ASSEMBLING THE JIGSAW PUZZLE: UNDERSTANDING FINANCIAL SETTLEMENT ON DIVORCE

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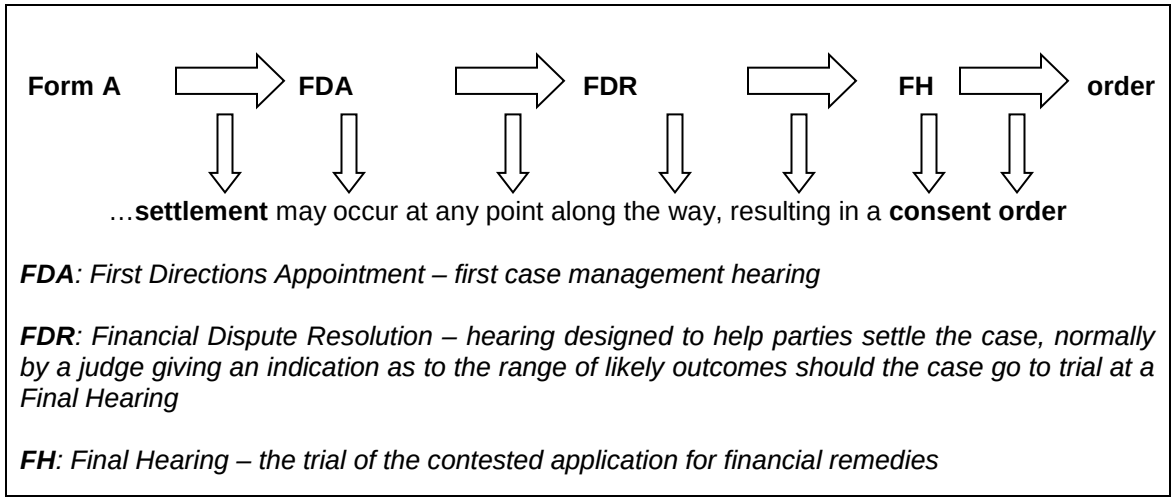
This briefing paper sets out the key initial findings from a study of financial settlement on divorce. The study involved a survey of nearly 400 court files in financial remedy cases concluded by various dates within 2010-12 from four courts in different areas of England and interviews with 32 family justice professionals – solicitors and mediators – practising in those four regions, exploring their experience of handling these types of cases. We cannot claim that our selection of cases in the court file survey is statistically representative of all divorces with a financial order in England and Wales, but we sought to gather data reflecting the typical business of a reasonable spread of different courts in varied geographical locations. All data were collected before implementation of the recent legal aid reforms by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). A full discussion of the methodology, other technical issues and our findings may be found in the online research report (available at website address listed at the end of this briefing).

In our first report for the project, we set out to explore the "**how**", "**when**" and "**why**" of financial settlement on divorce. In examining "how" and "why" settlement does (or does not) occur, whether pre-court or following the initiation of court proceedings, we aimed to examine what factors help, delay or entirely prevent settlement. We considered three broad categories of case in which court orders are made:

- **Pure consent order cases**: where the parties settle the case out of court without contested legal proceedings being started, and then seek to have that settlement converted into a binding court order, a "consent order"
- **Contested but settled cases**: where contested legal proceedings are started (by one party issuing "Form A") but the parties settle their case at some stage along the **standard financial hearings pathway** and obtain a consent order (see fig. 1)
- **Adjudicated cases**: where contested legal proceedings result in the judge making an order following a final hearing.

Fig. 1: The standard financial hearings pathway for contested cases



When is settlement reached?

