

## FW: Permission to publish research report

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Wed 27/05/2020 12:18

To: Draghici, Carmen <Carmen.Draghici.1@city.ac.uk>

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Dr Draghici

Further to your email, I can confirm that the MoJ has no objections to the publishing of the report.

Many thanks

Kind Regards

### Justine Cree

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**From:** Draghici, Carmen <Carmen.Draghici.1@city.ac.uk>

**Sent:** 30 April 2020 21:53

**To:** Weston, Bob (Gloucester) <bob.weston@Justice.gov.uk>

**Cc:** Frances Burton <frb@frburton.com>

**Subject:** Permission to publish research report

Dear Mr Weston,

Further to the approval by HMCTS in July 2018 of the *Data Collections and Research Request Application* we submitted for the project of the Centre for Child and Family Law Reform on “Fast-Tracking Low Value Financial Claims in the Family Court”, and in accordance with the *Privileged Access Agreement* we signed with the Departmental Library and Records Management Services of the Ministry of Justice, we are writing to request permission to publish the report produced on the basis of the data extracted from the case files consulted between August and October 2018 at the five Family Courts visited under the terms of the agreement (Edmonton, Oxford, Exeter, Leeds, Cardiff).

Please find attached a copy of the report and the executive summary accompanying the report. Subject to the permission requested, we are planning

to publish these documents on the website of the Centre for Child and Family Law Reform, which is one of the City, University of London's Law Research Centres pages: <https://www.city.ac.uk/about/schools/law/research/centre-on-child-and-family-law-reform>.

Yours sincerely,

Dr Frances Burton

Dr Carmen Draghici



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CENTRE FOR CHILD AND FAMILY LAW REFORM

NORTHAMPTON SQUARE · LONDON · EC1V 0HB

## **Fast-Tracking Low-Value Financial Claims in the Family Court**

Report on a Research Project undertaken by the Centre for Child and Family Law Reform  
with the support of City, University of London's  
HEFCE Enterprise and Knowledge Exchange Fund

Frances Burton and Carmen Draghici

### **Copyright statement**

First published May 2020 [revised version of the report to the funder of July 2019].

Any inquiries about this publication should be directed at the CCFLR Committee's Secretary, Harry Nosworthy, at [hn@4pb.com](mailto:hn@4pb.com).

The publication is available to download on the [Centre for Child and Family Law Reform website](#).

### **Acknowledgements**

We would like to thank all those who facilitated this research project, in particular the President of the Family Division for consenting to court access, the Rt Hon Lord Justice Baker, Chairman of the Family Justice Council, and Alex Clark, Personal Assistant to the President and Secretary of the FJC, for assisting in obtaining that permission, to Joanna Miles of Trinity College, Cambridge and the Cambridge Family Law Centre for advising on selection of an appropriate researcher, Bob Watson and Rebecca Cobbin of HMCTS for organising visits to the designated courts, and to court staff at each of the courts for so kindly assisting the researcher's work and making her welcome, despite the busy demands of their own daily schedules.

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## 1 Background

The project entitled ‘Fast-Tracking Low-Value Financial Claims in the Family Court’ was an initiative of the Centre for Child and Family Law Reform (CCFLR)<sup>1</sup> funded through a HEFCE (now UK Research and Innovation [UKRI]) Enterprise and Knowledge Exchange Fund award managed by City, University of London. Its objective was to investigate the experience of litigants in person (and other impecunious litigants, who are only partially advised and represented under unbundling arrangements<sup>2</sup> or by non-specialist lawyers), during the course of legal proceedings for financial provision upon divorce under the Matrimonial Causes Act 1973. Equivalent provisions are found in the Civil Partnership Act 2004, and the experience of civil partners upon dissolution can be expected to be similar.

