

Update on Alternative Dispute Resolution Private FDRs and Early Neutral Evaluation

Finance | 01.05.2020 | [Laura Moys](#)

[Private FDRs](#) and [Early Neutral Evaluation \('ENE'\)](#) have both been around for some time but, for a variety of reasons, are still not being embraced as much as they could be.

In my practice I often come across a perception that private FDRs, in particular, are only for 'big money' cases and that the cost of undertaking the FDR exercise is prohibitive and/or disproportionate when you can have a court FDR 'for free'.

Whilst the current lockdown situation has certainly transformed the way in which [family lawyers](#) are working, and has increased (often overnight) the use of remote technology, it has also highlighted many of the pre-existing difficulties that our profession and our clients already encounter in resolving their disputes in a timely manner and without incurring excessive cost.

Courts that were already struggling to accommodate listings have been hit hard by the double whammy of an enforced and rapid change to a 'remote' system (which does not suit every type of case and where a desire for flexibility can be thwarted by ageing or incompatible technology) and a reduction in the availability of staff and judges.

As many of you have experienced, the knock-on effect of this has been removal of cases from the lists at the last minute, uncertainty about whether hearings will go ahead, understandable anxiety from clients about how effective their hearing will be over an intermittent Skype connection/telephone call, and an increase in delay in listing cases such as FDRs and more 'routine' hearings in children cases as the Courts prioritise emergency cases.

It is not unusual to be advising clients that their recently vacated FDR will now be relisted

at the end of this year or the beginning of the next. When the country, and the Courts, begin to get back to something approaching 'normal', I suspect that there will be a large backlog of cases that need to be resolved and this will put even further pressure on Court lists.

If ever there was a time to reconsider the benefits of Alternative Dispute Resolution (and dispel some of the myths), this is it!

First, private FDRs are not only for 'big money' cases. Family lawyers are acutely aware that it is often the lower value, needs-driven cases that are the hardest to crack. Where money is plentiful so are the options for settlement. Where one or both parties face a tight (or dire) financial situation, greater creativity (and sensitivity) is often required.

The huge advantage of the private FDR process is that it is entirely bespoke. If the funds aren't available, you don't have to instruct the most senior of senior juniors or a silk as your 'judge'. Specialist family counsel of a more junior level of call will be very used to encountering the issues arising in your case (it is often more junior counsel who are instructed in more modest claims and who are already experienced in resolving them at court).

Flexibility doesn't stop at your choice of FDR judge; it also extends to the process itself and these are a few examples:

- A private FDR can be convened on a date and at a time of day to suit our clients rather than shoehorned into a busy court list. Court FDRs can be fraught at the best of times but at present with parties (and lawyers) working from home and perhaps juggling work commitments with home schooling, or with a divorcing couple stuck under the same roof, there are myriad practical difficulties assisting parties to participate fully in a Court convened FDR. We can arrange a private FDR using state-of-the art video conferencing technology at a time to suit you (including outside 'usual' hours if that suits the parties' other commitments) and as quickly as you want;
- A private FDR judge is available for as long as you need them to be and will be

completely focussed on resolving your case. In my experience, the prospects of settlement are greatly increased when the parties have the confidence that their tribunal fully understands the detail of their case and has had an appropriate amount of time to read the papers and listen to the competing arguments. In modest asset cases (including where a 'reality check' may be required) it is vital to have a judge who is able to deliver a 'robust' indication with kindness and sensitivity and without appearing rushed or brusque;

- An effective private FDR (especially if undertaken early on in the process) will often significantly reduce costs in the long run. Conversely, an ineffective or disappointing court FDR, whilst 'free' in terms of the cost of the tribunal, can be very costly if the parties plough on to a final hearing when they could have settled the case with a bit more time and a better steer.
- Whilst the Courts strive to keep 'children' issues and 'money' issues strictly separate, we all know that this is often highly artificial. How many times have you had a financial case stall because the parties can't agree the child arrangements or one party is manipulating their stance on one aspect to influence the outcome of another? There is no reason why, in an appropriate case, the private FDR process cannot be adapted to encompass an early neutral evaluation in respect of child arrangements issues as well. Ultimately, it is up to the parties to agree how they would be best assisted.

As far as Early Neutral Evaluation is concerned, there is great value in obtaining a neutral opinion at an early stage when it comes to disputed child arrangements. Whilst arbitration is a very good alternative to litigation, many clients want to try and resolve their dispute without any court/quasi court proceedings at all. Likewise, clients sometimes need more of a directive 'steer' than is appropriate in mediation.

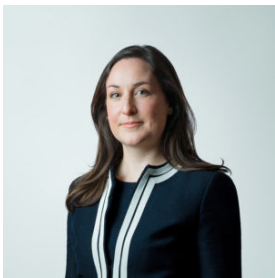
Early Neutral Evaluation is a process through which a neutral opinion is presented to both parties jointly, giving them guidance to help them agree child arrangements without the need for court proceedings. As a form of ADR, there is also no reason why parties cannot agree to 'pause' existing litigation (or make use of existing delays) to obtain a neutral steer.

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The current crisis poses new challenges resolving child arrangements (and honouring existing ones) and it can be immensely helpful for the parties to obtain insight and suggestions at an early stage from specialist family counsel who are not acting for either side.

If you are interested in learning more about what **1KBW** can offer in terms of private FDRs and/or Early Neutral Evaluation we have a dedicated **clerking team** on hand to answer any questions you may have, as well as a number of **practitioners** at various level of call who undertake this work.

As far as my own experience is concerned, I have 11 years' experience dealing with all aspects of family breakdown and I act as a private FDR judge as well as providing Early Neutral Evaluation in connection with financial, child arrangements and cohabitation disputes. In 2018 I was appointed a family Recorder, a job I love and which has greatly assisted me in obtaining a deeper understanding of how a family conflict appears (and is resolved) from the 'other side' of the bench.



By Laura Moys - [click here to view profile](#)