any online advice would inevitably be general in nature and not a ready substitute for the tailored advice that solicitors are able to give to their clients. It is difficult to see how parties with no legal training could successfully apply very general legal information to resolve their own case satisfactorily.[228]

THE POST-LASPO LANDSCAPE: NEW FUNDING MODELS

The interviews indicate that having tailored legal advice is important in both pre-court and court process as an aid to settlement. However, it remains to be seen whether all parties who would benefit from such advice will obtain it in future. The family law funding landscape has now been changed by LASPO, and (conducting our interviews before LASPO's legal aid reforms came into force) we discussed with practitioners what changes they were considering putting in place to deal with the post-LASPO funding environment.

Unbundling of legal services

Unbundling of legal services is not a new concept.[229] The traditional model of legal service provision is the full-service retainer, whereby the solicitor handles all elements of the case for the client, normally on an hourly-fee basis. A client who cannot afford that traditional "full" legal service may instead want to pay for discrete legal services, such as initial advice or the drafting of a consent order – and so these are "unbundled" from the full-service model for the client to pay for separately.

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[228] Any individual accessing online resources needs to have a basic level of legal knowledge for the online material to be of use to them: Macfarlane (2013),10; Denvir et al (2011).

[229] See Moorhead and Sefton (2005), 53.

The unbundling model has met with criticism from some in the legal profession, who compare unbundling to *"taking your car to the mechanic once you've had a go under the bonnet yourself or a patient attending surgery once they've made the necessary incisions on themselves".*[230] Despite such criticisms, our interviewees were on the whole open to the concept.[231] Some suggested that they or their firm would not need to use it as they were not a legal aid firm and *"most of our clients have their lawyers on speed dial round here".* (S11) However, others indicated that they were already offering unbundled services:

> *"what you find are people now … dip in and dip out. … some of the lawyers won't do it unless they're taken on at the beginning and seeing it through to the end. The way I see it, a lot of our role is going to be that we'll be advising in the background a lot more. People will be doing the paperwork themselves but you will almost be approving it and giving them a bit of guidance as and when they need it." (S13)*

Another interviewee suggested they were thinking of offering a type of *"pay-as-you-go"* system, assisting clients with any forms that needed completing, but not being available to deal with phone calls or correspondence. (S16) Another firm was exploring various options, including unbundling, for which they may offer a:

> *"'hands off' service where we can give people straight legal advice about ways to move forward but ultimately they do all the bits and pieces. Or perhaps a more involved one like helping them draft a document, statements, that sort of thing but ultimately they go to court and represent themselves." (S22)*

However, some considered unbundling a messy option, with clients sometimes getting more work out of solicitors than the fee paid (S14). This solicitor gave an example of an "unbundled" client who was representing themselves at the final hearing, who rang from court because they needed advice and assistance. Another practitioner suggested that

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[230] Walker (2013).

[231] Contrast Moorhead and Sefton's findings where when considering why levels of unbundling may be low the authors identified reasons such as "resistance on the part of the lawyers, or protection of their market for advice": (2005), 54.

there was a huge potential for negligence if the solicitor is not in control of the case, for example because of the difficulties of advising in isolation on one particular issue (SM31).

However, despite these concerns, the post-LASPO environment requires firms to consider offering these sorts of services and unbundling is considered a feasible option. Notably, some of the problems just identified have been addressed with the Law Society's recent practice note on unbundling for family lawyers, which emphasises the importance of solicitors clearly defining the limits of their work for "unbundled" clients, and exercising discipline to keep within the terms of the agreement.[232]

Fixed fees

A number of solicitors suggested that several of the firms in and around their area would be offering fixed fees (S18, S19, S22 and SM28). It was the main option being examined by one interviewee's firm, given that legal aid work constituted 30-40% of the firm's financial remedy work:

> *"The push now is towards enabling those clients that would have qualified for legal aid to see how they could fund a private case if they wanted a solicitor. And that's a challenge for us. … We're looking at fixed fees. We sort of dabbled with litigation loans at the moment though I'm not that impressed with what's out there at present, or, perhaps more so, whether it would fit our client type." (SM29)*

Some solicitors said that they would not need to offer fixed fees, appreciating that they were fortunate in still having quite a lot of private clients who can afford to pay: "*I think here we're sheltered from it to a certain extent."* (S26) However, others indicated that fixed fees and unbundling were options in the new funding environment, leaving the client to choose which would best suit their circumstances. (S22 and SM28)

A fixed fee approach helps clients control their costs; they are aware of the fee that they will be paying for the service and can budget accordingly. However, for the solicitor,

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[232] The Law Society has recently published a practice note on unbundling for family lawyers: available at: www.lawsociety.org.uk/advice/practice-notes/unbundling-family-legal-services/ [last accessed 20 Sept 2013].

although fixed fees can be a relatively straightforward solution for certain cases, such as obtaining a divorce, it is harder to fix a fee for handling financial remedy proceedings, when it is unclear how the case will pan out, how long it will last or how complex it will be:

> *"Well, we are looking into setting up fixed fee work as far as we possibly can. Obviously the difficulty with contested proceedings is that we can't possibly put a fixed fee on it and so it's difficult." (S22)*

Moreover, complexities are not confined to contested cases. One interviewee highlighted that even a fixed fee clean break consent order can have hidden complexities which mean that the firm has to be very careful about the type of case for which they offer that sort of service: *"We wouldn't do it if there were kids, we wouldn't do it if there was any maintenance, we wouldn't do it if there was any pension. So there are lots of caveats and get out clauses."* (SM32) This interviewee's clean break consent order fixed fee deal was for the recently married couple with no children, both professionals, who just need to walk away from their marriage and tie it up properly.

Time will tell whether these and other[233] new funding models will enable previously funded clients who cannot use mediation to access the advice, assistance and/or representation required to enable them to conclude their financial remedy cases efficiently, effectively and fairly; whether some clients will simply drop off the radar entirely, potentially failing to achieve any financial settlement or a fair settlement; or whether they turn up in court as LIPs with unmanaged expectations and otherwise poorly prepared cases which burden the court system.

[233] There are other funding options in theory available, e.g. litigation loans and orders for payments in respect of legal services under s 22ZA of the MCA 1973, but these may not commonly be suitable.

KEY FINDINGS

- A large minority (just over a third) of both pure consent order / contested cases in our court file survey involved at least one party acting without the apparent support of a lawyer / without representation for at least part of the case.

- Cases in the court file survey involving LIPs appeared to be less likely to settle, and if settled, to settle at a later stage of the proceedings compared with cases with no LIP involvement.

- LIPS who have had no tailored (or simply no) legal advice have had no one to evaluate the strength of their case or indicate the range of outcomes within which settlement might reasonably be reached. This lack of expectation management can impede settlement. Mediators emphasised how important it was to have a solicitor in the background during financial mediation, in particular.

- Solicitors reported several difficulties dealing with cases involving a LIP both before and during the court process: LIPs' limited understanding of the law and process contributing to a general reluctance to settle; poorly completed court documents hindering negotiation; LIPs' reluctance to negotiate directly with the solicitor because of mistrust or lack of confidence; LIPs' reliance on the one solicitor in the case; additional costs burdens on the represented client, particularly for a represented respondent in a case that proceeds to the final hearing.

- Solicitors considered that LIPs experience various difficulties at the FDR stage: misunderstanding or lacking awareness of the purpose of the FDR; navigating the paperwork; reluctance to engage in negotiation and a natural hesitation in concluding matters; difficulty in understanding the judge, particularly the judicial indication and its implications.

- Whilst they may suit some clients, neither unbundling of legal services nor fixed fee funding models are regarded as problem-free alternatives to public funding of financial remedy cases.

CHAPTER 6: DOING THE SETTLEMENT JIGSAW PUZZLE

THINKING ABOUT THE PROCESS OF FINANCIAL SETTLEMENT

It is tempting to view settlement as the destination at the end of a simple path – certainly the Family Procedure Rules create the impression of a well-organised process in which one simply needs to take each step at a time for settlement to come at some point along the 'standard financial hearings pathway', as we have called it. Metaphors based on 'pathways' or 'building blocks' of settlement suggest a coherent progression from A to Z – whether by moving along a road, or by stacking up pieces one by one. But in reflecting on our findings, we have been struck by the way in which the accumulation of necessary conditions A to Z may be a rather messier process, with some parts in place long before others that – ideally – one would have sorted out at an earlier stage.

So instead of a pathway to settlement along which parties are travelling together, we prefer to think in terms the settlement process as being akin to the joint completion of a unique and complex jigsaw puzzle without having the box lid to hand to show you in advance exactly what you are aiming to achieve. A jigsaw puzzle commonly has lots of pieces that need to come together in a particular way in order to be completed. It can be completed in a more or less organised way. The best way, arguably, is to turn over all the pieces (disclosure), sort the edge bits from the middle and do the edges first (identify the broad parameters of the likely settlement and the process by which it will be reached), then do the distinctive parts of the image (firm up the key components of the settlement), and finally tackle the trickier bits – e.g. the sky/the sea (the finer details, and – more intangibly – the parties' willingness to commit to the proposed settlement) so that the jigsaw can be declared "finished". Ideally one will have been sorting out the sky/sea pieces from the more distinctive pieces as one goes along, and best of all trying to group the sky/sea pieces according to their subtle features to assist in the completion of those parts in due course.

For this process to work effectively (or at all), we need two willing players, neither of whom is hiding pieces, both of whom are in a suitably focused state of mind to puzzle away at the problem before them. If our players are not experienced, or if the puzzle in front of them is

a particularly demanding one with lots of fiddly pieces, they may benefit from the assistance of jigsaw tutors (solicitors) and/or a shared tutor (a mediator), and in the hardest of cases, a super-tutor (the judge) may need to be enlisted at various stages as well. Sometimes, just the prospect of seeing the super-tutor will be enough to get the parties to knuckle down and finish the puzzle for themselves. Those who do their puzzle without a super-tutor's involvement may still need to get a super-tutor to check their work if they want it signed off as officially "finished" (the consent order process). While those who prove incapable, for whatever reason, of finishing the puzzle themselves will have to have a super-tutor come in and do it for them (adjudication at a final hearing).

With the aid of this jigsaw motif, we seek in this chapter to draw together some of the key themes emerging from our findings about the factors that will promote, delay and prevent settlement.

COMING TO THE TABLE WITH ALL THE PIECES AND READY TO PLAY

Our puzzlers need to be ready and willing to play, committed to cooperate as far as it necessary to do the puzzle. In so far as each is likely to need at least some input from a jigsaw tutor or other professional puzzle-solvers, they need to be receptive to and be able to understand what these professionals tell them. Since each of them possesses half the pieces necessary to do the puzzle at all, little progress will be made without their cooperation, particularly in revealing what pieces they have – recalcitrance on that front will be a reason for bringing in the super-tutor. It is clear from our data, as from earlier studies,[234] how central parties' emotional state and other personal characteristics are to this process:

> *"I think the main thing actually is the client's character. Because you can have the most complicated legal set of circumstances, but if the client is prepared to work through that, accept advice, understand it … because if the client doesn't really understand what's going on, when you're throwing figures at them, they're just not*

[234] See LCD (1998), [11.4]; Ingleby (1992), 8; Eekelaar et al (2000), 81-2

going to get it. So I think the client's personality and character is very important." (S13)

"I think if people have a financial understanding, then they will try and reach agreement, resolve things and get going. And if they are able to get over the emotional distress – not everyone's bitter when their marriage or a relationship breaks down – I think everybody is distressed – if they can get over that, then they can get to an agreement very quickly." (S19)

It is clear that some parties are just not in the right emotional place to sit down and play: they are not able to think about the exercise at all, cannot articulate what they want to achieve or what their priorities are – and that is important given that many specific details of financial settlement on divorce (the sky/sea) in our discretionary system may turn on party preference.[235] And of course for settlement to be reached, both parties need to assent – all the pieces may be essentially in place, but until the parties are both prepared to sign up to the deal, the puzzle is not complete. While the legal system can attempt to deal with players who are hiding pieces of the puzzle (as we discuss below), there is arguably little that the law, legal system or agents within it can do more generally to enable parties to get into a position in which they are ready to play and ready to settle. Some parties will take longer than others to get to that point – and as other researchers have noted, delay can actually be helpful to allow some of these issues to resolve themselves.[236] Some may need additional (non-legal) professional assistance to get to that point. But it is also necessary to accept that there will always be a few individuals who simply will not play the game at all or will play but never be able to bring themselves to agree on a finished puzzle. Where one party simply fails to turn up or refuses to agree on the finished article, there will be no choice but to enlist a super-tutor to do the work necessary to solve the puzzle for the parties.

