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In the current climate, there is a role for Early Neutral
Evaluation Hearings and are they utilised enough?

Trina Little and Komal Patel

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What is an Early Neutral Evaluation?

1. Early Neutral Evaluation is a process used to help parties reach an agreement on financial issues prior to the commencement of litigation. It is based upon the principles of an FDR but would occur any time after the parties have completed voluntary Form E's/exchanging disclosure or after the FDA appointment.
2. At an FDR the judge provides an indication as to the financial outcome of the case [aiding the parties to negotiate a settlement]. An Early Neutral Evaluation (also known as a 'Private FDR') is based upon the same premise but the evaluator is not a judge, but a trusted third-party legal professional who has been appointed by both spouses to conduct the evaluation of their case to try and help them settle their dispute. This trusted third-party could be a solicitor, barrister or part-time/retired judge who would have the time to deal with the matter.

What is the need for an Early Neutral Evaluation?

3. Financial Dispute Resolution hearings are, in theory, an excellent concept, as they encourage and assist spouses to negotiate a settlement that they can both live with rather than having an outcome imposed on them following an expensive and stressful trial.
4. However, in reality, FDRs are often not as effective as they could be due to the limited resources available within the court system. Parties often have to wait many months to secure a hearing date, during which time they remain in financial limbo. Sadly, sometimes a Judge with a busy list simply does not have sufficient time to read and evaluate all of the documentation filed in the case; on occasion this can result in a very 'broad brush' approach being taken, leaving some parties frustrated and disappointed.

Family Procedure Rules, Rule 3.3

[1] The Court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.

[2] In considering whether non-court dispute resolution is appropriate in proceedings which were commenced by a relevant family application, the court must take into account

(a) whether a MIAM took place;

(b) whether a valid MIAM exemption was claimed or mediator's exemption was confirmed; and

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(c) whether the parties attempted mediation or another form of non-court dispute resolution and the outcome of that process.

Family Procedure Rules, Rule 3.4

[1] If the court considers that non-court dispute resolution is appropriate, it may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –

(a) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and

(b) where the parties agree, to enable non-court dispute resolution to take place.

(2) The court may give directions under this rule on an application or of its own initiative.

[27th July 2018] President's Circular Financial Remedies Court Pilot Phase 2

5. Early Neutral Evaluation has had support from the judiciary. On his last day in office as President of the Family Division, Sir James Munby expressed his support by saying:

[7] "I hope that the lead and other judges will take the opportunity to develop and encourage the use of 'private' FDRs locally. A private FDR is a simple concept. The parties pay for a financial remedy specialist to act as a private FDR judge. That person may be a solicitor, barrister, or retired judge. No additional qualifications are required. The private FDR takes place at a time convenient to the parties, usually in solicitors' offices or barristers' chambers, and a full day is normally set aside to maximise the prospects of settlement. It takes the place of the in-court FDR."

[8] At present, demand on court resources has led to instances of over-listing of FDRs. A high settlement success rate is not likely to be achieved if the district judge's list for the day has more than five FDRs in it. This has the inevitable knock-on of far more cases being listed for a final hearing than should be so – a classic example of the law of diminishing returns.

[9] Although a private FDR does require some (often quite modest) investment by the parties, this expense can be greatly outweighed by the advantages gained. The very fact of investment by the parties will signify a voluntary seat at the negotiating table rather than a sense of being dragged there. The "hearing" can take place at a time convenient to the parties, even in the evening or at a week-end, and for as long as the parties want. The private FDR judge will, by definition, have been given all the time needed to prepare fully for the hearing.

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[10] Anecdotal evidence suggests that private FDRs have a very high settlement rate. Of course, each settlement frees up court resources to deal, sooner and more fully, with those interim and final hearings that demand a judicial determination.

[11] Usually, where the parties have agreed to a private FDR the order made at the first appointment will record such an agreement in a recital, and will provide for a short directions hearing shortly after the date of the private FDR. That directions hearing can be vacated if agreed minutes of order are submitted following a successful FDR. If it has been unsuccessful then directions for the final hearing can be given. An alternative is for the case to be adjourned generally while the private FDR process takes place. In that event an order in the terms of para 81 of standard order No. 1.1 would normally be made.