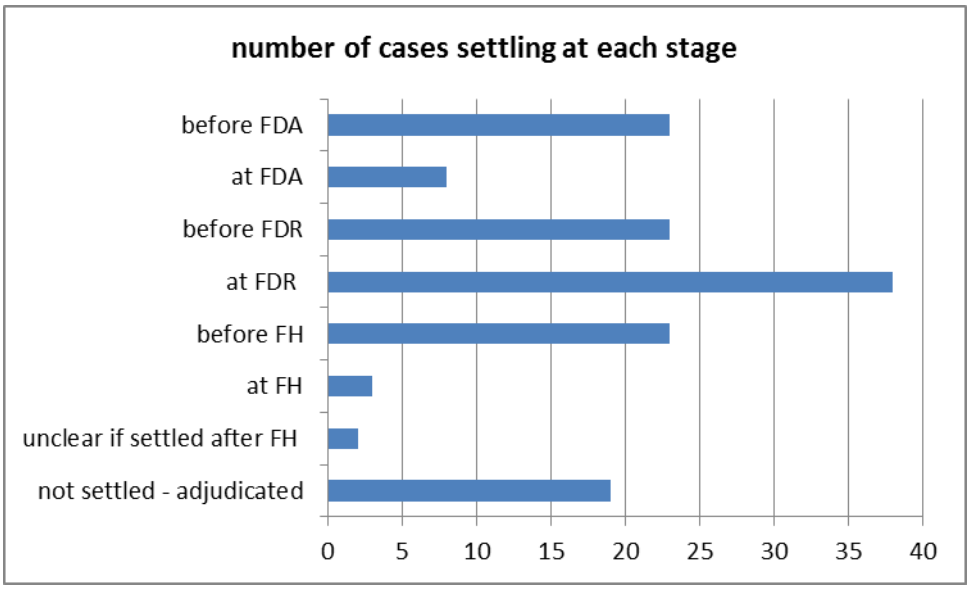
Reflecting official data on financial orders in England and Wales (MOJ (2013). *Court statistics (quarterly) Oct-Dec 2012*, London: MOJ, available at www.gov.uk/government/publications/court-statistics-quarterly--2), the majority of financial orders in our court file survey were made following a pure consent order application.

Table 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**
Pure consent order	65% (260 cases)	68%
Contested but settled	30% (118 cases)	25%
Adjudicated	5% (19 cases) [+ 2 unclear]	7%

Where cases are contested, both the court file data (see chart 1 below) and interview data in our study showed that settlement can follow at any time. Cases settle at all points along the standard financial hearings pathway, hearings appearing to act as a catalyst to settlement. 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. A substantial minority of cases settled before the FH or even at the FH.

Chart 1: stage at which settlement reached in contested cases in court file survey (N=139)



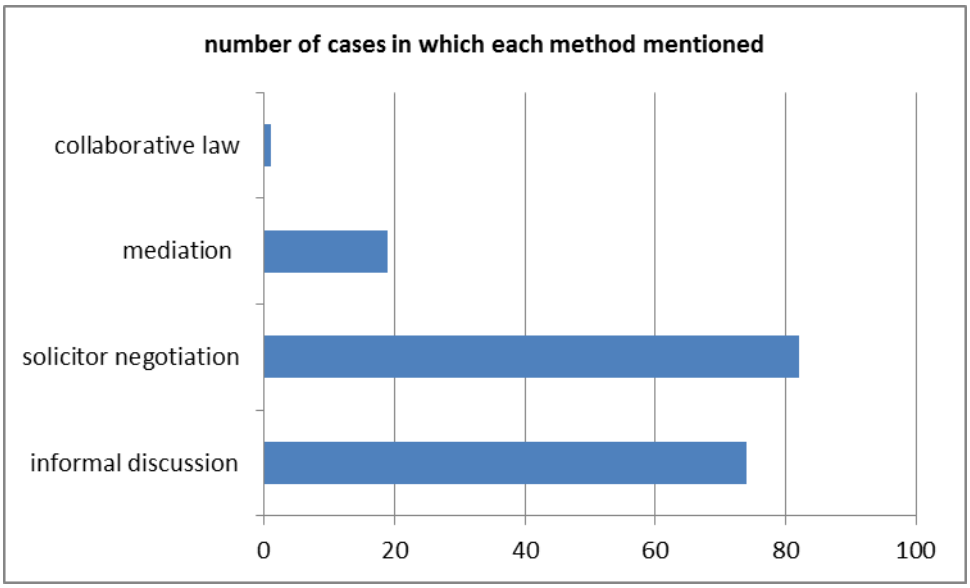
The commencement of litigation is clearly not a one-way street to adjudication: a clear majority of cases that are litigated are settled (nearly 85% of the contested cases in our survey).

> *"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."* [quotation from solicitor interviewee]

How is settlement reached?