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[235] See Mnookin & Kornhauser (1979), 966, on the place of party preference as one of their five key determinants of the bargaining process.

[236] For example, Eekelaar et al (2000), 167.

IT HELPS TO DO THE EDGES FIRST…

We have seen throughout our interview data the importance of solicitors' role as manager of their clients' expectations. Previous research has emphasised the importance of this aspect of divorce lawyering: not just negotiating with the other side, but first negotiating with their own client to bring their own client to a reasonable position, focused on the task at hand, aware of the legally and practically feasible options, aware of what is relevant and irrelevant to the legal resolution of the divorce itself and its financial consequences, aware of the demands of the process by which settlement will (it is hoped) ultimately be achieved (whether that involves court hearings or not).[237]

In so far as this involves managing clients' emotions out of the process, it is an essential step in bringing each client to the jigsaw puzzling table. But once they are at the table, they need to know the broad parameters within which the financial settlement exercise can be conducted. So it helps to "do the edges first", to define the scope of the exercise and contain the dispute within legally pertinent bounds, and to start sorting out the remaining pieces so that we can begin to get an idea of what image we may be working towards creating. The role of solicitor (or mediator) as jigsaw-tutor is invaluable here.

What we do not want is pieces all over the place (or missing). Yet the danger is that that is what we will have where there is a LIP on one (or both) sides. The LIP, unsupported by legal advice, may not begin to understand how to tackle the jigsaw puzzle at all. As one of our interviewees put it:

> *"[LIPs] have no understanding of the underlying s 25 criteria, of what the job is that the court is there to do [at an FDR], of the fact that the housing needs of the children are the priority – they just don't get it. They don't understand what a property adjustment order is, they don't understand what the options are on the pension… it's all very alien." (S13)*

[237] See Ingleby, (1992), 78 and 136; Davis et al (1994), 67, 76 and 185, Eekelaar et al (2000), 56, 90 and 92 et seq.

LIPs may struggle to sort out the edge pieces from the middle pieces and so struggle to have any appreciation of the substantive and procedural conditions within which the financial negotiation needs to happen in order to come to a successful and legally acceptable conclusion. They may not appreciate the necessity for full and frank disclosure. They may obsess about some tricky area of the puzzle, predictably get nowhere with it and fail to gain any appreciation of what the bigger picture might look like. Meanwhile, the jigsaw tutor on the other side is dutifully trying to get the edges done without the LIP's assistance – but she will be struggling as she needs the LIP to provide some of the edge bits and cannot get a grip on the distinctive features of the image without some key pieces from the LIP. Moreover, as we have seen, the LIP may be reluctant to play at all when the other party has their own tutor, concerned that they may be duped into agreeing to something contrary to their interests. And with no lawyer on either side, all of the pieces may be in a horribly disorganised mess. Whether one or two LIPs are attempting the puzzle, it seems that the chances of getting all the pieces to the table and the edges sorted out are lower, and so it seems that there is therefore a greater likelihood that the services of the super-tutor judge will be required.

But whether or not the case involves LIPs, some puzzles may have longer edges than others – the inherent complexity of the puzzle, or one or both sides' mischievous concealment of key pieces may mean that more time and possibly more of the legal process will be required to help them solve it. For example, the "super-tutor" judge's intervention may be required at the FDA: to help decide what pieces are needed at all,[238] and to require the delivery of pieces to the table.[239] But however long the edges are, once they are sorted out, the parties have a good chance of the rest of the puzzle coming together.

[238] E.g. adjudication on questionnaires or decisions about required valuations at the FDA.

[239] To order disclosure on pain of contempt proceedings in case of lack of cooperation.

KNOWING ROUGHLY WHAT THE FINAL IMAGE SHOULD LOOK LIKE

Each puzzle may be to some extent unique, but once the key pieces have been located and sorted, the jigsaw tutor solicitors – as repeat players with ample puzzling experience – will have a good general idea about what the final image might look like. The further into the task they get, the clearer that idea will become. The sooner the solicitors and their clients are able to agree on what the image is and able to organise the pieces to achieve that, the sooner settlement will be reached. Again, difficulties arise when there are one or two LIPs in the case: they may have no experience by reference to which to judge what the final image ought to look like and so make no progress in bringing the pieces together coherently:

> *"There's nobody telling them to be reasonable, there's nobody even helping them understand what's reasonable". (S23)*

In cases where for whatever reason the parties are struggling to agree what the final image might be, the super-tutor may be called in to give them some guidance: the FDR. By now, the edges should be more or less linked up and all the pieces of the puzzle should be evident, but the judge's intervention may be necessary to help the puzzlers realise what the final image probably looks like. Once everyone has agreed on the same basic idea (which may not happen if the super-tutor fails to be helpful at the FDR), the parties should be better placed to complete the puzzle collaboratively and pretty swiftly.

"FINISHED!" LIKE IT OR NOT…

In relatively rare cases where the puzzlers simply cannot get the job done between them for whatever reason, the super-tutor will have to finish the puzzle for them. But as we have seen, most puzzles are solved by the parties with greater or lesser assistance from their jigsaw tutors. If they want their puzzle officially approved as "finished", they will have to take it to the super-tutor for approval as a consent order. The judge must check that the pieces fit together well and make a satisfactory picture. When the judge is concerned that the pieces do not fit together correctly (perhaps part of the picture looks a little "odd" - the substance does not appear quite fair) or the edges look less than straight (perhaps where

one party is a LIP and the paperwork is not as well ordered as it might be), he or she may call the parties together (approval hearing) or query the application in writing to ensure that the image as designed by the parties is an acceptable outcome for them.

Ideally, in its "finished" state the puzzle pieces will fit together snugly and the image will be clear. But that clarity depends in part on the parties' emotional preparedness to accept the final outcome – the trickiest part of puzzle-solving (part of the sky and the sea) involves the parties' emotional commitment to the outcome. In extreme cases, where the case has been adjudicated and one party perceives themselves as having "lost", they may be unable to reconcile themselves to the outcome and so the puzzling may not be finished: they might appeal to a superior group of jigsaw-puzzlers (the appellate court), they might just grab some of the pieces and run off, but one way or another, the dispute may be less than fully resolved. You may not be completely finished even when you think you are.

But as previous studies have found, it is not only in the adjudicated cases that we may have reason to ask whether settlement of the case can fully be equated with true agreement to the outcome.[240] We have seen that all manner of negative factors may drive parties to settle the case at the time that they do, whether that be fear of costs, fear of court, feelings of guilt, a concern not to "rock the boat", fear for the ongoing relationship with any children, as well as the effects of the expectation management effected by the professionals involved in the case. Compromises often have to be made to get the puzzle finished. Those compromises may be difficult and leave underlying emotional problems unresolved. One of our interviewees described a case in which agreement had been reached on all the headline issues (house, pensions, income) and yet the wife's fixation on the fate of one item (a piece of jewellery) caused problems between the two parties. The case was *"[e]asy in one sense because I kept looking at the paperwork, you are so balanced, this is easy peasy but it wasn't, it was so emotionally charged, and they were so vile to each other."* (M3) In another case, the couple were *"…superficially able to cooperate, articulate, but [there were] undercurrents of difficulties and sniping going on."* (M4) We do not have data in this project with which to address how, if at all, such ongoing

[240] See Ingleby (1992), 179; Davis et al (1994), 185, 211 and 261; Wasoff (2005), 247

difficulties may manifest themselves. But as Davis et al found in their *Simple Quarrels* project, it is clear the veneer of settlement may be just that, a veneer giving the illusion of agreement, not the real thing.[241] The puzzle may be officially "finished", but that does not mean that both (or either) of the puzzlers are content with what they have produced.

[241] See Davis et al, (1994), ch 11.

CHAPTER 7: KEY FINDINGS AND POLICY IMPLICATIONS

In this first report from our study, we have set out to explore the "how, when and why" of financial settlement on divorce, helping to fill some of the "data gaps" identified by the Family Justice Review. In examining "how" and "why" settlement does (or does not) occur, whether pre-court or following the initiating of court proceedings, we have sought to provide a richer understanding of private ordering of financial issues on divorce and in particular to examine what factors help, delay or entirely prevent settlement. In this concluding chapter, we summarise our findings and explore some policy implications.

THE KEY FINDINGS

When is settlement reached?

As was to be expected given official data on financial orders, a clear majority of financial orders in our court file survey were made following a pure consent order application. Of greater interest, casting new light on this area, was our examination of the stage at which settlement is reached in those cases in which proceedings are commenced. We found – both in our court file data (summarised in chart 3.1) and in our interview data relating to solicitor interviewees' most recent "contested but settled" cases[242] – that once proceedings have been initiated, settlement can come at any time. A substantial minority of cases in our court file survey settled even before the FDA. The bulk of settlement activity appeared to be happening before and at the FDR. And it is never too late: a substantial minority of cases settled before the FH or even at the FH. So cases settle at all points along the standard financial hearings pathway, hearings appearing to act as a catalyst to settlement. Given these findings, it is important to emphasise that the commencement of litigation is not a one-way street to adjudication. Far from it: as official data show, a clear majority of cases that are litigated are settled.

[242] See chapter 3, p 72 onwards.

How is settlement reached?

Our court file survey indicated that both for pure consent order cases (see chart 2.1) and contested but settled cases,[243] lawyer-led negotiation is the dominant dispute resolution mechanism, alongside informal discussion (often used in combination). Our survey suggested that successful mediation of financial cases remains a minority activity; we have no clear evidence about the impact of MIAMs in encouraging greater use of mediation.[244] Collaborative law is a very niche practice.[245]

Given the strong settlement culture which defines much family law practice, a high prevalence of solicitor negotiation was expected. But it is important to emphasise the role that solicitors play in achieving a large proportion of out of court settlements, in order to attempt once more to dispel the popular view that lawyer involvement necessarily means litigation (and by implication, failure to settle). As our court file and interview data make clear, solicitors are regularly involved in pure consent order applications. And even if contested proceedings have been launched, they generally result in a consent order. This reflects Galanter's suggestion of a "litigotiation scale" to describe how solicitors use the (threat of) court in their dealings with each other, with settlement sometimes being pursued by mobilising the court process.[246] Our findings emphasise that attempts at negotiation do not stop once the application to court has been made. On the contrary, solicitors described to us a process in which they continue to attempt to engage parties in negotiation through the litigation stages: litigation and negotiation are not distinct entities, but part of an overall strategy that can be employed in order to put the pieces of the financial remedy jigsaw puzzle together. For some cases, even those that are not adjudicated, the litigation process is essential to achieving settlement.

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[243] See chapter 3, p 66 onwards.

[244] Ibid, p 67 onwards.

[245] See chapter 2, p 38-9.

[246] Galanter (1984).

We also examined the degree of judicial involvement in financial settlements, particularly at the FDR (see below) and through their intervention in the consent order approval process. In relation to the latter,[247] we seem to have found a somewhat different picture from previous research,[248] with intervention occurring more frequently, even if lawyers are involved in the case, and quite often resulting in some change to the proposed order (even if only of a relatively minor/technical nature). Furthermore, it is clear from both our interviews and court file data that when deciding whether to approve a proposed consent order some judges appreciate fuller information than is typically provided on the standard court form.[249] In the few collaborative law cases that we encountered in the court file survey, it was striking that much fuller information tended to be provided than in standard cases, covering letters from the lawyers involved offering very helpful and full explanations of the orders proposed, their rationale and net effect on the parties' positions.

Why is settlement reached (or not)?

Our interview data make clear that the factors which contribute to settlement are rarely simple: a number of factors are likely to have to coalesce in order to make settlement achievable at that point in time for those parties.[250] Whilst there may be legal and practical obstacles to settlement inherent to the case, many of the factors essential to achieving settlement (or not) are "non-legal" in nature, inherent to the parties themselves.

To begin with the unusual cases which go all the way: there will always be cases where court proceedings, sometimes resulting in adjudication, are unavoidable. These are cases where a range of factors may be impeding settlement (whether inherent to the case – e.g. legal or factual complexity; or inherent to the parties – e.g. total non-participation on one

[247] See chapter 2, p 52 onwards.

[248] Davis et al (2000a).

[249] See chapter 2, p 54 onwards.

