

Lord Wilson of Culworth

Keynote Address at a reception hosted by Collaborative Family Law, at the Reform Club

29 November 2011

1. Let me begin my expression of profound commitment for alternative methods of the resolution of private family disputes by suggesting, perhaps paradoxically, why a well-functioning court system needs to remain available for the judicial determination of some disputes following the breakdown of a family relationship. There will always be a residue of such disputes which can be resolved only in court. In my experience, born of working in the family courts first as a barrister and then as a judge, day in day out, for 40 years, there are five main reasons why some private family disputes need to proceed all the way to the judge's determination – indeed sometimes beyond in the shape of an appeal.

2. First, lack of legal advice. Parties often leave a relationship with unrealistic expectations about their legal entitlements. It is one of the main functions of lawyers, albeit never an enjoyable one, to inject a note of realism into their clients' aspirations. In the absence of unpalatable advice of that character, parties often continue to misappraise their rights and to convince themselves that a judge will vindicate what they think. The result, of course, is always disappointment and often disaster. The government's proposed withdrawal of public funding of legal advice even for parties who have no chance of being able to purchase it for themselves is - at a superficial level – entirely understandable given the present economic emergency. But it would actually be a false economy. Without legal advice, more private family disputes would end up in court; without legal representation, the hearings of them would take longer; and, without assistant legal navigators, the trial judges would more often be blown off course so there would be more appeals. Applications for financial relief in which the parties' net assets total £100k, all usually tied up in a house, are far more difficult for a judge to resolve than those in which they total £10m. Tonight I publicly join the chorus of so many others with intimate knowledge of the family justice system who are urging the government to think again.

3. Second, wrong legal advice. During my 40 years I never formed the view that a family lawyer, whether solicitor or barrister, had deliberately given over-optimistic (or otherwise bad) advice in order to prolong the dispute and to enlarge his fees. Among the many public misconceptions about family justice, some fomented by one or two members of the press who occasionally appear impervious to evidence inconsistent with their pre-conceived agenda about it, the perception of the stereotypical family lawyer who cynically bumps up the costs is one of the most unfair. But I did encounter cases in which, unintentionally, the wrong legal advice had been given about the likely outcome of the case in court. So the clients had gone blithely forward, rejecting realistic proposals for settlement, until, on judgment day, they received a painful education.

4. Third, lack of clarity in the law. Good lawyers sometimes have to confess that they are unable to predict the outcome of the case with any confidence; and unsurprisingly, the result is that all save the most generous settlement proposals are rejected. The law can be in a state of flux; see its current movement in relation to the circumstances in which a parent will be permitted to take a child to live abroad. Or the law may deliberately have been designed to be fluid and discretionary. A prime example is our law of financial provision following divorce; during the last decade dramatic new principles have been injected into it, case by case, in order to reflect society's changing sensations of fairness but it takes time for the courts clearly to work out their ramifications. So sometimes good lawyers on each side may reasonably offer to their clients a substantially different prediction of the result.

5. Fourth, a refusal, real or perceived, by one party to deal honestly with the other. Of course I have in mind, in particular, a refusal to make full disclosure of his or her financial resources. Full mutual disclosure is the essential foundation of any settlement of financial claims: if it is reasonably perceived to be absent, there is no escape from proceeding to draw down, from within the court system, the ferreting qualities of the family lawyer and the worldly shrewdness of most family judges.

6. And fifth, the way in which, in the wake of the breakdown of a relationship, emotions of fear, mistrust, anger or revenge can infect a person's ability to accept

advice and to proceed to settlement. The family lawyer is sensitive to the reasons for such barriers to his client's acceptance of his advice; and sometimes he has to conclude that, without application of an unacceptable degree of pressure, he cannot overcome them and that his client's emotional need requires simply that he should lay the case to best advantage before a judge.

7. But the vast majority of disputes which follow the breakdown of a relationship, whether the parties were married, were civil partners or otherwise, are entirely capable of consensual settlement rather than adjudication; and it is vital that all cases which can be settled should be settled. There are five main disadvantages to proceeding to court.