Courts in England and Wales have wide discretion to reallocate property, capital and future income between former spouses or civil partners in the event of relationship breakdown, regardless of strict ownership rights, and this is achieved by means of financial and property orders, under ss. 23-24B Matrimonial Causes Act 1973 and Schedule 5 to the Civil Partnership Act 2004, respectively, i.e. periodical payments orders, lump sum orders, property adjustment orders (whether transfer of property or settlement until a specified event occurs), and/or pension sharing orders. Financial and property orders can also be made for the benefit of a child of the

<sup>1</sup> See <https://www.city.ac.uk/about/schools/law/research/centre-on-child-and-family-law-reform#tab=tab-1>. Comprised of academics, judges and practitioners (both barristers and solicitors), the CCFLR Committee meets quarterly to discuss recent developments in family law and proposals for reform. Current membership of the Centre is as follows: Chairman: His Honour Michael Horowitz QC, Retired Circuit Judge, Mediator and Family Arbitrator, MCI Arb. Chairmen Emeritus: Professor Hugh Bevan, Emeritus Professor of Child Law, University of Cambridge and His Honour Donald Cryan, Hon LLD, Retired Judge of the Family Court. Hon. Secretary: Rebecca Foulkes, Barrister; from 2019, Harry Nosworthy, Barrister (both at 4 Paper Buildings, Inner Temple). Members: Simon Blain, Solicitor, Forsters LLP; Duncan Brooks, Barrister, Queen Elizabeth Building Chambers, Middle Temple; Dr Frances Burton, Senior Lecturer in Law, Retired Barrister, Mediator and Family Arbitrator, MCI Arb, Associate Member of Resolution, University of Buckingham and 10 Old Square Chambers, Lincolns Inn; Andrew Campbell, Barrister Queen Elizabeth Building Chambers, Middle Temple; Professor Jo Delahunty QC, Gresham Professor of Family Law, 4 Paper Buildings Chambers, Inner Temple; Dr Carmen Draghici, Reader, The City Law School, Visiting Professor in International Law at the Open University of Catalonia, Barcelona; Grant Howell, Solicitor, Fellow IAFL and Family Arbitrator, Partner, Charles Russell Speechlys LLP; The Hon Mrs Justice Knowles, Justice of the Family Division of the High Court; Philip Marshall QC, Fellow IAFL, Associate Member of Resolution, Joint Head of Chambers 1 Kings Bench Walk, Inner Temple; James Turner QC, 1 Kings Bench Walk Chambers, Inner Temple; Naomi Wiseman, Barrister, Garden Court Chambers, Middle Temple. Diana Draghici, PhD Candidate, Harvard University Government and Social Policy Program, was also coopted by the CCFLR for the purposes of this project. Further details of the Centre’s previous work can be found at <https://www.city.ac.uk/about/schools/law/research/centre-on-child-and-family-law-reform#tab=tab-2>.

<sup>2</sup> The term ‘unbundling arrangements’ refers to situations in which the client contracts with the lawyer to provide only some of the components that full-service representation typically includes (e.g. the drafting of a document for the client to file personally or counselling a client who appears *pro se*).

family, and the court has the power to order the sale of property if a secured periodical payments, a lump sum or a property adjustment order is made. Within this context there are now many litigants in person obliged to make applications for these orders themselves without the advice and representation which would have been funded by the Legal Aid Agency for qualifying impecunious parties until the implementation of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 (which from 2013 made radical cuts to legal aid in Family cases). Prior to this Act such cases would have usually been professionally prepared and presented to the court by solicitors and counsel on a legal aid certificate for those litigants who could not afford to pay privately.

In the spring of 2018, the Centre decided to embark on a research project to examine whether, in the light of this statutory restriction on the ability of poorer litigants to access the Family Court for financial provision, the Family Court was likely to remain fit for purpose in low-value financial provision cases, in which it seemed unlikely that such litigants would be able to afford advice and representation; whereas previously those on 'low incomes' (within the meaning of qualification for legal aid and/or remission of court fees)<sup>3</sup> would normally have obtained a legal aid certificate to provide such advice and representation, they can now only do so in Family cases if they fall within the LASPO Act 2012 exceptions - namely if there is evidenced domestic violence present, or the case involves public law child protection proceedings pursuant to the Children Act 1989.