[250] See chapter 2, p 39-40 and chapter 4, p 85-88.

side), and where conflict between the parties may be rife (possibly extending beyond the financial issues into other areas of life after divorce).[251]

> *"The thing that I feel most strongly about is not to assume that everybody wants to settle, that whatever process we have, has to take account of the fact that there are plenty of people who don't want to settle." (S23)*

The legal process exists to resolve these cases, to secure the legal entitlements and enforce the legal responsibilities of the parties concerned. Whilst it may be considered desirable from a policy and resource-allocation perspective to minimize the number of cases which require the full service of the courts, there is nothing a priori wrong with parties seeking to access and use that service.[252]

A persistent theme throughout the interviews was the parties' emotional readiness to settle (or even to start thinking constructively about the financial issues), which necessarily affects both the occurrence and the timing of settlement.[253] Many of our interviewees (both mediators and solicitors) emphasised that parties will only settle when they are ready to do so, in particular, if they have moved on from the emotional distress surrounding the breakdown of the marriage. Both parties need to be ready and willing to start putting the settlement "jigsaw puzzle" together, and may need some help to reach that point:

> *"It's why you can't just deal with the figures . ... It's about shifting emotional positions, it's about examining scripts, getting people to look at scripts that are in the back of the head ... they're not something that they are aware of, they're carrying a script that they've got from their parents, that they've got from their culture, that they've got from their religion – a mix of all three – but they've got that script here, and they're not even aware of it, lots of them. And you need to get them to look at that script and examine it and understand it in order for them to move." (M3)*

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[251] See chapter 4 p 88 onwards.

[252] Eekelaar (1991).

[253] See chapter 2, p 40 and chapter 4, p 89.

Another key ingredient to settlement evident from our interviews is the need for client expectation management or some other means of ensuring that the parties appreciate the parameters of the financial settlement exercise.[254] Parties need to have a realistic sense of the range of outcomes within which their settlement needs to come – ideally by way of tailored legal advice that addresses their particular situation, rather than more general legal information – so that they can engage constructively in settlement-oriented negotiation, mediation or informal discussion. Provision of tailored legal advice is the province of solicitors; it is not something that mediators can properly undertake.[255]

The situation of LIPs attempting to navigate this process (to do the "jigsaw puzzle" unaided) can be particularly difficult. In our court file survey, legal representation appeared to be associated with settlement occurring and doing so sooner rather than later in the court process.[256] This finding fits with our interview data about the difficulties lawyers reported having had when handling a case with a LIP on the other side.[257] LIPs may encounter difficulties which hinder settlement during both the pre-court and court-based phases of the financial settlement process, both in terms of navigating the procedure and appreciating the realistic range within which settlement should be reached. Without the support of a lawyer, LIPs may struggle to prepare the paperwork (necessary to achieving settlement) in a timely (and legally relevant) fashion, and to organise valuations and pension reports. And without the expectation management – in particular the legal benchmarking and reality-checking – enjoyed by clients who are legally represented, LIPs may find it difficult to settle the case. In particular, they may struggle at the FDR to understand the judge's indication and what it means for their case, and may fail to appreciate, or be uncomfortable with the expectation, that they should be negotiating with the lawyer on the other side – or in cases with two LIPs, with each other.

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[254] See chapter 47, p xx, chapter 3, p 76, chapter 4, p 96 and chapter 5, p 116.

[255] Family Mediation Council (2010), para 5.3.

[256] See chapter 5, p 115 and also Moorhead and Sefton (2005), 257-8. As we note there, we cannot say that representation status itself is necessarily causally related to settlement, though it might be – other factors associated with parties' representation status may be driving settlement.

[257] See chapter 5, p 116 onwards.

Whether or not a case involves LIPs, the judiciary has a key role in helping to secure settlement at the FDR stage; one of the most common difficulties associated with FDRs which do not achieve settlement was a weak judicial indication. For several of our solicitor interviewees, this limited the effectiveness of the appointment. Consequently, solicitors favoured robust indications by the judge at an FDR over a weak or ineffectual opinion.

PROBLEMS AND POLICY IMPLICATIONS

The impact of emotions

Emotions are central to the settlement process. For those working in the family justice system, the first question must be to consider what role – if any – that system can and should have in enabling parties to get emotionally ready to settle. This may be a "problem" that the family justice system cannot resolve, but it is an issue to which the family justice system needs to be sensitive. The simple passage of time may make it easier to mediate or negotiate certain cases. For some others, additional professional (non-legal) services such as counselling might be thought desirable, and some of our interviewees reported that they recommend such services to some clients.

But whilst the passage of time can itself be curative, we would not advocate that any deliberate "delay" be built into the system specifically to allow for this.[258] Cases that settle entirely out of court (leading to a consent order application) can perhaps simply be allowed to take their own time, with any advisors directing parties to appropriate support services to help move the case along. For those cases which arrive at court contested, the FPR timetable is appropriately concerned to provide a structure within which key preparation ahead of each hearing on the standard financial hearings pathway can be conducted and to help the judge control the case management.[259] There are all sorts of reasons (emotional and otherwise) why some parties may, perfectly properly, not be able to meet that timetable with military precision. Where additional time is needed between hearings, in

[258] Contrast the unimplemented Family Law Act 1996 divorce reforms, which have required minimum periods of time to elapse before certain stages of the divorce process could be activated.

[259] Strong judicial case management is a key theme across the family justice system in the post-LASPO era: see in particular Ryder (2012) in relation to public law children cases.

particular because of ongoing attempts at negotiation, mediation or even reconciliation, it seems to us appropriate that adjournments or other directions be applied for ad hoc in the individual case, rather than to subject all couples to any sort of compulsory "waiting period". Necessarily arbitrary minimum time periods will pointlessly prevent couples who have already moved on from concluding their case promptly. And for those who could do with having more time to get emotionally ready to tackle the case, having a metaphorical clock ticking down in the background may counter-productively place additional pressure on those parties rather than assist. We therefore do not make any specific policy recommendation on this issue, save to observe that delay in these cases is not necessarily a bad thing. Whilst it is essential (for example, for judges giving directions in the management of contested cases) to be alert to the fact that delay can be used strategically by one party in a war of attrition against the other, delay can also serve a useful function in enabling settlement to happen.

Taking responsibility: acknowledging the complementary roles of solicitors and mediators

Successive governments' family policies from the 1990s onwards have emphasised the importance of parties "taking responsibility" for the issues that arise on relationship breakdown. On this view, "responsible" action involves settling the case without initiating court proceedings, and even – it might appear – without using lawyers' out of court settlement services.[260] Responsible parties mediate instead. Government documentation preceding the legal aid reforms in LASPO[261] is typical of this approach. For example, having noted the high proportion of pure consent order cases in the jurisdiction-wide statistics on financial orders following divorce,[262] the consultation paper suggested that this

[260] For a general critique of this approach, as played out in relation to failed divorce reforms in 1996, see Reece (2003) and Eekelaar (1999); see also new preference for "family-based arrangements" in relation to child support, over applications to the statutory agency: DWP (2006), Child Maintenance and Other Payments Act 2008, DWP (2011).

[261] Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[262] See most recently MOJ (2013), table 2.6.

> "indicat[ed] that the majority of individuals are able and willing to take responsibility for organising their own financial affairs following relationship breakdown. We propose to fund mediation in these cases, to support individuals to reach an agreement without recourse to the courts".[263]

Meanwhile, all legal aid other than for mediation was to be removed.[264] Lawyers would in future receive funding only for their work done in support of mediation – but not for their own out of court settlement work.[265]

So "taking responsibility" appears to be equated specifically with using mediation. Yet our court file survey data[266] suggest that most of the "majority of individuals" who "take responsibility" for their affairs by bringing applications for pure consent orders have been doing so (at least pre-LASPO) with the support of solicitors, and following use of solicitor negotiation and/or informal discussion supported by legal advice. Rather fewer, it appears, had reached their settlement through mediation. Despite this, no mention is made of the role of solicitor negotiation in the government's discussion of financial remedy cases.

It is difficult to understand why solicitor negotiation might be judged unsuitable – by implication, even "irresponsible" – as a method of out of court dispute resolution for money matters on divorce.[267] Given the subject matter, financial remedy work is necessarily technical, even in quite straightforward cases. Tailored legal advice given in light of full and frank disclosure is generally essential to fair and legally appropriate outcomes being

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[263] MOJ (2010), para 4.157. See also discussion of mediation at 4.69-4.73: no suggestion that solicitor negotiation also available as an out of court dispute resolution mechanism; lawyers' involvement implicitly equated with "routine" resort to court proceedings, which should be kept to the minimum necessary. See Eekelaar et al (2000), 6-9 for a similar critique of earlier government family law policy in this vein.

[264] Ibid, para 4.158.

[265] Ibid, para 4.72.

[266] Particularly responses to question 6 on the new Form D81 in the second tranche of the survey: see chart 2.1 above.

[267] We endorse the strong critique of earlier government policy given by Eekelaar (1999).

reached. As previous studies show,[268] solicitors' out of court work has long been an essential part of the operation of the family justice system, helping cases that might otherwise not have settled either to stay out of court (save for a consent order application) or to settle earlier in the course of contested proceedings.

We therefore think it is unfortunate that public funding for legal services (save in support of mediation) has been removed both for out of court work commonly used to help settle and then formally conclude pure consent order cases, (through Legal Help and Family Help (Lower)), and for representation in court and ongoing attempts to negotiate in the minority of cases that embark on the standard financial hearings pathway. The government hopes that more cases will now be diverted to mediation. We consider the possibility below. But most problematically, if mediation fails to achieve settlement, or if the mediator judges the case not to be suited to mediation at all, there is now ordinarily no chance of legal aid for lawyers' services to be provided instead. Funding for lawyers' full services is available for all types of private family law case for those who can demonstrate (by means of specified types of evidence) that they have been or are at risk of becoming victims of domestic violence (but not for the alleged perpetrator),[269] and may otherwise be granted as 'exceptional funding' in order to ensure compliance with Article 6, ECHR.[270] But many individuals formerly eligible for publicly funded legal services may be unable to bring their case within those categories.

The future: litigants in person?

Our data pre-date LASPO. It is difficult to forecast what the removal of full legal services for formerly publicly funded clients may do for that client group, though we have reported in chapter 5 what our interviewees anticipated might happen to their own practices and

[268] Notably, Ingleby (1992), Davis et al (1994), Eekelaar et al (2000).

[269] LASPO 2012, Sch 1 para 12; see also para 13 on private law cases involving child protection concerns; the required evidence gateways are prescribed in SI 2012/3098, r 33. For early concerns that many victims of domestic violence may find it difficult to satisfy the new criteria for accessing legal aid, see Women's Aid et al (2013).

[270] See Miles (2011a and 2011b); for reports of difficulties accessing exceptional funding, see Public Law Project (2013).

experience of handling these cases. One early apparent impact has been dramatic drop in mediation numbers jurisdiction-wide: recently published figures released from the Ministry of Justice record a steep decrease in the number of mediation referrals in the second quarter of 2013 compared with the same period in 2012.[271] These data corroborate a number of earlier anecdotal reports from mediators of a large drop in referrals since LASPO was implemented, generating concerns for the viability of several mediation services.[272] One explanation for this may be that the summary removal of lawyers from the process has deprived mediation services of the chief conduit by which clients came to them: some of our interviewees (looking ahead to the post-LASPO era) expressed concern that mediation referrals might drop for this reason.[273]

For so long as mediation is not absorbing cases that would previously have been handled by solicitors, one can anticipate various other potential consequences for parties who would formally have been eligible for public funding for lawyers' services:[274]

(i) some parties will instead bring contested financial applications as LIPs, so increasing the number of LIPs in financial cases who have not benefited from lawyers' expectation management services;

(ii) increased numbers of LIPs will be involved in consent order applications, potentially prompting judges to request more approval hearings and/or requiring greater judicial involvement in drafting orders (where both parties are LIPs);

(iii) LIPs (both those seeking consent orders and those litigating) will place increased burdens on the courts through struggling to understand both the procedural and

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[271]See http://www.lawgazette.co.uk/practice/referrals-to-family-mediation-plummet/5037894.article; the number of referrals to mediation fell by 26% between April-June 2013, compared with the same period 12 months previously. More recent data obtained from MOJ indicate that the number of legally aided mediations in July-Aug 2013 was down by 43% on the same period pre-LASPO, and the average drop post-LASPO is around a third: http://lawyersupportedmediation.com/blog-posts/couples-still-bypassing-mediation [accessed 5 Nov 2013].

[272] See ap Cynan (2013) 1095.

[273] Davis et al's early evaluation of the take-up of mediation by publicly funded clients (2000b), 64: found that the majority of referrals to mediation came through solicitors (70%), with only limited numbers of self-referrals or referrals by the court or other professionals.