Our court file survey suggested that both for pure consent order cases and contested but settled cases, lawyer-led negotiation was the dominant reported dispute resolution mechanism, alongside informal discussion (often used in combination). Chart 2 reports data for 136 out of 139 the recent pure consent order cases in our survey for which we have direct evidence of the dispute resolution method(s) used, in almost all cases from parties' responses to question 6 on the new version of Form D81 which asks them to state which dispute resolution method(s) was (were) used. Lawyer-led negotiation was reported in 60% of these cases. Successful mediation of financial cases appeared to be a minority activity (reported in 14% of the recent pure consent order cases), while collaborative law is a very niche practice (we encountered only five collaborative cases in the full survey). It is entirely possible that there were some cases in which mediation had been used to some effect but was not recorded on the D81, perhaps successfully narrowing the issues if not actually settling the case, but even allowing for that sort of potential under-count, the proportion of mediation cases would be likely to remain low. In a handful of cases 'solicitor advice' was also mentioned, usually in support of informal discussions, but we have excluded those from Chart 2:

Chart 2: Count of dispute resolution methods reported: pure consent orders (136 cases)



The role that solicitors apparently play in negotiating (and advising on) a large proportion of out of court settlements is at odds with the popular view that lawyer involvement necessarily means litigation. At least in our (pre-LASPO) data, solicitors were regularly involved in pure consent order applications. Even when contested proceedings have been launched, attempts at negotiation do not stop. 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 achieve settlement.

> "*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." [quotation from solicitor interviewee]

Judges play a key role in overseeing and potentially shaping final outcomes, particularly through their intervention in the consent order approval process. Here we found a somewhat different picture in our court file survey from previous research (Davis et al 2000, 'Ancillary Relief Outcomes' *Child and Family Law Quarterly* 12: 43). Intervention in consent order applications occurred quite commonly (in nearly one third of pure consent order applications in our court file survey), even if lawyers were involved in the case, for both drafting/technical and substantive reasons. This quite often resulted in some revision of the proposed order (even if only of a relatively minor/technical nature), occasionally materially altering the provision being made by the order. Our findings here suggest rather more proactive judicial activity in the consent order process than Davis et al found. But what we cannot tell is whether we happened to collect data from courts and to interview solicitors practising in areas with a more strongly interventionist culture than those which Davis et al visited, or whether our data reflect a wider cultural change amongst family judges since the late 1990s.

Why is settlement reached (or not)?

We explored with the solicitor and mediator interviewees the range of factors which might influence settlement, both in general terms and in light of their experience of recent cases they had handled. Solicitors reflected on recent cases which had resulted in pure consent orders, cases which were contested but settled and adjudicated cases. Mediators discussed cases which had and had not resulted in heads of agreement being reached following mediation.

The tables below summarise the variety of issues which emerged from our interview data as factors which may promote, delay or prevent settlement. Whilst many of these may be classified as legal or process-related factors inherent to the case (table 3), many of the factors essential to achieving settlement (or not) are "non-legal" in nature, some inherent to the parties themselves (table 2). The factors which delay or prevent settlement are, to a large extent, the "other side of the coin" to those which promote settlement. Where they prevent settlement, they are manifested in a particularly extreme and/or complex way: adjudicated cases are, by their nature, atypical.

As tables 2 and 3 indicate, 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.

"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." [quotation from solicitor interviewee]

Table 2: Factors affecting settlement – non-legal and personal issues

FACTORS PROMOTING SETTLEMENT	FACTORS DELAYING SETTLEMENT	FACTORS PRECLUDING SETTLEMENT
NON-LEGAL/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 or both parties choose 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 parties unable to agree on what would be best for the children, delaying 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

This complexity of the settlement process may be likened to the joint completion of a unique and complex jigsaw puzzle. The task can be approached in a more or less organised way. For the 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 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). 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.

Table 3: Factors affecting settlement – legal and process-related issues

FACTORS PROMOTING SETTLEMENT	FACTORS DELAYING SETTLEMENT	FACTORS PRECLUDING SETTLEMENT
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 (litigant in person)
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 case regarded as 'worth a punt'

Where contested proceedings are commenced but settlement occurs around the FDA, the fact of the contested application itself may be what focuses the parties' minds and gets things moving, by providing a court timetable that can kick-start or re-start negotiations; the prospect of court can encourage parties to avoid the emotional and financial cost of litigation:

> "*...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." [quotation from solicitor interviewee]

The FDR can play a central role in settling cases that reach that stage: its associated paperwork requirements (in theory) ensure that all the required information has been shared and the FDR itself prompts further negotiation; the immediacy of being in front of a judge and receiving a judicial indication regarding outcome provides a reality check for one or both parties; and ongoing litigation has an attrition effect on the parties, both emotionally and financially. A robust indication from the judge at the FDR about the likely range of outcomes should the case proceed to trial can have a powerful effect in promoting settlement. However, one of the most common difficulties identified by our solicitor interviewees associated with FDRs which do not achieve settlement was a weak judicial indication.