The Centre therefore envisaged such research as likely to benefit not only future poorer litigants but also government planners in considering ways of addressing the deficit created by the Act. In the latter connection, we had also noted the impact on the Court judiciary whom Lady Justice Black, in the case of *Lindner v Rawlins*,<sup>4</sup> had already flagged up as being adversely affected by the change, especially where such a case went on appeal to a higher court - such as the Court of Appeal, where argument on the law would be likely to be intensified and challenging for litigants in person or non-specialist lawyers to address.

<sup>3</sup> For Legal Help (Lower), the lowest form of legal aid which would provide advice, eligibility is defined by the regulations at the time of application (see <https://www.gov.uk>) and this usually means no more than £2657 per month disposable income (slightly higher if an applicant has more than 4 children) and limited disposable capital, beyond which the applicant is expected to find alternative affordable assistance from charities and Not For Profit (NFP) organisations, such as Citizens Advice; and legal aid for representation is similarly limited, including as to disposable capital, i.e. an applicant's liquid savings. With solicitors' fees commonly from £200 or more per hour even outside leading firms, it is easy to see why LIPs decide to self-represent.

<sup>4</sup> [2015] EWCA Civ 61.

## ***How the research project was articulated***

The scope of the research was suggested by two of the practitioner members of the Centre, Simon Blain, a specialist Family solicitor, and Andrew Campbell, a specialist Family barrister, who had had adverse professional experience of the operation of the Family Court in cases where the parties were either representing themselves or were represented by non-specialist professionals (possibly because such non-specialists would agree a lower fee tariff). In either case this led to delay, confusion, irritation of both judiciary and other court users, such as these two committee members, who had gone to the court expecting a smoothly run process only to find this not to be the case. The aspects to investigate were as follows:

- How long cases were taking from filing of Form A to commence the process to final order i.e. what was the average length of time and what evidence was available of delay caused by LIPs or other poor presentation without benefit of the former professionals who had been funded by legal aid.
- The average asset totals that were involved in such ‘low value’ (also called by court users, court staff and many commentators, ‘small money’) cases (as opposed to the ‘big money’ cases in which millions and high-level professional representation usually feature, and for which the Family Court generally uses specialist judiciary at the Central London Family Court and High Court).<sup>5</sup>
- How well court forms and processes generally were being handled without either privately paid or legally aid funded professionals.
- How and when cases were settled, and consent orders presented for approval, if that was the case.
- If not, how many cases ended in court orders not made by consent.
- What was the format of final orders: property adjustment, lump sum, periodical payments, or other?

The two practitioners drafted a research brief requesting the proposed researcher to examine the court files from which this data was to be extracted and to record the information that they considered would enable the CCFLR Committee to draw conclusions, or at worst inferences, as

<sup>5</sup> No specific asset total was included in the research brief to define ‘low value’ as this would have involved court staff in inappropriately additional work in selecting case files for our researcher’s perusal (a concern which was in fact an early HMCTS potential objection to our project, when we initially sought their consent for and cooperation in the research, i.e. that selecting cases was too labour-intensive for already burdened court staff); instead, we defined cases for the court’s selection by the parties’ own likely criteria for electing self-representation, viz, that at least one party must have been unrepresented professionally for all or part of the case, a matter which could easily be established by court staff since there is space for that information to be recorded on the front cover of the Court’s paper files. In the event, this system for identification of cases generally worked well, though we were surprised that, in a very small number of cases, parties with over a million sterling of assets in dispute apparently did not consider this merited professional representation or more than very limited professional assistance.

to the working of the Family Court without the former legal aid support; and potentially to make recommendations on how this could be achieved more effectively. For the brief, which was also approved by the then Honorary Secretary to the Centre, Rebecca Foulkes, and the Chairman, HH Michael Horowitz QC, and circulated to the full committee, see [Appendix A.2](#).