[274] See also Maclean and Eekelaar (2012).

substantive aspects of their case, and potentially having greater support needs than many LIPs already in the system;[275]

(iv) conversely, some individuals will no longer pursue their cases at all, whether because they are unaware of their legal rights in this area and/or practically unable to pursue them. In at least some cases, this will result in individuals (and their dependent children) suffering economically (and potentially burdening the state).

LIPs' need for expectation management

Some parties will always ignore the advice they receive, but client expectation management is vital as a factor contributing to settlement, in particular the provision of tailored legal advice indicating the range of reasonable settlement options given the specific circumstances of the parties' case. The need for such advice is inevitable given our discretionary financial provision law. Generic legal information services, whether delivered online or in some other manner, cannot provide what is needed. Nor can mediators be expected to fill the gap left by solicitors: they cannot provide tailored legal advice for either party as that would be incompatible with the neutral position that they have to adopt as mediators.[276] Mediators and solicitors provide complementary – not alternative – dispute resolution services within the family justice system. That much is plain from mediators' concerns about the substantial reduction in the role of solicitors acting in support of mediation post-LASPO,[277] and from the view of the mediators whom we interviewed.[278] Those unable to access the services of a solicitor may struggle to find a functionally equivalent service from any other source, with the result that they struggle to manage their own case and to achieve a legally appropriate, fair financial settlement, or any settlement at all.

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[275] For evidence suggesting that the formerly legal aid-eligible client group may be more vulnerable and have greater support needs than other LIPs, see Miles et al (2012).

[276] Family Mediation Council (2010), para 5.3.

[277] See for example Stepan (2011).

[278] See chapter 5, from p 124.

LIPs in the system: adaptations to the court process?

There were already LIPs in the court system pre-LASPO. Whether or not the numbers increase, it is appropriate to consider what if any adaptations could be made to the court process both to help accommodate LIPs' particular needs and to try to reduce the burden which they may place on the system, whilst ensuring that the system (including the allocation of costs) operates fairly for represented clients.[279] As the Judicial Working Group on LIPs remarked,

> "Litigants in person are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants. We consider it vital that, despite the enormous challenge presented, judges are enabled and empowered to adapt the system to the needs of litigants in person, rather than vice versa".[280]

We noted in the course of collecting data for the court file survey that some LIPs appeared to struggle with some of the court forms; interviewees also related experience of poorly completed paperwork by LIPs. Chief amongst those which we encountered was the acknowledgement of service for divorce cases: this form is not user-friendly, using rather small print; some questions on the form are frequently misunderstood, with the result that nonsensical answers are given (in particular to the question regarding the English court's jurisdiction to grant the divorce). This is just one example of what we consider may be a wider issue regarding the accessibility and comprehensibility of court forms (and accompanying guidance notes) for LIPs. It is important to bear in mind that many of the potential new LIPs may have additional vulnerabilities which impair their comprehension of and/or ability to complete court forms.[281]

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[279] See chapter 4, p 119.

[280] Hickinbottom (2013), para 2.5.

[281] See Miles et al (2012); Williams' literature review (2011) highlights that pre-LASPO LIPs in civil and family cases tended to have lower educational levels than those with legal representation.

Our interview data also make clear that consideration may also need to be given to the conduct of FDRs where one or both parties are LIPs. The draft guidance for judges conducting family proceedings involving LIPs remarks that "The role of the judiciary remains the same whether the case involves represented or unrepresented parties", but notes that "the approach may differ".[282] For the FDR to do the job that it is intended to do, both parties need to understand its purpose, both parties need to understand what the judge says, and both parties need to appreciate that it is entirely appropriate and expected for them to endeavour to settle the case in light of the indication that the judge has given as to likely outcome. Where one or both parties are unaccompanied by a lawyer, the judge presiding over the FDR must conduct the hearing in a way that (as far as possible) accommodates the particular needs of the LIP(s). We make these recommendations:

- Correspondence from the court regarding the FDR should clearly communicate to the parties the purpose of the FDR and its objective to encourage negotiation and agreement.[283] While parties with legal representation should be aware of the FDR's purpose, our solicitor interviewees suggested that LIPs have little or no understanding of the desirability (and propriety of) engaging with the other party with a view to settling outside the court hearing(s), including on the day of the hearing itself.
- Judicial training should be developed to encourage and equip judges (where appropriate) to deliver robust, clear, lay-person friendly indications at FDR.[284] Judges need to communicate directly with the parties. Robust FDR indications were strongly supported by our solicitor interviewees, who emphasised the

[282] Hickinbottom (2013), Annex B, para 3-4.

[283] This may be part of a wider point about the need for all court communications and other documentation to be addressed directly to parties, i.e. not assuming that they have a lawyer on hand to "translate" the material for them. Cf recent Best Practice Guidance for FDRs which assumes throughout that both parties are represented: FJC (2012).

[284] We note that the new Best Practice Guidance for FDRs (Family Justice Council (2012)) properly acknowledges that in some cases an indication will not be appropriate. But the Guidance makes no mention of LIP involvement at FDRs and how FDRs should be managed in such circumstances: throughout, the guidance presupposes two represented clients, placing the onus on representatives to prepare the clients for the appointment – to manage their expectations. We understand that guidance is being prepared by the FJC for money cases involving LIPs: Hickinbottom (2013), 2.7.

powerful influence that a judge's indication can have if it is sufficiently robust *and* understandable, even where both parties are represented. The need is all the greater where one or both parties are not represented.

- The FDR judge should reiterate the message conveyed in court correspondence: that the parties are expected to attempt to settle the case at the FDR, guided by the indication provided.

We have identified various problems with the standard financial hearings pathway where there is LIP involvement, but we consider that further, in-depth research (including observation of hearings in financial cases and interviews with LIPs) is required in order more fully to understand what LIPs find problematic and what further adaptations may therefore be necessary in financial cases. Some problems may prove rather intractable: our solicitor interviewees reported that LIPs are (understandably) reluctant to reach agreement with the other side's lawyer, for fear that they may not be able properly to assess their own interests and so may prefer the protection that adjudication at a Final Hearing may be expected to bring. It is not clear what refinement of the legal process can overcome this obstacle. While we do not recommend this here, it may be that the FDR model does not work well for many LIP cases and that some more radical change of practice is required, even dispensing with the FDR stage in some LIP cases.[285]

The cases which go off radar…

One further potential consequence of the withdrawal of public funding for legal services is that more cases will simply fail to come to court at all. For some couples, that may not seem to be an especially bad outcome. Where resources are limited and any order would simply or principally have served to dismiss all future claims between the parties, obtaining a consent order may be regarded as a useful means of "tidying up" on divorce, guaranteeing that the parties' economic relationship ends along with the marriage, but perhaps not a necessity. Theoretically, without an order dismissing claims, should one party's circumstances change dramatically at some later stage, the other would be entitled

[285] Judges have the power to dispense with the FDR on a case by case basis; we saw examples of this in the court file survey were it was clear that for one reason or another an FDR would be futile.

to bring a claim – such circumstances may be relatively unusual, but they are not unheard of.[286] However, for others, the failure to bring a financial case may mean that legal entitlements and corresponding legal obligations are not being pursued, with the result that those individuals, and their dependent children, suffer economically (and burden the state) in circumstances where they ought not have had to do so.

We know already that around 60% of divorcing couples do not obtain financial orders at all. Our research design did not cover those who negotiate their own agreements outside of the family justice system. Whilst we were able to examine elements of self-negotiated agreements where there was solicitor involvement at the consent application stage, more research is needed[287] into the 60%. In the absence of legal aid for solicitor negotiation, and if parties do not attend mediation instead, it may be expected that a greater proportion of couples may now attempt to settle their financial disputes entirely outside the legal system, and without reference to the applicable law. Numerous questions arise concerning this sector of the divorcing population which future research should seek to address. Who are these couples: Do they tend to be parties to shorter marriages, with no children, or with limited assets, or who are financially independent? Or are some of them parties who appear to have real financial issues and viable legal claims that should be addressed? Why are they opting to deal with the financial implications of their divorce informally, or not at all? Do they have any real choice in the matter? Is there no particularly strong practical need for a financial order (other than for the closure that it would provide)? Or are there cases in which provision ought to be being made but is not, and why?

A solution?

If the ultimate objective is to maximise settlement rates and reduce the burden on our courts, we struggle to understand the rationale for the removal of legal aid for out of court, settlement-oriented work by solicitors (save in support of mediation). It is too early to say

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[286] See p 128 above, quotation from S16.

[287] But for two excellent studies, see Douglas and Perry (2001) and Arthur et al (2002); and see generally data from the Civil and Social Justice Survey: Pleasence et al (2010), Pleasence et al (2003), and emerging findings from the *Mapping Paths to Family Justice* project: Barlow et al (2013).

what will happen to mediation numbers over the longer-term, following the recent decline. (Ironically, numbers may not pick up unless the solicitor-conduit is reinstated). But, mediation aside, we consider that there is a clear, economically efficient rationale for the public funding of legal services provided with a view to negotiating settlement of financial issues on divorce, whether or not that work is undertaken as an adjunct to mediation (as LASPO now ordinarily requires). At the very least, the re-introduction of Legal Help and Family Help (Lower) for this class of work – or something functionally equivalent to it (such as drop-in legal advice centres for family cases providing free or low-cost advice at the point of access) – would help restore the principal route to settlement of financial cases for this client group. And it would also provide parties navigating the court alone (should attempts at settlement fail and funding for legal representation not be available) with the benefit of tailored legal advice that may better enable them to handle their own case. But even then, adaptations to the court process would very probably still be necessary. It would also benefit the court where parties are bringing consent order applications for the proposed order to have been drafted and evaluated by lawyers: absent such lawyer support, judges may feel more often compelled to require an approval hearing and may more often need to get more actively involved in sorting out the drafting of the order itself.[288] However, it is important to bear in mind the potential dangers of limited legal advice: proper handling of financial cases takes time, expertise and advice in the light of full disclosure, otherwise the exercise is fraught with danger for both client (who may not obtain the appropriate outcome) and solicitor (in terms of potential liability in negligence).[289]

[288] Family help does exist in public children cases and was introduced to divert cases from the courts and ensure parties had realistic advice before proceedings started. The context is different and there are issues about the quality of advice given on a fixed fee basis, but the process has been shown to enable these emotionally fraught cases to be diverted from the courts. See Masson et al (2013), which highlights the value of this legal advice, not just for the individuals involved, but to the advantage of the effective working of the family justice system.

[289] See concerns expressed re fixed fee/unbundling work at pp 133-4 above.

Diversion to mediation? MIAMs

While we are unable from our court file data to draw any conclusions about the impact of the new MIAMs protocol, our interviewees offered mixed reports. We are doubtful whether the new prima facie obligation to attend MIAMs, due to be introduced by the Children and Families Bill 2013, will make a substantial difference to take-up and success rates for mediation or more generally for settlement.[290] There are three inter-related, weighty problems which need to be overcome for the MIAM to divert cases from court:

- the need for both parties to engage in the process (only the applicant need attend the MIAM);
- the relatively late stage in the settlement process at which the MIAM comes – at least one party having provisionally decided that resort to litigation is required; and
- the fact that most represented clients (at least) will already have made extensive efforts to settle the case without resort to court.[291]

MIAMs might have more traction with LIPs who have had little or no input from a solicitor prior to that point: if no serious attempts at settlement have yet been undertaken, mediation may well offer an alternative to court (assuming that the parties cannot afford to pay privately for solicitor negotiation).

However, there are cases in which mediation simply is not appropriate, for all sorts of reasons and parties may therefore properly – indeed, "responsibly" – decline to participate in it. We perhaps saw some examples of that in our case file survey amongst some of the reasons given for not attending a MIAM. Moreover, as Parker J suggested recently:

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[290] Most recent figures indicate that the number of couples attending MIAMs (in all types of case) fell by 51% between April and Aug 2013, compared with the same period in 2012: http://lawyersupportedmediation.com/blog-posts/couples-still-bypassing-mediation [last accessed 5 Nov 2013]

[291] The main protocol of The Law Society's Family Law Protocol encourages solicitors to make a commitment to resolve disputes in a non-confrontational and constructive way, and to consider the use of other methods of dispute resolution: Law Society (2010), 1-3. See also Maclean (2010), 106.

> *Mediation is a very useful tool in the box of resolving disputes between parties, but I do not think a party who considers that an application made against him or her is wholly unreasonable is to be forced into mediation, which would have been fruitless, it seems, in any event because the husband would no doubt have stuck to his guns as I found he was entitled to do.*[292]

However, a party who was formerly legally aided may now not be able to access the legal advice and assistance necessary to press a good defence to an unwarranted application.