> *"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."*
>
> *"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."*
>
> [quotations from solicitor interviewees]

The situation of litigants in person (LIPs) attempting to navigate this process (to do the "jigsaw puzzle" without the aid of a tutor) can be particularly difficult. Our data from the court file survey on this issue is naturally limited by what we could discern from the court file about whether lawyers had been involved in any capacity – there may have been lawyers in the background not evident on the file in some cases. That caveat noted, even in our (pre-LASPO) court file data, a large minority (just over a third) of pure consent order cases involved at least one party acting without the apparent support of a lawyer, and in a similar proportion of contested cases at least one party acted without representation for at least part of the case (both referred to here as litigants in person – "LIPs"). The latter type of contested case appeared to be less likely to settle and, if settled, to settle at a later stage of the proceedings compared with cases with no litigant in person involvement. While there appeared therefore to be some association between lawyer-involvement and (early) settlement in the cases in our court file survey, we cannot say whether or not lawyer-involvement is itself a cause of (early) settlement. Cases involving lawyers may share other features which contribute to settlement occurring when it does, but the client-expectation management and other tasks performed by lawyers (discussed below) may also be important factors.

Solicitor interviewees reported having had difficulties handling cases with a LIP on the other side. 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.

> *"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'."* [quotation from solicitor interviewee, reflecting on pre-court phase]

The introduction of a LIP into the FDR equation can undermine the effectiveness of that process:

> *"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 on something – I think there's that natural suspicion and so they're very hesitant in concluding things."* [quotation from solicitor-mediator interviewee]

We found mixed views amongst solicitors about the impact of costs-related issues on settlement, both the influence on settlement of Form H (the form on which parties are required to record costs incurred at each stage along the standard financial hearings pathway) and the demise of the *Calderbank* rule. This was the old costs rule which supported the practice of 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. The practice was intended to give parties an incentive to make and accept reasonable offers at an early stage. Views appeared to be split along practice-type lines, interviewees who regretted the loss of *Calderbank* tending to be those with privately-funded clients:

> "*I understand the arguments 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."*
>
> *"I think most of us found those [Calderbank] 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."*
>
> [quotations from solicitor interviewees]

Some problems and policy implications

Our findings highlight a number of problems for the family justice system in handling financial disputes that arise on divorce, not all of which are readily amenable to family justice solutions.

It is clear from our interview data how ***party emotion is central to the resolution of financial cases on divorce***.

> *"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." [quotation from mediator interviewee]

But it is unclear what, if anything, the family justice system can do to help both parties reach an emotional state in which they can focus on negotiating or mediating a settlement. We do not recommend that delay be deliberately built into the legal process to facilitate this. However, where contested proceedings are underway, whilst judges need to keep a firm hand on case management to avoid unconstructive delay, it may sometimes be appropriate to adjourn proceedings in order, for example, to enable one party to undergo counselling (should that option be feasible and practical).

The complementary roles of solicitors and mediators need to be acknowledged. Recent legal aid reforms, which generally remove public funding for lawyers' services in these financial cases (other than limited funding for work in support of mediation), neglect the central role that this and a number of earlier research studies (notably Eekelaar et al, *Family lawyers,* (Oxford: Hart, 2000), Ingleby, *Solicitors and Divorce,* (Oxford: Clarendon Press, 1992) have shown is played by lawyers in settling financial cases on divorce, both prior to any court proceedings and then in the minority of cases in which proceedings are initiated.

"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." [quotation from mediator interviewee]

"… 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." [quotation from solicitor interviewee]

Solicitors firms have been exploring alternative fee structures to make their services accessible to clients who would formerly have received legal aid for their services, for example through fixed fee deals (which may only be realistic for the most simple, "cookie-cutter" cases) and "unbundling", where the client pays the lawyer to do particular tasks but otherwise conducts the case him- or herself. But it remains to be seen whether many clients will be able to access these deals, or feel confident enough to manage parts of the case for themselves. Litigation loans and orders under s 22ZA of the Matrimonial Causes Act 1973 for payments in respect of legal services may not be practicable in many cases. More could be done to improve other information and advice services, and to help guide clients towards mediation services (a role formerly played by legal aid solicitors). However, even run-of-the-mill financial cases on divorce are not like run-of-the-mill children cases: even quite straightforward financial cases are technical, necessarily involving factual (as well as legal) information which many lay clients may struggle to handle competently or confidently. Self-evidently, mediation cannot provide a complete solution: there will always be a significant number of cases for which mediation (or, by extension, informal

discussion) cannot be used, not least where the other party refuses to participate, whether at all or through failing to provide full disclosure.