Based on this brief, Dr Carmen Draghici (Reader in Law at City, University of London and the latter's representative on the CCFLR Committee) prepared an application for funding for the proposed research under the HEFCE Enterprise and Knowledge Exchange Fund scheme. In February 2018, City, University of London awarded her a HEFCE-sponsored grant of £2,500 to fund the costs of travel, accommodation, subsistence and a professional researcher's time.<sup>6</sup>

The organisation of the fieldwork further required the approval of Her Majesty's Courts and Tribunals Service (HMCTS), an agency of the Ministry of Justice (MOJ), for access to the court files, which we needed to examine in order to gather the data envisaged by the practitioner members' brief. This necessitated support from both Mr Justice (now Lord Justice) Baker, Chairman of the Family Justice Council (and previously a member of the CCFLR) and the assistance of Alexander Clark, Secretary to the Council, and Personal Assistant to the President. Although the Data Collection and Research Request Application submitted by Dr Draghici and Dr Burton obtained HMCTS approval in July 2018, this was on condition that access was granted solely for perusal of the paper files at each court to be visited, and without access to the Courts' electronic management system, 'FamilyMan'. The HMCTS remained concerned that, if we were given FamilyMan access, our work would not only place extra burden on court staff, but that any access to FamilyMan would require training time to be made available to the researcher, which the already stretched court resources could not support. Although perusal of FamilyMan had formed an integral part of the research brief drafted by the practitioner members of the committee (on the grounds that it was their experience that not all documents would be found on the paper files, since some might be included only on FamilyMan rather than being copied for retention in both formats), we decided to go ahead with the project, for which funding was already in place, on those terms.

To avoid further delay in the process of securing the consent of HMCTS to access court files, which required a good deal of documentation to be generated, including details of all those involved in the inspection of files and storage of the data collected, the CCFLR decided to abandon the search for an external professional research assistant and to rely on the services of a member of the Committee with appropriate research skills. This decision was also shaped by

<sup>6</sup> This was supplemented by a further £383.56 grant from The City Law School in April 2019, to cover the widened regional reach of the fieldwork agreed with Her Majesty's Courts and Tribunals Service, in particular two additional court visits, in Wales and the North, as detailed in the next section.

informal advice from Joanna Miles, Reader in Family Law and Policy at the University of Cambridge, who indicated that a Committee member with both academic research skills and practice experience of Family Law would be more likely satisfactorily to identify and abstract the detailed data which was expected to be available in the paper files. This advice was readily accepted for additional reasons, in particular because the research was already handicapped by lack of access to 'FamilyMan', as a result of which a researcher with both a practice and academic background would be required to make sense of what might be incomplete paper files. Dr Frances Burton was therefore deputed to undertake the research, which also facilitated HMCTS' approval of her access to the Court files since, as a Retired Judge of the Upper Tribunal Administrative Appeals Chamber, she was already experienced in the degree and practice of the confidentiality required in respect of court files, including the care and anonymisation of records abstracted from them and kept in paper and electronic form (the HMCTS preferred the research to be recorded in the latter format). Dr Burton and Dr Draghici prepared the necessary documentation detailing the confidentiality and anonymisation of the research data and limiting its dissemination, for which a Privileged Access Agreement was required to be signed by both.

### ***The geographical range of courts to be visited***

The original version of the draft research brief envisaged visits to only three courts in the southern half of England, and excluding both Wales and the North, on the grounds of distance from the London-based CCFLR Committee; however, given the restriction of access to paper files only, it was decided that the funding could realistically stretch to five such courts, in five regions, so as to include both Cardiff in Wales and Leeds in the North, with a view to spreading the regional sampling. In London, Dr Burton had requested that the Family Court at Croydon should be included, as she had previously conducted research at this location, and was thus aware that it received much outer south London business, as well as from the adjacent counties of Surrey and Kent. HMCTS declined access to Croydon and the Committee was invited to suggest another location; HH Donald Cryan thereupon suggested Edmonton in North London, and this was agreed, the final courts then being Oxford (Midland Circuit), Edmonton (North London, South Eastern Circuit), Cardiff (Wales), Leeds (Northern Circuit) and Exeter (South Western region, comprising the Western Circuit).