Improving the consent order approval process?

Like Davis at al (2000a) before us, we would have found it easier as researchers to understand the net effect and rationale of some of the orders that were made in our court file survey had fuller or even just clearer information been provided as a matter of course, even in quite simple cases. If we struggled, so too must judges.[293] Indeed, we often found them raising queries. The necessity for judicial intervention (and with it the burden of correspondence on both parties and court staff) might be reduced by further improving the Statement of Information form (D81) and/or by providing clearer instructions for its completion. This may be increasingly important if numbers of LIPs rise. As we noted in chapter 5, one of our interviewees suggested that judicial intervention may have become *less* frequent in their local court because the increased numbers of LIPs made it impossible to investigate every application. The more that can be done to help all parties, represented and not represented, give clear information to the judge up front, the less need there may be for judicial intervention (at least for the purposes of seeking clarification).

Compared with the Form E in a contested application, even the new version of Form D81 gives the court only basic information about the parties and their finances and confusion can readily arise. It does not require any factual information beyond the parties' ages, length of marriage, current relationship status, proposed accommodation and basic capital

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[292] *T v T* [2013] EWHC B3, [71].

[293] See comments by DJ Exton (2011).

and income. The new version of Form D81 does at least now stipulate[294] that the parties' capital and income information should be given as it is before the division/transfers to be made by the proposed order. But this is not always done, and confusion can arise where the two parties appear to state their positions on different bases (one pre-, the other post-order). Moreover, income transfers between the parties are frequently unclear: notably, Form D81 requires parties to include child support received as part of their income, but it was never clear to us whether the income declared by the non-resident parent was net of any such payments (the Form asks for parties to declare income net of tax and National Insurance only). At the very least, such confusion should be avoided. We therefore recommend that:

- In relation to capital, both parties and the judge would be assisted if the parties were required by Form D81 to set out both their "before" and "after" positions, so that the net effect of the order in capital terms could be identified at a glance.

- In relation to income, Form D81 should expressly require parties to state child support amounts received and paid separately from the rest of their income (specifying whether they are received from/paid to the other party, rather than a third party).[295]

Form D81 has clear limitations for a high net worth client with complex assets; some practitioners therefore attach their own schedules of assets and/or provide substantial accompanying letters explaining the proposed order and its background. Indeed, some judges at some courts actively encourage further detail to be appended. However, overall our data suggest that this is far from invariably done. Providing extra information up front can pay dividends: *"The only time I've ever had anything come back is if the information hasn't been clear enough and I write and say, well, actually, we've done that because x,y,z, and they come back, oh, right, ok."* (SM30) We think that there is therefore also scope to encourage the parties to provide more systematic information up front explaining

[294] At the top of page 2.

[295] Form E could also be improved in this area.

the rationale of the proposed transfers. Parties are now invited by question 9 of Form D81 to provide (in a small box) supporting substantive information to explain the proposed order – "any other matters relating to the proposed consent order that the court should consider", giving examples such as health, prior agreement, changes in circumstance. But this box provides scant room for the inclusion of any significant details regarding the rationale behind the agreement. And it does not expressly require parties to set out the rationale. Given the frequency with which we found judges raising queries regarding the parties' circumstances and/or aspects of the proposed order, it would not seem to be disproportionate for the Form and guidance notes actively to encourage (or even require) parties to provide such information to minimise the need for such inquiries to be raised.

CLOSING THOUGHTS

The process of financial settlement on divorce is a complex, individualised exercise. It depends for its success or failure on features inherent in the case and inherent in the parties involved. Some cases will appear to be considerably more straightforward than others. But many factors need to come together in the right way at the right time in order for the 'jigsaw puzzle' to be completed. We have explored in this chapter some steps that might be taken in order to help more parties to complete the puzzle successfully, particularly (but not only) if they are attempting the exercise unaided by lawyers, and in a way that limits the burden on court resources. But while the family justice system must inevitably remain the forum in which these cases are ultimately resolved, there is only so much that that system can do in order to make settlement possible.

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APPENDIX A: TECHNICAL AND METHODOLOGICAL DISCUSSION

The study was designed using a mixed methods approach. The quantitative stage involved a survey of c.400 court files to examine issues such as the stage at which settlement is reached in contested cases, the involvement of lawyers and other family justice professionals, judicial intervention in consent applications. The qualitative stage involved interviews with 32 family justice system professionals in order to explore in greater depth how, when and why cases do and do not settle. Combining the quantitative and qualitative approaches enabled us to set the court file data in a deeper and broader context, helping us to obtain a richer understanding of private ordering of financial disputes in this jurisdiction and the factors that promote, delay or prevent settlement in these cases. All data was collected from English sources, so there is no Welsh representation in the study.

THE CASE FILE STUDY DATA

The dataset and method by which cases were selected

Our court file dataset is stratified by court and time. For reasons that we discuss below, we did not expect to be able to claim that our selection of cases is statistically representative of all divorces[296] or even all divorces with a financial order in England and Wales, and additional obstacles to achieving such a sample became clear during and after data collection. We instead sought to provide a reasonable spread of different court type/size and geographical location to provide largely descriptive statistics regarding the range of cases that we found there.

We drew our data from four courts located in different regions of England of varying sizes and socio-economic/demographic (including ethnic) context. Two courts were located in large metropolitan areas, one in a mixed urban / rural catchment area, and one in a more

[296] Not least since only c.40% of divorces have a financial order: see chapter 1.

predominantly rural area with a number of small to large towns. From each court, we aimed to collect data from 100 files in which a financial order had been made disposing of an application for financial relief following divorce under the Matrimonial Causes Act 1973 (giving a total of 400 – achieved number 399).[297]

As discussed in chapter 1, for each court, HMCTS provided two lists of cases in which the financial order was recorded as having been made before a given date. The first date preceded the introduction of the new Family Procedure Rules 2010; the second followed the introduction of those new Rules, but preceded implementation of LASPO 2012 legal aid reforms. We aimed to draw 50 files going backwards from each of these two dates in each court.[298] We did not target or over-sample for specific types of case, simply taking files as they came from the list (on a census basis) in order to gain a snapshot of the financial order "business" of each court in each time period.[299] We excluded a number of cases on the list provided by HMCTS from our data collection for the reasons recorded in the table below.[300] Where a file was excluded (or simply missing), we moved on to the next file on the list until we had achieved our target number. The resulting limitations in the coverage of our dataset, discussed below, give us reason to doubt whether our data is

[297] One file was only identified as ineligible after the data collection had concluded.

[298] In reaching our target of 50 orders per tranche for each court, the cases that we happened to include naturally depended on the order in which cases happened to be entered on the FamilyMan list by court staff (we do not know what protocols, if any, court staff worked to in entering cases on the database, or whether they simply went through the pile of files as they came into the office). Where there were several cases on the same day, some pure consent orders, others following a contested application, it may be a matter of chance which were listed first and so picked up by us to count towards our 50 cases; we may also have inadvertently skipped a case towards the end of two lists, taking the next file instead.

[299] There is some slight variation in the date of the most recent file from which data was collected for each tranche of cases in the different courts, but the basic principle of the time period (pre or post new FPRs) were the same. By contrast, different caseloads in each court necessarily mean that the date of the earliest file included in the dataset varies substantially: in the busiest courts in the survey, 50 orders were made within the space of a month; in the least busy court, a time frame of around four months was required to reach the target 50 cases for each tranche.

[300] No other data was collected regarding excluded cases, and the data was recorded in aggregated form, rather than by case.

fully representative of the financial order business of the courts included, and so by extension of the jurisdiction-wide picture.

Table A.1: Cases excluded from the court file survey

Reason for exclusion	***Number of cases excluded***
No final financial order[301] or order made but not located in file	11
Final financial order made outside reference period[302]	18
Duplicate – case appeared on list twice	2
File missing or unavailable	19
Event recorded on FamilyMan at relevant date not a final financial order (such an order made earlier or apparently not made)[303]	30
Application withdrawn during attempted reconciliation	2
No financial documentation (D81, Form E or equivalent) on file	2
Civil partnership file[304]	5
Total excluded:	**89**

Limitations and problems

We could not achieve a statistically representative sample because we could not generate a random sample from a known population, but rather (as is common for court file surveys)

[301] Including one order revoked as a nullity. We also count here one application under Part III of the MFPA 1984 for financial relief after a foreign divorce where the order was not on file.

[302] In these cases, the date of the order on file appeared to be different from that on the FamilyMan system. There may have been some inconsistency here in whether cases were entered on FamMan by reference to the date on the order itself (which is sometimes back-dated) and the date on which the order was actually made; we may in turn have been inconsistent on some occasions in selecting cases by reference to the latter date rather than the former.

[303] E.g. dismissal or variation of periodical payments order made at earlier date; application for enforcement or under liberty to apply provision of order made at earlier date; amendment, including under slip rule, of order made at earlier date.

[304] It was always intended to exclude these cases, but they were not identified until we saw the file.

a sample stratified by court and time. Most pragmatically, our data collection was dependent on obtaining access to courts, and not all courts approached were able to take part in the study for various reasons. But there were (and remain) other impediments to achieving such a sample.

Jurisdiction-wide data are now published on the number of financial remedy disposals / applications per court.[305] And since we undertook our data collection, data have been published on the proportion of cases jurisdiction-wide which are decided following an initial application for a consent order, a contested application which results in a consent order and those that are adjudicated.[306] However, we do not know the number of final orders (as opposed to individual disposals)[307] or the proportion of pure consent orders, contested but settled cases and adjudicated cases for each court. So while we can compare our dataset with the jurisdiction-wide picture, we do not know whether the profile of orders that we obtained in our survey matches the average business of those four courts. We do, however, know that all four courts included in our study had numbers of disposals above the jurisdiction-wide mean and median for 2011 (Q3);[308] these figures were published before we had confirmed our participating courts and reassured us that we would be visiting courts that would have enough recent files eligible for inclusion in the study.

Moreover, there is a known problem with official data which also affected the coverage of our survey. HMCTS identified cases to be included in our survey by using its electronic case management system, FamilyMan, using event codes “ARAPP” together with “ARORD” or “CON”. There is an issue with use of event code ARAPP to identify cases for

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[305] Disposals were recorded in the 2011 Q3 table on “family courts and mediation”. A “disposal” for this purpose is a particular type of order (e.g. for periodical payments, for property adjustment) and so one complete order will typically contain more than one such “disposal”. So these statistics do not count complete orders, but the numbers of disposals may serve as a rough guide to the total volume of complete orders per court. By contrast, the more recent Family court transparency tables at MOJ (2013) instead record applications rather than disposals.

[306] MOJ (2013), table 2.9: this data counts complete orders, rather than individual disposals within complete orders.

[307] Ibid.

[308] See n 9, 2011 Q3 statistical report.

our survey that also impacts on published statistics: courts do not systematically record the application event and so table 2.9 of MOJ (2013) shows a number of applications estimated to be 10-15% lower than actual applications, and we have recently become aware from MOJ statisticians that pure consent order applications are those most likely to be omitted.[309] Our survey, like the official statistics, may accordingly have fewer pure consent order cases than are actually in the whole population of financial order cases.

Putting aside the ARAPP problem, if our dataset were representative of the jurisdiction-wide picture (as portrayed by published figures for 2011),[310] we might have expected a breakdown of roughly:

- 28 adjudicated cases (7.2%)
- 100 contested but settled cases (24.7%) and
- 272 pure consent order cases (68%).

As it is, we have an achieved sample (N=399) of:

- 19 adjudicated cases (c.5%)
- c.120[311] contested but settled cases (c.30%) and
- 260 pure consent order cases (c.65%).

Our figures are not markedly different from the jurisdiction-wide picture and numbers are relatively small so some variation is to be expected. But that said, we may – for two linked reasons – have an over-representation of contested but settled cases and an under-

[309] This is now noted on the published tables, which are published without any adjustment: see MOJ (2013), notes to table 2.9 and most recently note 3 to table 2.6: https://www.gov.uk/government/publications/court-statistics-quarterly-april-to-june-2013, in the third link on that page [last accessed 4 November 2013].

[310] MOJ (2013), table 2.9. There appears to have been some increase in the proportion of cases which are contested and adjudicated nationally in the last few years: in 2008, the most 'consensual' year in the 2007-2012 period, 73% of applications were consent cases and just over 5% of cases were adjudicated. Given the ARAPP problem discussed above, if we suppose that there are 10% cases missing and that these are all pure consent order cases, when we would have 300 (68%) such cases in our dataset, rather than 260 (65%), and official statistics for 2011 would record c 70% consent orders, rather than 68%, with accordingly lower overall proportions of contested but settled and adjudicated cases.