Two main dangers arise from the lack of satisfactory alternative funding mechanisms for accessing solicitors' legal services and from the fact that mediation will not resolve, or even be suitable for, all cases:

- more parties may arrive at court as LIPs who, having not had lawyers advise them about what they can reasonably expect by way of financial settlement and otherwise prepare them for litigation, may have a poor grasp of the applicable law and procedural requirements; this may in turn make settlement harder to achieve;
- individuals may entirely forgo legally sustainable claims, because they are either unaware of their legal rights and/or practically unable to pursue them.

These problems may only be satisfactorily resolved by the re-introduction of some level of public funding for lawyers' services, whether in or out of court. However, our findings indicate that there were large numbers of LIPs involved in financial cases even before the legal aid reforms effected by LASPO. It is clear that ***various adaptations should be made to the court process to accommodate the needs of LIPs***. In particular, consideration needs to be given to the accessibility of court forms, correspondence and other documentation; and to judicial training, particularly regarding the conduct of FDRs to ensure that LIPs have a clear understanding of the purpose of the appointment and of the significance of any judicial indication regarding the appropriate outcome. It may, however, also be necessary to consider whether the FDR format is workable at all, particularly where both parties are acting in person and so where there is no lawyer on hand to help them negotiate a settlement in light of the judge's indication. Even where there is a lawyer on one side, the FDR stage can be problematic:

> *"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 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."* [quotation from solicitor interviewee]

In view of the increased burden likely to be experienced by the family courts (both court staff and judges) in the post-LASPO era, it is worth exploring ways in which parts of that burden can be reduced. One area to explore is how the need for judicial intervention in the consent order process might be reduced by improving the paperwork which parties are required to submit in support of their application. ***The burden on courts would be alleviated to some extent by improving the court form (D81) on which parties supply the court with information in support of consent order applications***. It was clear from our court file survey that when deciding whether to approve a proposed consent order some judges wanted fuller information than is typically provided. We suggest that parties should be required:

- in relation to capital, 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, 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); and
- to set out in brief terms the rationale underpinning the proposed order, in order to reduce the frequency with which judges feel the need to inquire about the parties' circumstances and/or aspects of the proposed order.

However, while it is important to explore these sorts of avenues, such change would probably make only small savings of administrative and judicial time that might be outweighed by the impact of new problems, not least the drafting of consent orders in cases involving litigants in person, a task which may now more often fall on the judge.

> *"An intelligent [lay] person can't do a consent order, full stop... What will happen with self-represented people, I don't 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."* [quotation from solicitor interviewee]

***Monitoring the pattern of court business in financial cases post-LASPO will be important. Questions to be addressed include**:*

- are there more financial order applications (consent or contested) or fewer?
- are there more contested and adjudicated financial cases or fewer?
- are contested cases taking longer to settle / settling at a later stage along the standard financial hearings pathway?
- what proportion of contested cases involves at least one litigant in person?
- are judges requiring more approval hearings for or otherwise intervening more frequently in consent order applications?
- are judges becoming routinely involved in drafting orders or other parts of the conduct of cases?

While not a concern of the *court* system, ***attention must also be paid to whether the proportion of divorces not accompanied by a financial order (currently around 60%) increases***. We know relatively little about the financial outcomes reached on those divorces: whether they are largely simple divorces after short, childless marriages with few if any assets to divide, or whether amongst them there are spouses with strong claims for financial provision who are losing out, with detrimental consequences for any dependent children of the family as well as the economically vulnerable adult party.

> "*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."* [quotation from solicitor interviewee]

As a matter of family justice, the fate of such individuals is important and demands further research in the post-LASPO world.

This briefing paper summarises key findings from the research report *Assembling the jigsaw puzzle: Understanding financial settlement on divorce*, by Emma Hitchings (University of Bristol), Joanna Miles (University of Cambridge) and Hilary Woodward (Cardiff University)

The full report is available online at

http://www.bristol.ac.uk/law/research/researchpublications/2013/assemblingthejigsawpuzzle.pdf

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