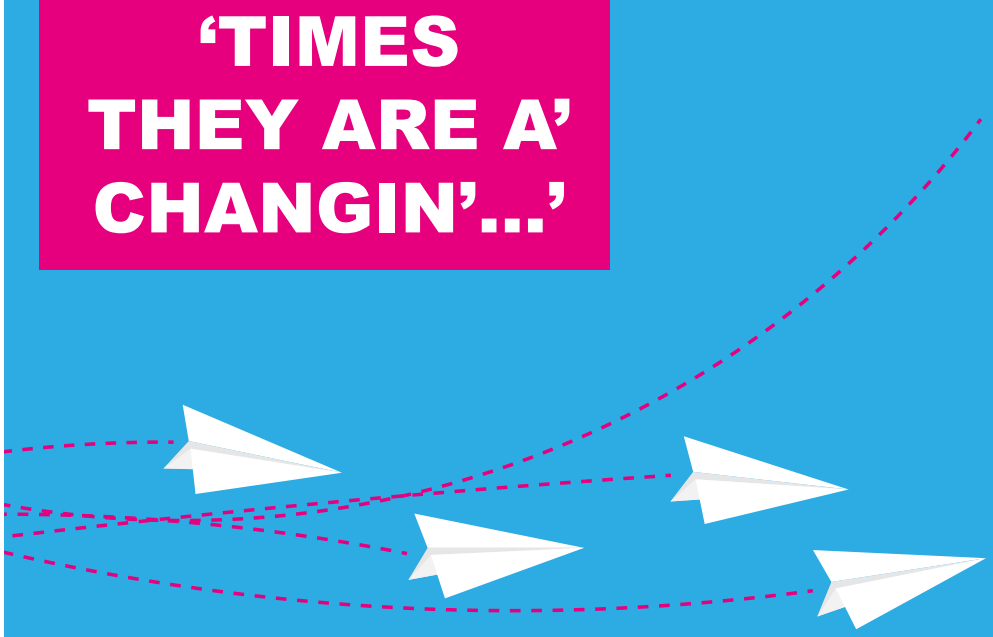
‘TIMES THEY ARE A’ CHANGIN’...’



DOING DR AND LITIGATION DIFFERENTLY: MODELS, PARTICIPATION AND FLEXIBILITY IN FAMILY LAW

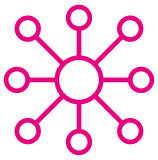
Authored by: Natalie O’Shea, Claire Blakemore and Michael Gouriet – Withers

Bob Dylan wrote those lyrics during a time of political and military upheaval as a rallying call for people to come together to bring about a needed change. Some 60 years on, Bob’s line resonates in many of today’s settings. Perhaps one is our current system for divorcing and separating couples, and so it was a privilege to gather together (joyfully in person for the first time in a long time) at the ThoughtLeaders4 Future of Family Practice DR Conference in May 2022.

The purpose of the afternoon was to exchange information about what we are all doing (or perhaps should be doing) differently as family law practitioners and to share ideas about how the profession is adapting in a family law system which is undergoing rapid change.

As lawyers, mediators, arbitrators, and collaborative lawyers and litigators, reaching an outcome which suits our clients has always been our goal, whether that is through conducting litigation in certain cases, and/or through one of the many family DR processes. But the way clients want to get to that goal is changing, with increasing choice of options, and family lawyers now find themselves competing with unregulated services and multidisciplinary practices. Our understanding of what clients want and above all need, has also evolved. This is in part, because we have been mobilised by an overburdened family justice system - but it is also as a result of consumer-driven demand for a different way of doing things. This excellent conference put the spotlight on how we are creating new models and ways of working in the litigation and DR contexts.

Sharing innovation and encouraging each other as we adapt to changing practices is one of the hallmarks of family law and so in the interests of full disclosure, here are some of the key themes which emerged from the conference, all thanks to the speakers’ generosity in sharing their experience and to Claire Blakemore as Chair.



New models in family law

Jaqueline Marks, Karin Walker, David Lister, and Claire Blakemore candidly and generously shared their journeys and insights in setting up innovative ways of working with family clients (sharing information about The Mediation Space, The Certainty Project and Hybrid Mediation, Separating Together and Uncouple respectively). What emerged was that clients’ needs lie at the centre of each innovation and that an understanding the psychological process of divorce by the couple underpins all of the new ways of working. SRA and compliance issues must and can be worked through and there is flexibility and certainty for clients in terms of the process and the cost.

Frustrations and lack of understanding about what there is on offer?