8. First, the cost. Take a financial case in which the assets are say £700k. In pursuing that case to judgment each party nowadays may easily incur costs of £100k and so may together reduce the pool to £500k; such a ratio of costs to assets is unacceptable and its malign consequences are likely to impact substantially upon both of them.

9. Second, the delay. Only when the assembly of a case for final presentation is well under way will the court be willing to fix a date for the main hearing. But the date which it then fixes will be many months ahead and, if a long hearing – say five days – appears necessary, it will probably be more than a year ahead. The lawyers will take such delay in their stride; but, for anxious parties, it must be an eternity.

10. Third, the publicity. The press is now usually entitled to attend what are still called private hearings of family proceedings; and, although its right to publish what it there learns remains circumscribed, the daily march into and out of the court building by parties in whom the public has an interest is intrusively tracked and assiduously reported.

11. Fourth, the uncertainty. In family proceedings there is often a spectrum of legitimate outcomes even in circumstances in which the law is reasonably clear. The point along the spectrum at which the particular outcome falls will depend upon a variety of factors from which - I fear - one can never entirely banish the identity of the

judge but which will certainly include the performance of the witnesses and of their advocates on the day.

12. And fifth, the emotional burden cast upon the parties by the hearing. They loved each other once and shared moments of utter happiness, physical and otherwise. Often indeed they remain joined in parenthood. Those of us lucky enough to have escaped divorce cannot, I suspect, fully appreciate the sickening unpleasantness for them of becoming locked in battle across a court.

13. I have laid the ground for the central message to which I referred at the outset. which I wish to convey tonight. It is one of unalloyed support for the various other methods of achieving resolution of family disputes which our hosts, Collaborative Family Law, now offer and which they explain in particular on a new website which came on stream today and which I have visited.

14. When I was at the family bar, there were only two methods of achieving settlement. The first was by an exchange of letters between solicitors. No doubt this method is still much in use – and often rightly so. But it is slow: for the dialogue must be interrupted by the solicitor's need at every stage to take instructions and, perhaps, to consult counsel. And it is expensive: for his taking of such steps is costly, as is his clever drafting of the next letter in the chain. The second was by negotiations between counsel, almost always at the door of the court. This was – and remains – a particularly poor means of achieving settlement. By that point almost all of the costs have been incurred; and the delays have been suffered. Yes, the settlements which I there secured for my clients achieved certainty and avoided the unpleasantness for them of the contest otherwise about to begin. But in retrospect I consider that I failed to appreciate what an inappropriate moment it was for me to ask them to take life-changing decisions about their future; and how uncondusive to that exercise were the circumstances of a court corridor, of a judge waiting with a greater or lesser degree of patience, and of the conundrum (with which all advocates have to wrestle) that, were too much time to be invested in a negotiation which was ultimately to prove unsuccessful, there might remain insufficient time for the judge to conduct the hearing.

15. Collaborative Family Law offers various mechanisms of dispute resolution which, in most cases, will much better serve the interests of the parties than those to which I have referred. In a way unfortunately the Group's new name disguises the mechanisms which it offers other than that of collaborative law; clearly, however, the collaborative mechanism is at its centre. It was introduced into the UK from the US about eight years ago and it has achieved an astonishing level of success in the negotiation of substantial financial and other issues (and indeed, for example, in the generation of pre-nuptial agreements, nowadays likely to be held binding, in circumstances in which at the time of their generation there may well be no issue at all). The platform necessary for the collaborative exercise is a high level of residual trust between the parties, who instruct specially trained collaborative solicitors to participate in meetings between all four of them across only one table. Hence the Group's logo of four loose pieces of jigsaw able, or (on my closer study) almost able, to fit together. But the unusual – and, to my mind, the essential – feature of the collaborative exercise is a written agreement on the part of all four of them at the outset that, were settlement not to be achieved, the respective solicitors would not continue to act for the parties in the contentious proceedings which lie ahead. The solicitors are therefore seen to have no interest in the continuation of the dispute; the parties have every interest in not being obliged to dis-instruct solicitors in whom they have confidence; and in the dialogue each can respond freely to the other's solicitor without suspecting that he is collecting ammunition for use in court.