[311] This includes two cases in relation to which it is unclear whether the final order was by consent or not. If those cases were in fact adjudicated, we have 5.2% adjudicated cases (21), rather than 4.7% (19) and 29.5% contested but settled.

representation of adjudicated outcomes in our dataset. First, one court had a substantially higher proportion of contested (but settled) applications than the other three courts, well above the jurisdiction-wide percentage (which accounts for our larger than expected proportion of contested but settled cases), yet that court's proportion of adjudicated outcomes was in line with the jurisdiction-wide percentage of such outcomes. It may be (we do not know) that that profile accurately reflects the business of that court: high rates of contested applications but high rates of settlement achieved. However, our second reason suggests we should remain cautious and not assume that we have happened to achieve a representative sample. As the table above indicates, amongst those files excluded from the study were (i) 19 files that were either missing or not available and (ii) 30 files in which the event logged on FamilyMan at the relevant date was one which post-dated the original financial order (made some time earlier) which was intended to end the case. It follows from (ii) that an unknown number of cases in which a final order had been made in the time period we were examining would not appear on the HMCTS list for that period and so escaped our attention: they would have been re-logged at the time of their later event. As for (i), the files which were missing or not available, we do not know why they were absent. It is likely that at least some were involved in some post-order activity (and so might in due course not have appeared on the list at all because of issue (ii)). In some cases, that new event may have been 'benign', e.g. an application for decree absolute following conclusion of the financial case, a slip-rule amendment, or an application prompted by suddenly changed circumstances out of both parties' control frustrating the order. But in other cases, the ongoing issue may have been an appeal or other challenge to the financial order by a dissatisfied party or an application for enforcement of the order. And it may be – we cannot say from our data one way or another – that particular types of cases, e.g. more heavily conflicted (and adjudicated?) cases, are more likely to involve such activity. If that is the case (we cannot say), our dataset is 'missing' a number of adjudicated outcomes.

For all these reasons, we cannot safely claim that our dataset is statistically representative of the jurisdiction-wide picture. Conversely, we may also have missed a number of consent order cases, given the known problem with the ARAPP event code, detailed above, but that is a problem we share with the published statistics.

With the benefit of hindsight, we might have avoided at least some of these difficulties by doing as Davis et al (2000a) did by instead asking for all files with a divorce petition from a certain date, and select from all those cases those which had a financial order – probably no more than 40% of all cases included.[312] In order to avoid the danger of excluding long-running cases, it would be necessary to pick a start date some years back, but this has the disadvantage that it is less easy to examine the impact of more recent developments. On the other hand, this approach would enable researchers to capture cases in which financial applications are made but entirely withdrawn for some reason. Since our survey only included cases in which a financial order was made, we cannot say anything about such cases.

Form of data collection

Data for each case included in the survey was collected manually on paper data collection sheets under a unique, random project code number that denotes from which court (using a code letter) and time period the case came. The fields on the data collection sheet in large part mirrored data fields on relevant court forms (including the divorce petition, acknowledgement of service, the decrees, statement of arrangements for children, Form A, Form D81 and/or Form E, Form H, the final order, listing and attendance sheets for hearings) and other relevant documents (including FDA/FDR/Final Hearing documents, any public funding certificate, correspondence between parties/representatives and court staff regarding relevant issues, including judicial intervention in a consent order application). Some questions on the data collection sheet required the researchers to attempt to identify (from a potentially wide range of sources on file) issues such as the stage at which settlement was reached, whether either party was publicly funded, and what legal support each party had during the case. The whole research team undertook a one-day pilot exercise in one court in order to test and refine the data collection sheet. Given the potentially lengthy timetable for obtaining permission to access courts and court files (up to 24 weeks), it was not feasible to conduct a fuller pilot exercise longer before the main data collection, but we benefited in designing our data collection sheet from one

[312] This approach would place a correspondingly larger burden on court staff to locate and supply a large number of files from which data would then not be collected.

team member's recent experience of conducting a similar survey using the same class of court files.

THE INTERVIEW DATA

The interview sample and method by which practitioners were selected

Solicitors, mediators[313] and solicitor-mediators[314] were purposively selected from the Resolution Directory, Law Society and member organisations of the Family Mediation Council to achieve a diverse sample ranging from regional 'premier' law firms, firms with several branches in a range of urban and rural locations, specialist family law and mediation firms, through to high street, firms with a legal aid franchise and sole practitioners and mediators (in-house and independent). Within this range, we attempted to include a mix of respondents from both genders with varying experience (sampling by reference to years qualified) and degree of specialisation using information obtained from the various websites. We recruited interviewees from each of the four areas in which the case file survey courts were located.

Each was sent a letter explaining the study and seeking their participation. The letter was followed up by a scheduled telephone call to answer any questions raised, confirm consent to participate, and arrange a date and time for the interview. This strategy met with some success and whilst we initially anticipated that approximately half of the family justice professionals contacted would agree to participate resulting in an achieved sample of 32, we needed to send out further letters to ensure our sample reached the required number.

Form of data collection

Interviewees were asked ahead of the interview to be ready to discuss in outline (without disclosing identifying details) their two or three most recent concluded financial remedy

[313] Mediators included practitioners from a variety of the mediation organisations. Mediators often belong to one, two or more organisations simultaneously.

[314] Solicitor-mediators were classed as those who maintained a practice in both fields rather than having simply trained as a mediator without sustaining a caseload.

cases.[315] Interviews generally began with these case discussions, and then practitioners were asked to comment on whether these cases were atypical and what factors, in their view, led to the case concluding as it did. They were then asked more general questions relating to settlement and consent orders and issues relating generally to litigants in person.[316] All the interviews were digitally recorded and complete transcriptions were produced.

Limitations and problems

The interview data is limited both numerically and in terms of its focus. The sample is relatively small (though not unduly so for a qualitative study) and it examines the perspective of particular types of family justice professional. This study therefore does not have a consumer perspective of the process, other than that provided by the professionals who used the courts. We do not therefore know what the parties involved in our court file survey or practitioners' case examples made of financial settlement process.

We experienced various difficulties in the recruitment and design phases of the interview stage. In terms of recruitment, having hoped to achieve a diverse sample of interviewees in terms of experience, gender, type of firm, status within firm (for example), we experienced a noticeable difference in the acceptance rates in different groups of practitioners. Fewer younger and less experienced solicitors agreed to take part in the study, despite additional contact from researchers. Consequently, we have a slightly lower proportion of this cohort within our sample, and a greater number of 'partners' (particularly with 11-15 years experience) and more senior mediators (for example Professional Practice Consultants).

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[315] For solicitors and solicitor-mediators this encompassed three categories of case: those which settled, were initially contested then settled or were contested; whilst mediators were asked to discuss two cases: those which settled in mediation and those which left mediation where the parties had not reached agreement. This is a similar methodology to that used by Eekelaar et al (2000). In that study, the interview schedule focused on the first divorce case which the solicitor opened after a specified date.

[316] See Appendix C for the interview schedules.

Table A.2: Interviewees' post qualification experience

Solicitors' /mediators' experience in their respective roles[317]	***Number of practitioners***
5 years and under	4
6-10 years	5
11-15 years	12
16-20 years	4
21+ years	7

The 32 interviews took place between November 2012 and January 2013. Notably, these were the last few months of legal aid. Of the legal aid solicitors that we contacted to participate, a number felt unable to be interviewed as they were inundated with work in the run-up to LASPO being implemented in April 2013. We therefore had to contact a greater number of legal aid solicitors than originally anticipated.[318]

In terms of design: We prepared separate interview schedules[319] (with some common questions) to accommodate the different experiences of the different professional interviewees. Notably mediators rarely know what happened after the mediation ended, and that is reflected in the types of recent case and other specific questions each group of interviewees were asked to address. Solicitors' experiences naturally mapped neatly onto our court file data categories: pure consent order applications, contested but settled cases and adjudicated cases. Mediators, by contrast, have cases that either do or do not reach agreement in mediation.

The interview schedules were reviewed by members of the project's advisory group prior to piloting and then by the research team after pilot interviews with a solicitor and a

[317] The experience of solicitor-mediators in the sample was determined by reference to their primary role, which in all cases was their legal rather than mediation experience.

[318] All mediators (10) had a legal aid franchise. Twelve of the solicitors and solicitor-mediators had no legal aid franchise for ancillary relief compared with 10 who did. Of those 12 who did not, 1 practitioner had a legal aid family mediation contract only, whereas another practitioner's firm had a legal aid franchise for public law Children Act work only.

[319] See Appendix C

mediator. The two pilot interviews highlighted the need to reduce the length of the original schedules and to ensure a more semi-structured, rather than tightly focused (questionnaire-style) approach. To achieve an appropriate length of interview focused on our core research questions, we therefore removed questions touching on some issues which had emerged from the case file survey and literature review, and devised more open-ended questions, giving practitioners scope to respond more freely and thereby allowing unforeseen themes and issues to emerge.

TYPES OF ANALYSES CONDUCTED

The court file data was inputted into an SPSS database (SPSS 19) which contains over 600 variables, including recoded and derived variables; some longer string variables were recorded separately, along with notes on data entry for each case, in an Excel spreadsheet. No case requires use of all variables, and this report – given its focus on largely procedural questions – has required analysis of only some of the variables. The large number of variables in the dataset is attributable in part to the different variables used initially to record financial data from each of the two different versions of Form D81 used for cases within the survey and the use of Form E for contested cases. Each of these forms contains different, and more (Form E) or fewer (D81, especially the older version) questions. Some contested cases have data for both Form E and Form D81. Other large groups of variables are relevant only to contested cases (e.g. those relating to hearings) and those involving dependent children. The analysis of the court file data in this report is principally descriptive (frequencies), though – while conscious of the limitations of our dataset, given its non-random nature and problems with coverage discussed above – we also conducted some bi-variate analysis using a non-parametric test (cross-tabulations with Chi-sq testing), for example, in order to assess the significance of parties' legal representation status on the progress of contested cases. We have not conducted any multi-variate analysis. Percentages reported without any decimal point are rounded up or down to the nearest whole number.

The software NVivo10 was used to code the qualitative data. We drew on a mixed approach: (i) themes that had been identified previously during the court file data survey,

ongoing SPSS analysis and literature review were reflected in some nodes, and (ii) a grounded theory approach[320] was used, in which the data was broken down, examined, conceptualised and categorised.[321] By employing these methods, it was possible both to ensure that deviant (atypical) cases were not overlooked and to discover issues and themes arising across both datasets.

ETHICAL CONSIDERATIONS

Access to family court files is obtainable only following an application to HMCTS's Data Access Panel and grant of a Privileged Access Agreement, following permission for the project having been obtained from the President of the Family Division, and subject to conditions imposed in the permission granted, including compliance with data protection legislation. No names, addresses or other contact details of parties, their children or other relatives, other third parties, legal representatives/advisers, or judges were collected. All data was pseudonymised at the point of collection under unique project case file numbers. The linking documents which connected those numbers with actual court file numbers were stored separately from the data and have been destroyed, thereby anonymising the data. The specific court locations and time periods from which data was collected will be kept confidential by the project team. All data will be reported in such a way as to preclude any possibility of individuals being identified.

Although written consent was not obtained from the interviewees, consent to participate was acquired through the telephone call and on the day of the interview. On the day of the interview, the interviewer once again explained the project to the participant, asked if they were happy to have the interview recorded and responded to any questions regarding the conduct of the research project. Similarly to the court file data, all interview data was pseudonymised at the point of collection under unique project identification numbers. Practitioner interviewees have been given a practitioner identifier, e.g. SM is a solicitor-mediator, and the number has been allocated randomly. The linking document which

[320] Glaser and Strauss (1967)

[321] Strauss and Corbin (1990), 61

connects the practitioner identifiers with individual practitioners is stored separately by one member of the research team in a password protected computer file.

The ethical aspects of the study have been subjected to scrutiny by an Ethics Committee at the University of Bristol.