Many of the panellists - lawyers, mediators and other professionals included - spoke of their frustrations with the mediation process: sometimes it takes too long, or clients want more direction. On other occasions, mediation can be too prescriptive. Good mediators are adept at bringing financial neutrals, lawyers and therapists into the process, but there was consensus that there is a lack of understanding amongst the public about what they need and where to get it.

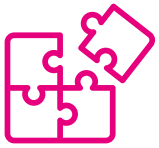
With the advent of digital services and AI tools, any gap in the market will swiftly be filled by unregulated providers offering alternative multi-faceted models and so it pays for the legal profession to be adaptable and flexible too.

The Single Gateway, plain language and listening

As Angela Lake-Carroll highlighted, many clients want and deserve a bespoke wrap-around service when seeking advice on relationship breakdown. If we want to appeal to them in the future, we should set out our stall in a way that makes sense to them. Working in silos does not help. Using plain language about the avenues open to client and listening to what they really need is critically important. We need to be thinking about how to work in DR ways in our everyday practice – everyone can use mediation skills whether mediating or not. We also need a system which allows clients to access all DR offerings whichever firm they call upon first.

Jargon-busting

But perhaps we also need to cut the jargon. The number of processes on offer is confusing for clients and for practitioners. We need to simplify the message, and rather than talking about clients being able to use mediation or private FDRs or collaborative law or arbitration or mediation, should we be using a different connector - 'and'?



Shifts in practice and practice shifts

Adapting within the professions can involve any number of changes to the way we work: using DR skills whether or not we are trained in a specific discipline; knowing enough about the various options to talk to clients about the option they might need; referring clients to the right person for help and advice. Nicola Wager, Tristan Harvey and Simon Pigott shared their experience in shifts in practice and/or shifts in role: whether working in hard-nosed litigation, as a mediator, an arbitrator a private FDR judge, or a selection of each. Frustrations with the current system in terms of achieving efficient outcomes for clients – getting to the heart of what clients really need – often motivated the change. Insights into how to use and combine skills from each discipline were shared – whether that involved bringing in a neutral evaluation when mediation is at an impasse or how best to combine skills in a practice where one client requires mediation in the morning, and another needs an Anton Pillar order in the afternoon.

Deal making

When it comes to negotiating (whether in in the litigation and DR context) we are all deal-makers and clients often need guidance from a barrister with a good sense of what the Judge might determine if the unresolved case went to court. Michael Gouriet, Chris Pocock QC and Katherine Kelsey discussed the pros and cons of FDRs, different models of Private FDRs Neutral Evaluations within litigation, and the method behind choosing your arbitrators and private judges. In court-based FDRs, judges frequently don't have time to read the papers, offers are necessarily positional and clients often come away after an exhausting day at court, dispirited. Conversely, in a private FDR, there's more flexibility in how the process is managed; barristers needn't write such long position statements and judges have time not only to read all of the papers, but to explain to the clients why they have reached their decisions, which then aids negotiations and possible settlement. This happens in the arbitration context too. Lamenting the manifest practice-wide decline in the art and benefit of negotiating a deal in advance of FDRs, Michael Gouriet encouraged lawyers to have the courage of their convictions in making 'outcome' rather than 'positional' offers (and if appropriate on an open basis). There was general support for the re-introduction of Calderbank offers which were considered to encourage negotiations.

Complementary Professionals – involve the experts early on

The specialists on this panel were from non-legal professions: Naomi Goode – a psychotherapist Sarah Middleton – an accountant who undertakes business valuations and Duncan Wilson – a financial planner. When asked by the chair of the panel, Natalie O'Shea, what family lawyers could do to improve services for their clients, there was consensus about the need for solicitors and mediators to involve them earlier and how this benefits clients when we do. The wider professional services needed by divorcing and separating clients are often delivered in a disconnected process with experts being brought in too late or with limited knowledge of the wider context. The need for emotional support, expert valuation advice and financial planning advice doesn't start and end once a deal has been brokered. A good deal means not only the 'right' financial outcome, but one in which both have trust. If it is to work on the ground it must be future-proofed and reality-tested, well before the court is asked to ratify. Perhaps we should be more open and flexible with our colleagues in other professions about the processes at play and about what our clients really need. We should also work harder to understand what those colleagues need from us, so that ultimately, our receive the bespoke, wrap-around service they are looking for.

Family law - it is a 'changin

It was good to meet and even better to share insights and experience as we all start designing different ways of practicing – and so with apologies to Mr Dylan… come family lawyers, private evaluators and Judges, mediators, arbitrators, collaborative lawyers, consultants, psychotherapists, wealth planners, IFAs and valuers – time to heed the call.