6. It is a popular misconception that private FDRs are only appropriate in “big money” cases. This is not the case. They are equally effective where resources are scarce. They shorten litigation thereby reducing cost. Early neutral evaluation is not confined to divorce cases. This route is also available to parties in cohabitee and property disputes.

Financial Remedies Court – Good Practice Protocol

7. *[8] of the Good Practice Protocol states: “If the parties wish to agree the directions to be made at the First Appointment they may do so using the ‘Accelerated First Appointment Procedure’ originally piloted in the Central Family Court, set out in the fourth schedule below and referred to as “FRC3”.*
8. *[9] of the Good Practice Protocol states: “FRC Judges will be ever-mindful of opportunities for the parties to engage in attempts to reach settlement of some or all the issues out of court by whatever means are suited to the case: Arbitration, Mediation, The Divorce Surgery and Private FDRs where available. Parties will be referred to websites for the Family Mediation Council, the Institute of Family Law Arbitrators and to The Private FDR Guide 2018”.*
9. *[10] of the Good Practice Protocol states: Where a case has been referred to be dealt with by an out of court settlement mechanism, it shall be not ordinarily be given further court time save for a short directions appointment which may be vacated by consent in the event an agreement is reached and a consent order presented and approved. Where a private FDR has taken place, the next FRC judge dealing with the case will ordinarily wish to be satisfied that a thorough FDR exercise has taken place and parties should provide a written explanation to that judge of what has happened so the FRC judge can be so satisfied. Absent specific enquiry by the FRC Judge, this explanation should not include reference to any without prejudice positions, but should describe the date of the private FDR, the tribunal, the time spent and an assurance that offers were made on each side and an indication given.*

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Choosing an evaluator

9. The parties have the free choice on who to instruct as the evaluator for their case. This could be any of the following who have a specialism in family law financial remedy cases: a barrister, a solicitor, a chartered legal executive or retired judge. The legal professional they choose may also be an arbitrator or judge themselves and although for the purposes of the Early Neutral Evaluation they will not be acting in that capacity, they will have the background expertise in determining cases.

When and Where does the Early Neutral Evaluation take place?

10. A mutually convenient date and time for the Early Neutral Evaluation can be organised, which can have a significant advantage compared to the long wait that is likely to be for a court listed FDR. Usually, a whole day is set aside for the Early Neutral Evaluation, whereas at court there may only be a few hours available. The location can also be worked out so that it is convenient for all, usually, it takes place at a solicitor's office or barrister's chambers. Arrangements can also easily be made for the process to be dealt with remotely using an online video conferencing platform such as Zoom or Skype.
11. The evaluator on the day will just be there to deal with the case in hand. As well as providing an indication the evaluator can also get actively involved in trying to broker the deal if necessary to try and assist the spouses to reach an agreement. The Early Neutral Evaluation forum can also be an extremely valuable sounding board where there are factual issues in dispute.
12. As with the formal court FDR, an Early Neutral Evaluation is 'without prejudice'. Evidence of anything said or any admission made in the course of the Early Neutral Evaluation will not be admissible in evidence at trial if a settlement can't be reached (except for in some specific exceptional circumstances). Simply put, neither spouse will be held to the negotiations nor indication given unless an agreement is reached. This creates a safe space for discussions to be had, and for the exploration of settlement options. If an agreement can be reached then it can be drawn up as a consent order.

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Benefits of choosing a private FDR over the traditional court-based FDR:

- **Cost:** the parties split the cost of the private FDR session between them.
- **Focus:** the private FDR is tailored to the circumstances of each case and the nature of the dispute. The case will be the absolute priority of the private FDR judge. He / she will have had plenty of time to read into and thoroughly / understand the issues.
- **Time:** the private FDR is scheduled for the day, on a date to suit the parties not one fixed by the court, faster than a court listing, and the time pressures of court attendance are removed.
- **Quality:** all papers will be read in advance and the parties can be assured of a fully-informed private FDR.
- **Flexibility:** the private FDR can respond to the nuances of the particular dispute and the direction and pace of negotiations on the day.
- **Privacy:** a private FDR is just that: private. No-one other than the parties, their lawyers and the chosen judge need know when or where the hearing is taking place