APPENDIX B: BASIC CHARACTERISTICS OF COURT FILE SURVEY CASES

In this appendix, we outline some broad characteristics of the 399 cases in our court file dataset, comparing them where possible with jurisdiction-wide statistics. The jurisdiction-wide statistics relate to **all** divorces, whereas our dataset consists only of cases from the sizeable minority[322] of divorces that are accompanied by a financial order; some differences are evident and we offer some possible explanations for these. With that caveat in mind, we compare the profile of our divorces with the profile of divorces in 2011 reported in ONS (2012). Again, this permits only rough comparison: in terms of date of decree absolute, our divorces span a period from 2003-2012, over 80% coming from 2011-12.[323]

Length of marriage

The median duration of all marriages in relation to which divorces were granted in 2011 was 11.5yrs.[324] In our dataset of divorces with financial orders, the median duration is a little longer at 15 years,[325] with a mean duration of just over 16 years.[326] Just under 9% (34) of marriages in our survey for which we have the data were 5 years or less in duration. The generally longer duration of marriages in our dataset may reflect that financial orders are more commonly obtained by parties who have more assets, commonly accumulated over the course of longer marriages. However, arguably more meaningful in

[322] Calculated from MOJ (2013), tables 2.8 and 2.9. See chapter 1, above.

[323] In 11 files, the decree absolute had not been made (or could not be located on file) at the time of data collection, so we do not have data relating to length of marriage or ages of parties at point of divorce for those cases. For 1 file, we do not have the date of marriage, so that case is also omitted from length of marriage analysis.

[324] ONS (2012), table 4 – accessible via link on p 6.

[325] Our calculation of years is rounded to the full year rather than expressed as years and months.

[326] Std. deviation = 9.185.

"real life" terms than date of decree absolute is the date of separation. We have a clear (i.e. agreed) date of separation for under half of the cases in our dataset (184). Where we have conflicting evidence of a separation date but the two dates offered are no more than two months apart, we have picked a compromise date between the two dates offered (141).[327] For both cases with an agreed separation date and cases with a compromise separation date, the median duration of marriage to the point of separation is 13 years, with a mean of nearly 14 years.[328] Hidden within those numbers are over 60 cases where the length of the separation before decree absolute exceeded three years, in a couple of cases exceeding 10 years. Most of these were cases in which the divorce proceeded on the basis of one of the separation facts, but just under a third were behaviour or adultery cases.

Ages of parties at divorce

The mean age of all wives divorcing in 2011 was 42.1yrs with a median age of 41.6, and for husbands, the mean age was 44.5yrs with a median age of 43.8.[329] Unsurprisingly, given the longer durations of our marriages, our spouses are a little older at point of decree absolute than the jurisdiction-wide average for 2011. We are able to calculate age at decree for two-thirds of spouses, 265 wives and 266 husbands. The mean age of wives at divorce was 44.7, with a median age of 44,[330] and for husbands, a mean age of 46.6 years, with a median age of 45.[331]

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[327] We have done this for 141 cases. In creating compromise dates: Where dates are given on multiple occasions, we have preferred dates on later documents. Where the offered dates are within a week of each other, we have adopted the earlier date, otherwise we have adopted a rough midway point. Where only one party has offered a date (often on the divorce petition), we have adopted that. Where a party gave a month for separation but not a day, we have adopted the 15th as the day in the month. Where the offered dates are more than two months apart (sometimes even years apart, perhaps each spouse having adopted a different understanding of "separation") we have not attempted to create a compromise date and so those cases, along with those where we have no data relating to separation date, are excluded from this analysis (N=74).

[328] Std. deviation for agreed date cases 9.294 and for compromise date cases 8.441. We have rounded to the nearest year here.

[329] ONS (2012), 5 and table 2a.

[330] Std. deviation 9.532. Our ages are calculated in years only (not parts of years). For 120 wives, we have age as declared on form D81 but no date of birth. D81 will often precede the decree

Who petitioned and relying on what fact

In 2011, 66% of all divorces were granted to wives and 34% to husbands, with a tiny number granted on cross-petitions.[332] Our dataset has a higher frequency of wife petitioners, 74% of wives (296) and 25% of husbands (101) being granted the divorce,[333] which is also reflected in the split of wife (70%) and husband (29%) applicants for the financial remedy in contested cases. In nearly 79% of cases (100 out of 127) for which we have the information where a contested financial application was brought, that application was made by the petitioner.

The facts[334] on which irretrievable marital breakdown was successfully established[335] jurisdiction-wide in 2011 were distributed as follows: 15% adultery petitions, 48% behaviour, <1% desertion, 25% 2 year separation with consent to the divorce, and 11% five year separation.[336] Over half (54%) of divorces granted to wives proceeded on the behaviour fact. Husbands most commonly proceeded on the basis of behaviour (36%) and two years' separation with consent (32%, relied on by only 22% of wives).[337] The cases in our dataset were rather differently distributed, as the last row on table B.1 shows, with a higher proportion of behaviour petitions and smaller proportion of separation petitions (and

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absolute, as finalisation of divorce is often deferred until the financial order has been made. These wives had a mean age of just over 44 and a median of 44 (std.dev. 8.546).

[331] Std. deviation 9.638. Our ages are calculated in years only (not parts of years). For 116 husbands, we have age as declared on form D81 (as for wives – see last note). These husbands had a mean age of 47.7 and a median of 45 (std.dev. 10.150).

[332] ONS (2012), table 8.

[333] We have excluded two cross decrees from this and the following analysis, one of which was adultery/behaviour, the other behaviour/behaviour.

[334] Under the MCA 1973, s 1, the petitioner must prove the ground for divorce (irretrievable breakdown of the marriage) by proving one of five "facts": adultery, behaviour, desertion, two-year separation with consent to the divorce, five-year separation.

[335] See Matrimonial Causes Act 1973, s 1.

[336] ONS (2012), table 8, combining the figures for wife and husband petitioners, reported separately there.

[337] Ibid, table 8 and p 7.

no desertion cases). Behaviour petitions were more common in our data from both wives and husbands than in the jurisdiction-wide statistics. But, reflecting the pattern for all divorces jurisdiction-wide, husbands relied on the separation facts more often than wives.

Table B.1 Fact relied on to establish irretrievable breakdown of marriage

		fact relied on to establish breakdown				Total
Whose petition		**Adultery**	**behaviour**	**Sep 2 yrs**	**Sep 5 yrs**	
Wife	Count	60	195	34	7	296
	% within W petitions	20.3%	65.9%	11.5%	2.4%	100.0%
husband	Count	15	59	23	4	101
	% within H petitions	14.9%	58.4%	22.8%	4.0%	100.0%
Total	Count	75	254	57	11	397
	%within all petitions	**18.9%**	**64.0%**	**14.4%**	**2.8%**	100.0%

It is not clear why behaviour petitions should be more common amongst divorces with a financial order than in the general divorcing population. It may be the case that parties who rely on the separation facts are more commonly simply able to go their separate ways on divorce, having long before sorted out the financial implications of their separation. Not obtaining any financial order – even one dismissing all claims at that point – does leave a loose end that might cause difficulty later on, but couples may deem the theoretical risk of any future financial claim from their ex-spouse too slight to make it worthwhile to get such an order on divorce. By contrast, those relying on the behaviour fact may be in more immediate need of financial orders, having only very recently separated – or even living in the same property still when the divorce petition is lodged.

A higher proportion of pure consent order applications arose from divorces which had proceeded on the basis of the two-year separation fact (18% as opposed to 7% of divorces with contested financial applications) and reliance on the behaviour fact was less common (60% of pure consent order cases, as opposed to 73% of contested application cases).[338]

[338] A Chi-sq test (on a cross-tabulation excluding five-year separation cases, owing to small numbers) suggests this difference in the facts relied on in pure consent order and contested cases

Dependent children

In terms of presence of dependent children, cases in our dataset match the jurisdiction-wide picture. In 2011, 49% of all couples divorcing had at least one child aged under 16 living in the family, with 1.76 children under 16 per divorcing couple with such children.[339] We similarly found "children of the family"[340] aged under 16 at the point of decree absolute in just under half our cases (344 children in total, average 1.74 per family with such children). However, presumably reflecting the slightly longer marriages and older spouses in our survey, the children in our cases were older than those jurisdiction-wide in all divorces. Only 12% of the children of the family we identified were under the age of 5 at the point of decree absolute, compared with 21% in divorces jurisdiction-wide, and 59% were under the age of 11, compared with 64% jurisdiction-wide.[341]

Where either spouse has dependent children under 16 or any children under 18 who are at school, college or in training, the petitioner is required to complete a "Statement of Arrangements" ("SOA") for those children to enable the court to discharge its duty under s 41 of the MCA 1973 to consider whether it ought to exercise any of its powers under the Children Act 1989 in relation to them.[342] We found SOAs in 245 cases (61%), which we can use as a guide to the number of cases featuring children under 18 prior to decree nisi.

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is significant: Chi sq=9.950, df=2, p=.007. The usual caution applies to this finding given the limitations on our court file data discussed in Appendix A.

[339] ONS (2012) p 7 and link to table 1.

[340] I.e. children who are either children of both parties or another child (not a foster child) treated by both as a child of the family (in colloquial terms, a step-child, commonly the child of one of them): see MCA 1973, s 52.

[341] See ONS (2012), p 7 and link to table 1.

[342] This duty is due to be repealed by clause 17 of the Children and Families Bill currently in Parliament (clause number as at 13.6.13). We support that move: the SOA is completed at a very early stage in the divorce at which many arrangements may be inchoate – not least given that the parties' financial and so (crucially) accommodation issues are yet to be settled. Indeed, in a number of cases, the parties were still living under the same roof at the time the SOA was completed (and when the decree nisi application was made, the last point at which to update the information on the basis of which the court takes its decision). This makes the document somewhat useless as a realistic guide to the court of the children's situation following divorce, and so an unnecessary piece of additional paperwork for parties, court staff and judges to have to deal with.

There are no national statistics regarding the total number of children (of any age – i.e. including adults) who are mentioned in divorce cases. Whilst 201 of cases in our dataset involved children (whether or not "of the family") under the age of 16, 330 out of 399 involved some children (of any age),[343] and in over 90% of those cases all of those children were identified as "children of the family".

The representation profile of the divorce cases

In chapter 5 we examined the issue of legal representation, lesser levels of lawyer support and parties acting in person in relation to the financial remedy case, drawing on both court file survey data pertinent to that issue and interviewees' experiences as solicitors and mediators involved in cases where one (or, in the case of mediators) both parties were acting without a solicitor. To complete the picture of our court file survey cases, we report here the data relating to the parties' use of lawyers in relation to the divorce itself (focusing on the stage of petition and acknowledgement of service[344]). In evaluating this data, it is important to bear in mind the obvious limitation that we only have access to information that makes it as far as the court file. We cannot exclude the possibility that some of these spouses for whom we observed no lawyer support had received advice at some stage, and we know that some certainly acquired a solicitor later in the lifetime of the divorce proceedings (perhaps in anticipation of or prompted by the financial application).

The vast majority of divorces, being undefended, are dealt with entirely on paper without any hearings.[345] A party may be technically represented (despite the improbability of any hearings in a divorce case), merely advised/assisted or act without any apparent lawyer support (where no solicitor involvement is evident from any of the paperwork) in

[343] We identified children not exclusively from the divorce papers – the existence of children sometimes became apparent at a later stage of the proceedings; in a handful of cases, their age and status (as "of the family" or not) was unclear, and we treated them as not of the family for analysis.

[344] This is the document returned by the respondent in response to the divorce petition, acknowledging service of that petition and indicating, inter alia, whether they intend to contest the divorce.

[345] We noted hearings in relation to divorce applications (usually concerning costs or respondents' applications for decree absolute) in only a handful of cases.

conducting the divorce. In many cases in this study, it was clear which category applied, but in others, while a solicitor was evidently involved for one or other party at the relevant stage, it was not clear in what capacity. As Moorhead and Sefton (2005) did,[346] at Table B.2 we therefore report the representation profile at petition/acknowledgement of service, combining all cases of known solicitor involvement (whether represented, advice/assistance only – including free advice – or unclear) into one category. This includes some parties who acquired lawyer support only after one or more unsuccessful attempts to complete the paperwork alone. Where there was no evidence of a lawyer on the court file at the petition/acknowledgement stage,[347] we treat the case as one of no lawyer involvement.

Table B.2: Lawyer support profile of divorce cases at point of petition/acknowledgement

Profile of lawyer involvement/ LIP status	Frequency	%
both parties had lawyer involvement	248	62.2
only one party had lawyer involvement	130	32.6
neither party had lawyer involvement	21	5.3
Total	399	100.0

Under 8% of petitioners for divorce in our survey had no evident lawyer support, compared with just over a third of respondents. This contrasts with Moorhead and Sefton's data (for 211 cases) in which 27.5% of petitioners and around two-thirds of respondents were unrepresented, and 25% of cases in which neither party had lawyer involvement.[348] However, Moorhead and Sefton were looking at all divorces, whereas we have data only for divorces with a financial order: our findings cannot be assumed to be typical of all divorces, and it would not be surprising if parties to divorces that include financial

[346] (2005), 11.

