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Ctrl, Alt, Del the Court Process – Bill and Melinda Gates

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Ctrl, Alt, Del the Court Process – Bill and Melinda Gates: the growing popularity of private agreements between divorcing spouses and the drive to use alternative methods of dispute resolution

When the news broke that Bill and Melinda Gates were to divorce after 27 years of marriage, three children and no pre-nuptial agreement, many expected that it would lead to potentially the biggest divorce battle of all time to separate their vast wealth estimated to be worth $124bn. However, shortly thereafter, it transpired that, prior to announcing their divorce, Bill and Melinda had already reached a private agreement regarding the division of their assets. Indeed, for a variety of reasons, such agreements are becoming increasingly more common.

Prior to the Covid-19 pandemic, the courts were already overburdened and their waiting lists long; indeed, some financial remedy cases taking between 18 to 24 months (and sometimes longer) from the issue of a formal financial remedy application to a case reaching a final hearing before the courts. Following the impact of Covid-19, this process is now potentially even longer and has led to many people exploring different avenues, which allow them to resolve their financial affairs in both a swifter and more economical way.

There are multiple routes available to resolve matters away from the courts. Parties can attend mediation, engage in negotiations through their solicitors, attend a private FDR or arbitrate their dispute. Indeed, my colleague, Beth McMullan, recently discussed the benefits (and pitfalls) of such in this article. If both parties are fully committed to the process, all of these alternative methods of dispute resolution can result in an early resolution (which is also likely to mean less legal fees).

Reflective of the alternative options available and, as a way to ease the pressure off the courts, avoid protracted legal proceedings and avoid the incurring of disproportionate legal costs by pursuing matters in the courts, increasingly, the courts themselves are actively encouraging parties to explore these alternative methods of dispute resolution.

In 2019, a change to Practice Direction 28A of the Family Procedure Rules ("FPR") altered the approach of the court when considering the conduct of the parties. Specifically, it allows a judge to view issues of litigation conduct broadly and a refusal or failure to negotiate reasonably may be penalised by way of a costs order. In particular, Mr Justice Mostyn has imposed costs orders where parties have failed reasonably to negotiate. For example, such an order was made in *OG v AG [2020] EWFC 52,* where Mr Justice Mostyn explicitly said: "*I hope that this decision will serve as a clear warning to all future litigants: if you do not negotiate reasonably you will be penalised in costs*".

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More recently, Mr Justice Mostyn has gone further again in the case of *LM v DM [2021] EWFC 28*. In this case, Mr Justice Mostyn imported the requirement to negotiate reasonably and openly into non-financial remedy proceedings (such as interim applications, which are not included in the definition of financial remedy proceedings for costs purposes (*FPR 28.3(4)*) and said, "*Litigants must learn that they will suffer a cost penalty if they do not negotiate openly and reasonably*." Thus, while strictly the obligation to negotiate openly and reasonably *may* not apply to an interim application, *LM v DM [2021] EWFC 28* makes clear that the obligation is pertinent to *all* family court financial proceedings.

Such cases exemplify a reoccurring willingness by the courts to penalise parties financially if their open positions are unreasonable, irrespective of any without prejudice discussions. Indeed, in *OG v AG [2020] EWFC 52*, although Mr Justice Mostyn described the husband's conduct as an *"abysmal, and let there be no doubt, dishonest, presentation"*, the wife was also penalised for not making, *once* the financial landscape was clear (and even if this only becomes clear very late in proceedings), a reasonable offer on an open basis.

Where the legal costs become disproportionate to the issues in dispute, it is also open to the court to exercise its case management powers to adjourn proceedings and direct the parties to attend non-court based dispute resolution (per Part 3 of the Family Procedure Rules). The application of this rule can be seen in the recent case of *WL v HL [2021] EWFC b10*, where Recorder Allen QC adjourned a case for the parties to explore non-court based mediation (and was thereafter asked by Mr Justice Mostyn to publish a short judgment on the same).

In his judgment, Recorder Allen QC said that adopting the approach that he did "*led to a better, quicker and less expensive outcome than would otherwise have been the case*". He also went on to say that it:

"…furthered the overriding objective of enabling the court to deal with cases justly and in particular the obligation in r.1.1(2)(b) of dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues; (d) of saving expense; and (e) allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. My use of these powers was also an exercise of my duty as set out in r.1.4 to further the overriding objective by actively managing cases which includes at r.1.4(2)(f) "encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".

Although the use of Part 3 of the FPR has historically not been overly common, its application is likely now to gain traction because of the courts' resounding message that parties must use their best endeavours to resolve matters consensually wherever possible.

For couples such as Bill and Melinda Gates, there are a myriad of benefits to choosing to resolve their differences outside of the court arena. They are not bound by a court timetable and can set their own agenda and timeframe. This flexibility can be hugely beneficial to busy international couples. They can also ensure that matters are dealt with on a confidential basis and privately at a venue of their choice, without the fanfare that often greets divorcing couples arriving at court and the risk that details of the divorce may be made public. Finally, and perhaps the greatest benefit of all is that, by committing to a process that depends on agreement and co-operation, rather than an adversarial court process, they are more likely to preserve an amicable relationship. This will be particularly important for their future as they continue to be parents to their three children and work together in the Bill and Melinda Gates Foundation.

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