16. The Group also offers mediation, being of course a totally different exercise. It is family mediation to which the government is a belated convert; and presently it proposes to fund mediation in circumstances in which it will not fund litigation. Indeed new rules require the undertaking of at any rate an assessment of the suitability of the parties for mediation before many applications to court may even now be issued. As President of the Family Mediators Association for the past 13 years, I have a profound commitment to family mediation and, prior to my appointment last May which has thrown my plans into wonderful disarray, I was planning soon to retire from the Court of Appeal and to ask the Association to train me as a family mediator. But it might not have been easy for a reasonably decisive judge to transmute into a subtle facilitator. The mediator, who, if provided from within this Group, would happen to be a lawyer but would not be acting as a lawyer, generally operates with the

parties on their own, although it is wise for them to have lawyers to whom they can turn for advice between sessions. By deft handling of the discussions, he enables them to move to common ground, whereupon, with his help, they record an agreement which resolves – or at least narrows – the issues and which, like the product of a successful collaborative exercise, can cover much more ground than can the contents of a court order.

17. In 1996, after I had become a judge of the Family Division, provision was made for judges to conduct Financial Dispute Resolution meetings. They were devised, in particular, by Lord Justice Thorpe and it will surely prove to be the most inspired of all his contributions to our system of family justice. It is, again, a mechanism entirely different from anything which I have yet described. A judge who, were the meeting to fail to produce consensus, would be disqualified from playing any part in the ongoing proceedings, will conduct the meeting between the parties and their lawyers and, at the end of a discussion of all apparently relevant issues, he will offer – if he can – an off-the-record prediction of the result of the proceedings in the event that they were to continue to judgment; and the more specific he can make it, the more helpful his prediction will be – so long as it is correct! If, as is intended, his prediction appears to them to be sufficiently authoritative, the parties are likely to wish to settle along the lines which he has identified. But they face delays and costs prior even to their arrival before the judge at the FDR meeting; and therein lies the relevance of the FDR meeting to the work of the Group. For some of its members now offer “private hearings”. Beneath this title – a questionable one in that the FDR exercise before the judge is deliberately described as a meeting rather than a hearing – lies another valuable mechanism for dispute resolution, very recently developed. A silk at the family bar or even a retired judge of the Family Division will conduct with the parties and their lawyers a meeting analogous to the FDR meeting and in particular will offer, off the record, what is intended to be an authoritative evaluation of the likely result in court which will lead to a settlement along those lines. Those of the Group who offer this service can do so at short notice and without the delays in the arrival of the parties at the FDR meeting; and they may be able to invest more time in pre-reading for it and in conducting it than is available to some of the judges.

18. But there is yet a different area in which the Group considers that some parties might benefit from a further and more dramatic invasion into the territory of the judges. I refer to arbitration, namely the imposition by a member of the Group of a result upon parties who have given their informed consent to be bound by it. I have not previously encountered arbitration in the family field; but a few members of the Group propose to offer it as from next year. I wish to understand more about the consequences which flow when a party, aggrieved by the arbitrator's determination, withholds consent to the court order, reflective of it, which is necessary for making a financial agreement watertight. In principle, however, arbitration would be likely to avoid – or lessen - a number of the disadvantages attendant upon proceeding to court, in particular delay and publicity. I am glad to learn that rigorous training, effected in conjunction with the Institute of Arbitrators, is a pre-requisite of a member's accreditation as an arbitrator. For he will need to be as wise as the family judge whose outstanding judicial qualities are intended to have been identified in the course of the appointments system and who in many cases will have developed the art of wise decision-making by experience over the years.

19. I am honoured to have been asked to speak about what is at present the hottest topic in family justice, namely the evolution of improved methods of the resolution in our society of private family disputes. I have said enough to explain why the Group is right at the forefront of this evolution. But its current pace is astonishing. Might I prevail on the generosity of our hosts to invite us all to another party in a few years' time at which, perhaps more interactively, we can together survey its further development?