[347] We have classified parties as having no lawyer involvement at this stage where it was clear from that data collected that any lawyer arrived on the scene at a later stage; we classified one spouse as having lawyer involvement where there was a notice of acting for that spouse 10 days after the acknowledgement of service (completed in person) had been signed. We have classified cases where the respondent simply failed to participate at all as ones of no lawyer involvement.

[348] (2005), 26.

proceedings more often had lawyers involved than those in which no financial application was made.

Looking at wives and husbands, as petitioners and respondents respectively, we found that the vast majority of wife petitioners had lawyer involvement: we have no evidence of lawyer involvement for only 19 out 297 wife petitioners – 6%, compared with 12 out of 102 (12%) of husband petitioners. The smaller percentage of wife petitioners who acted without lawyer support may be an indication of wives more commonly being eligible for Legal Help (pre-LASPO) than husbands. Respondents, whether wife or husband, much more commonly appeared to be acting without lawyer support: 36 out 102 wives, 105 out of 297 husbands – 35% in each case.

APPENDIX C: INTERVIEW SCHEDULES

1. Solicitor schedule [with alternative questions for solicitor-mediators]

2. Mediator schedule

1. SOLICITOR SCHEDULE [WITH ALTERNATIVE SOLICITOR-MEDIATOR QUESTIONS]

INTRODUCTION TO PROJECT INCLUDING CONFIDENTIALITY ISSUES AND PERMISSION TO RECORD THE INTERVIEW

GENERAL BACKGROUND: INDIVIDUAL

Ask them to self-define their role (Eg. Sol-Mediator / Sol / Collab lawyer) Status/position within firm/organisation

What is their primary role?

Years since mediation training and training provider / Collab law experience?

Years p.q.e.

Panel / professional memberships

Main areas of specialisation

Proportion of time spent on financial remedy cases

Rough breakdown of time spent on different types of work (eg. med/ legal/collab)

GENERAL BACKGROUND: FIRMS

Size of firm/practice: number of partners/sols/mediators, support staff, branches, etc

Type of client (eg. big/small money / mixed / public or privately funded)

Legal Aid contract? If so, for what?

Approximate legal aid percentage of total caseload (firm and individual)

MOST RECENT CASES (WITHOUT DISCLOSING CONFIDENTIAL DETAILS RE THE CLIENT)

Describe in outline the most recent financial remedy case in which they were involved that was taken to court as a **consent order application**.

Describe in outline the most recent financial remedy case in which they were involved in which Form A proceedings were **issued** (i.e. not for dismissal purposes only with a consent order application) **but eventually settled**.

Describe in outline the most recent financial remedy case in which they were involved that resulted in a **contested final hearing** (if have had one). NB: If no contested case or can't remember much detail about it, ask general questions re. their view as to lack of contested final hearing cases / how many contested final hearing cases have they ever dealt with

For each case, please ask the interviewee to discuss the following aspects:

Brief history of the case

Basic family set-up (age of parties / length of marriage /how many children and ages / step-children / other family members living in FMH etc)

Main issues in the case

Any background issues? (Eg conduct/dv /financial probs / bankruptcy etc which impacted on the case / or other factors that shaped advice to client or progress of case)

Nature and approximate value of property, capital assets, pensions and income

Final outcome

Progress of case

Length of time case took to conclusion (initial meeting to CO/contested hearing NB: NOT close of file)

Referral – mediation / counsel / financial adviser / elsewhere

Timing of this referral; Why at that point?

Option 1: Settlement case	Option 2: Initially contested but subsequently settled	Option 3: Contested case
Explore reason(s) for settlement Is this typical of settlement cases? Prompts if needed: At what stage did it settle and why? Impact of children on nature of settlement (i.e. Is agreement structured around presence of children – division of FMH / child support / periodical payments for eg. or were other (s.25) factors (more) important?)	Did client go to a MIAM? If not why not? How did they feel about it / their reaction / was it useful for them. Explore reasons / circumstances behind issuing the contested application and why it ultimately settled Is this typical of initially contested but subsequently settled cases? Prompts if needed: At what stage did case settle / why did it settle then? Impact of children on nature of settlement	Did client go to a MIAM? If not why not? How did they feel about it / their reaction / was it useful for them. Explore reason(s) why case did not settle Is this typical of contested cases? Prompts if needed: Type and detail of ct proceedings Impact of children in contested outcome

Costs: Legal aid or private / amount

Professional's views on most recent case:

Impressions of case – easy or difficult to sort out?

Factual/legal/procedural complexity

On a scale of 1-5 (1 being very difficult / 5 being very easy, where would solicitor place the case?

Client's understanding of issues

Client's response to outcome

On a scale of 1-5 (1 being very unhappy / 5 being very happy), where would you place your client's response to the outcome.

How well has law and process worked for this particular client?

GENERAL VIEWS ON SETTLEMENT IN FINANCIAL REMEDY CASES

NB: Not all questions may be necessary if covered already

Negotiating settlement

What is the solicitor's usual approach towards mediation in financial cases?

What is their view of mediation

How often does solicitor refer clients to mediation?

Have they had any experience of clients approaching them with a self-negotiated agreement?

Is successful negotiation always concluded with a consent order? If not, what proportion and types of cases are settled w/o being finalised with a consent order?

Collab lawyers only: How many cases in past year and proportion that resulted in a CO and what proportion did not.

[Solicitor-mediators only: Negotiating/mediating settlement]

[Ask interviewee to reflect generally on their differing experience of handling these cases as solicitor and as mediator:

What similarities and differences in terms of:

Routes to settlement

Types of client

Their own role as lawyer/ as mediator

Do they think that their lawyer background influences their work as mediators?

In terms of style adopted

Attitude towards issues like (non)disclosure

Tendency or not to refer in mediation to how case would likely resolve if settled by reference to legal criteria

Do they think that their experience as mediators affects the way they work as lawyers?

In terms of approach to negotiation

Tendency to encourage clients to mediate and/or negotiate directly with each other]

Settlement drivers and obstacles

What do they consider are the most significant factors which encourage parties to settle? and which hinder settlement? - by both lawyer negotiation and by mediation

If practitioners are not forthcoming, prompts include:

What role does the substantive law have in influencing settlement?

What role does process have in influencing settlement (eg. do you feel that the discipline of the FDR is helpful?)

What role do non-legal factors have in influencing settlement? (Eg. Emotions / costs)

What is the significance of children in settlement? (i.e. are children the main focus of agreements / accommodation / income issues / how is child support handled?)

In their opinion, would there be any impact on negotiation or mediation if the law were more prescriptive/less discretionary? If so, how?

Getting the order

In which court(s) does the solicitor normally issue? Why?

In their experience, how much scrutiny of the CO does that court provide, as evidenced either via queries in correspondence or by requiring approval hearings? And in what sorts of circumstances?

MIAMS

Experience of MIAMs (particularly in relation to their impact / effect on clients' pathways to settlement / time to settlement / increase in work)?

[Solicitor-mediators only: From mediator perspective, views on whether their private law caseload has altered because of MIAMs (eg. Private clients who may not have previously considered mediation may be coming their way, and may or may not be as suitable for mediation as others)]

Funding issues/costs

What is their general view about the impact of changes to legal aid entitlement on the practice of settlement (in particular for the poorest clients, who may currently just have claims dismissed?)

Particular issues you might explore:

Steps that they or their firm/org have taken/will be taking to adapt to the new (post LASPO) regime

Have they noticed an increasing prevalence of partial representation/unbundling of legal services?)

Have change in costs rules altered settlement behaviour?

Has the abandonment of the Calderbank principle affected settlement culture in any way?)

Has solicitor noticed any impact of Form H on settlement practice (i.e. reporting costs at every stage?)

LIP issues

(NB: if one or more of the recent cases discussed featured a LIP, no need to ask)

Experience of representing a client whose opponent is self-rep (does this affect their approach to settlement?)

Experience of mediating in a case where one or both clients are self-rep (does this affect their approach to settlement)?

Closing the interview

Is there anything else the practitioner would like to add about the settlement process in financial remedy cases that they think has not been covered in the interview

2. MEDIATOR SCHEDULE

INTRODUCTION TO PROJECT INCLUDING CONFIDENTIALITY ISSUES AND PERMISSION TO RECORD THE INTERVIEW

GENERAL BACKGROUND: INDIVIDUAL

Ask them to self-define their role (Eg. Mediator – full-time/part-time) / Position within organisation

Years since mediation training and training provider

Panel / professional memberships

Main areas of specialisation

Background prior to mediation training

Rough breakdown of time spent on different types of work (eg. children / all issues / financial / other)

GENERAL BACKGROUND: MEDIATION PRACTICE

Size of firm/practice: number of partners/sols/mediators, support staff, branches, etc

Type of client (eg. big/small money / mixed / public or privately funded)

Legal Aid contract? If so, for what?

Approximate legal aid percentage of total caseload (practice and individual)

MOST RECENT CASES: (without disclosing confidential details re clients)

Describe in outline the most recent financial remedy case in which they were involved that resulted in a heads of agreement.

Describe in outline the most recent financial remedy case in which they were involved that did not result in a heads of agreement.

For each case, please ask the interviewee to discuss the following aspects:

Brief history of the case

Basic family set-up (age of parties / length of marriage / how many children and ages / step-children / other family members living in FMH etc)

Main issues in the case

Any background issues? (Eg conduct/dv /financial probs / bankruptcy etc which impacted on the case / or other factors that shaped approach to mediation and progress of mediation)

Nature and approximate value of property, capital assets, pensions and income

Were either or both clients receiving support from a solicitor during the mediation process?

Outcome in heads of agreement.

What were the clients' intentions once the mediation process had finished?

Did the mediator receive further information or feedback on the final outcome? (i.e. what happened to the case after it left them?)

Progress of case:

Length of time case took to conclusion (initial meeting (screening and 1st mediation appointment) to heads of agreement for eg.)

Signposting/recommendations elsewhere – solicitor/counselling/financial adviser?

Timing of this recommendation. Why at that stage?

Option 1: Agreement case	Option 2: No heads of agreement
Explore reason(s) for agreement **<u>Is this typical of settlement cases?</u>**	**Explore reason(s) why parties did not agree** **<u>Is this typical of cases where there is no agreement in mediation?</u>**

Costs: Legal aid or private / amount

Professional's views on most recent case:

Impressions of case – easy or difficult to sort out?

Factual/legal/procedural complexity

On a scale of 1-5 (1 being very difficult / 5 being very easy), where would mediator place the case?

Clients' understanding of issues

Clients' responses to outcome

On a scale of 1-5 (1 being very unhappy / 5 being very happy), where would mediator place each of their clients' response to the outcome.

How well has law and process worked for each of these clients?

GENERAL VIEWS ON SETTLEMENT IN FINANCIAL REMEDY CASES

NB: Not all questions may be necessary if covered already

Negotiating settlement

What approach(es) do mediators adopt in their work in financial cases?

In terms of style used (eg. questioning / legally aware / client-led / problem -solving)

Attitude towards issues like (non)disclosure

In cases where the proposed settlement is manifestly unfair

Do they think that their background influences their work as mediators?

At what stage in the process (if at all) does the mediator discuss the need for solicitor support?

What does mediator suggest to clients upon the successful and unsuccessful conclusion of mediation?

Agreement drivers and obstacles

What do they consider are the most significant factors which encourage parties to achieve a successful mediation? and which hinder agreement?

If mediators are not forthcoming, prompts include:

What role does the substantive law and process have in influencing parties to reach an agreement?

What role do non-legal factors have in influencing agreement? (eg. Emotions/costs)

What is the significance of children in clients' agreements? (i.e. are children the main focus of agreements / accommodation / income issues / how is child support handled?)

In their opinion, would there be any impact on mediation if the law were more prescriptive/less discretionary? If so, how?

MIAMS

Experience of MIAMs (particularly in relation to their impact / effect on clients' pathways to settlement / time to settlement / increase in work)?

Mediators views on whether their private law caseload has altered because of MIAMs (eg. Private clients who may not have previously considered mediation may be coming their way, and may or may not be as suitable for mediation as others)

Funding issues/costs

Mediator's general views on impact that funding issues will have on the practice of mediation

Steps that they or their practice/organisation have taken/will be taking to adapt to the new (post LASPO) regime

LIP issues

(NB: If one or more of the recent cases discussed featured a LIP, no need to ask)

Mediator's experience of mediating in a case where one or both clients are self-rep (does this affect their approach to settlement)?

Closing the interview

Is there anything else the mediator would like to add about the settlement process in financial remedy cases that they think has not been covered in the interview