Alternatives to Court

December 2020

For most people contemplating divorce and separation, the prospect of going to Court and asking the Judge to make an order regarding children and finances can be very expensive and stressful.

So what other ways are available to enable separating parties to try and resolve their differences away from Court.

- Negotiated Settlement
- Collaborative Law
- Arbitration
- Mediation

NEGOTIATED SETTLEMENT

This is perhaps the most common method to try and reach settlement of all financial and custody issues.

Before you open negotiations, you need to know where you stand, the options available to you and where you might end up if you litigate before the Court.

In any negotiations relating to finance, there will need to be disclosure of each party's assets, debts and income. The disclosure stage itself can be complex especially where the assets are difficult to value, for example, if a family business is involved. However, the need for full disclosure cannot be emphasised enough. Clearly, you cannot negotiate a settlement of the assets if you do not know how big the cake is in the first place.

Disclosure is usually done by the exchange of Form A, a financial statement listing income, assets and liabilities.

In cases involving very simple assets, it may be possible to try and short circuit the disclosure process by exchanging a summary of assets and basic documentation.

Once this information has been exchanged, then negotiations can begin. This can be done via correspondence or by one or more round table meetings. If agreement is reached, the terms will need to be secured in a Court order either by way of a Judicial Separation by Consent (if there are no divorce proceedings) or by a Consent Order if a Final Order of divorce has been granted. This usually involves a short hearing, when the approval of the Court is sought.

Suitable for:

- Couples who want to resolve matters amicably, quickly and in a cost effective manner.

Procedure:

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1. One or both parties appoint their own advocate.
2. Each party provides disclosure of their finances with valuations and supporting documentation.
3. Negotiation is undertaken by advocates and/or the parties.
4. If agreement is reached in relation to all matters regarding children and finances, the agreement is presented to the Court by way of a Judicial Separation or Consent Order.

Advantages:

- Quick, cost effective and amicable.
- Each party has the benefit of legal advice if required.
- If negotiation fails, the option remains to go to Court.
- Concluded settlements can be converted into a binding Court order very quickly.
- A negotiated fair settlement avoids the cost, stress and uncertainty of going to Court, where a Judge could impose orders which neither of you may like.
- Certainty of outcome.

Disadvantages:

- Negotiation inevitably means compromise.

COLLABORATIVE LAW

Each party appoints their own specifically trained advocate and the lawyers then work together constructively to try and reach a settlement. Correspondence is kept to a minimum and all negotiations are dealt with by a series of face to face meetings involving both parties and their advocates.

Suitable for:

- Couples who want to fast track negotiation and employ lawyers who can work together constructively to try and reach a settlement.

Procedure:

1. The parties and their lawyers agree to work collaboratively.
2. Exchange of relevant documentation.
3. Joint valuations of assets.
4. Series of four-way meetings arranged between the parties and their respective advocates to negotiate a settlement.

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5. If agreement is reached, this is converted into a Judicial Separation or Consent Order.

Advantages:

- Both parties have the benefit of their own independent legal advice.
- The lawyers work together constructively for the mutual benefit of both parties.
- All negotiations are via face to face meetings rather than correspondence.
- The parties control the speed of the process and areas of discussion.

Disadvantages:

- Both parties need to instruct trained collaborative lawyers. In Guernsey, there are only a few lawyers trained in collaborative law.

ARBITRATION

Family arbitration is a type of private dispute resolution in which the parties appoint an independent family arbitrator to resolve their dispute.

Suitable for:

- Couples who want to resolve a family dispute without the delay and expense of the Court process.

Procedure:

1. Both parties agree to binding arbitration to resolve their dispute.
2. The parties sign an arbitration application and send this to the Institute of Family Law Arbitrators.
3. An arbitrator is appointed.
4. The arbitration proceeds usually by face to face meetings, including case management directions and a final meeting with the parties in attendance.
5. The arbitrator issues binding award.
6. The arbitrator's award is usually converted into a Court order, either by way of Judicial Separation or Consent Order.

Advantages:

- Quick and flexible, with timetable agreed by the parties.
- The parties define the scope of the arbitration and the time and venue of the meetings.
- Each party retains their own lawyer.

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- Likely to be less costly than the Court process.
- Whilst parties cannot choose their Judge in the Court process, the parties can choose their arbitrator.

Disadvantages:

- Arbitration is binding on the parties and it is difficult to appeal an arbitration unless the arbitrator has made a serious error.

MEDIATION

In mediation, separating couples appoint an impartial third party to assist them to communicate and to try and reach their own agreement in relation to finances and children.

Suitable for:

- Separating couples who want to resolve all issues amicably.

Procedure:

1. A mutually agreed mediator is appointed.
2. The mediator will assess the parties' suitability for mediation.
3. The mediator requests disclosure of each party's income, assets and documentary evidence in support.
4. The mediator arranges a three-way face to face meeting with the parties.
5. If agreement is reached, the mediator draws up a record of the agreement.
6. Each party is then at liberty to take their own legal advice, as to the proposed agreement.
7. If both parties agree, a Judicial Separation or Consent Order is drawn up and presented to the Court for ratification.

Advantages:

- The timescale and areas of discussion are entirely controlled by the parties themselves.
- The outcome is agreed, rather than imposed.
- Any agreement can quickly be converted into a binding Court order.

Disadvantages:

- A mediator cannot provide legal advice.
- Mediation requires full cooperation from both parties.
- Financial disclosure is less rigorous.

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- Mediation is not suitable for all situations, for example, where there are allegations of domestic abuse or significant power imbalance between the parties.
- If mediation breaks down, you can be back to square one and the whole process can take longer than if you had pursued an alternative route.

COURT

To be successful, the methods referred to above require both parties to commit to reach an amicable settlement. If either is not prepared to negotiate, then the only real option available is via the Court process when applications will be issued by one or both parties to determine matters relating to children and finances.

Suitable for:

- Disputes regarding children and finances where negotiations have stalled or broken down completely.
- Complex financial cases where problems arise with disclosure or valuation of assets.
- Disputes regarding children where there are allegations of domestic abuse and which require the assistance of the Family Proceedings Advisory Service.

Procedure:

See Flowchart of a financial application & Flowchart of applications relating to children.

Advantages:

- Forces a resolution.
- This is the last resort where everything else has failed.
- Reluctant parties can be made to engage with the Court process.
- Courts can impose orders for disclosure or valuation of complex assets.

Disadvantages:

- Expensive.
- Stressful.
- Court proceedings can be lengthy.
- Uncertainty of outcome.

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