## 2 Methodology

It had been the Centre's original intention that a Sub-Committee<sup>7</sup> would conduct a study of the data gathered from the fieldwork research into financial provision proceedings involving litigants in person, based on quantitative analysis supported by original data collection across several Family courts. The data tested the presence of delay and logistical problems in line with the anecdotal evidence reported in existing studies<sup>8</sup> to the effect that cases with LIPs took two or three times as long as those with representation, and indeed – as in the above-mentioned *Lindner v Rawlins* – that LIPs, even those with associated background knowledge, such as of business, would sometimes even get the law wrong. However, even the Centre's both academic influenced and strongly practitioner orientated committee membership was unprepared for the practical problems presented by the obviously shambolic impact of LIPs on a court system designed for lawyers and judiciary. While the dual paper and electronic management approach of the court system and our access to the former only to some extent limiting the scope of the quantitative data originally intended for collection and interpretation, this inadvertently made more qualitative data available, which was potentially even more valuable for its existence not having been anticipated.

Dr Frances Burton, on behalf of the CCFLR, inspected 69 court cases during the period August-October 2018 across the five Family Courts finally selected on the basis of HMCTS's decisions on their availability, but with a view to ensuring geographical/ jurisdictional representativeness by including each circuit/ region, as follows: 19 cases in Cardiff (for Wales) 19 cases; 18 cases in Edmonton (for the South Eastern Circuit region, this North London Court having been agreed by HMTCS in substitution for the Croydon Family Court requested, where there was no availability to accommodate a court visit); 19 cases in Leeds (for the North); 10 cases in Oxford (for the Midlands); 3 cases in Exeter (for the South Western region comprising the Western Circuit, although only 3 files meeting the research criteria were available at the Exeter Court).

The requested courts' clerical staff randomly selected the case files using a minimum set of criteria laid down by the project, namely:

- one or both parties must have represented themselves (at least for part of the proceedings);

<sup>7</sup> Chaired by HH Michael Horowitz QC, and comprising Simon Blain, Dr Frances Burton, Andrew Campbell, HH Donald Cryan, Dr Carmen Draghici and Harry Nosworthy.

<sup>8</sup> See, for example, policy researcher Katherine Vaughan, 'Standing Alone: going to the family court without a lawyer', part of a programme of work (copyright of the Citizens Advice Bureau) on exploring how well the justice system works for the public, <https://blogs.citizensadvice.org/> 28 March 2016; and Vanessa Friend, 'Practical perspectives on litigants in person', (2018) 197 *The Review*, p25, VOF@hunters-solicitors.co.uk.

- the initial application (Form A) must have been lodged with the court between 1 January 2012 and 1 January 2016 (however, where files complying with the period selected for lodging were not available, the researcher was given files of cases lodged after 1 January 2016);
- and the case was concluded, i.e. a final order was made, whether in the form of a consent order endorsing the terms of the parties' settlement or a judicial determination at a final hearing.

Access to FamilyMan being unavailable, the research was necessarily confined to frequently incomplete paper-based court files (for instance, hearing dates at various stages of the proceedings were not on record). The data collected generally included the following information, where available: the parties' ages, the parties' occupations, dates of marriage and separation, approximate value of the parties' assets, whether there were any minor dependent children at the time of the proceedings, whether either party was assisted by a solicitor at any stage of the procedure, whether court papers were adequately served, whether there were difficulties in respect of the parties' obligation to make full and frank disclosure, the stage at which the parties reached an out-of-court agreement, if at all, whether the case ended in a consent order under s. 33A Matrimonial Causes Act 1973 or a judicial decision under ss. 23-24B Matrimonial Causes Act 1973.

Dr Carmen Draghici was principally responsible for extracting quantitative information from the research case notes produced by the data collection exercise and for the data entry. The statistical analyses were carried out by Diana Draghici (PhD Candidate, Harvard University), using three statistical software packages (R, Stata, and MATLAB). The qualitative data was analysed by Dr Frances Burton with input from the practitioner members of the Sub-Committee.

Whilst the data collected permitted the consideration of several aspects of financial disputes after divorce and some interesting features of litigants' profiles, for the purposes of the present study we have focused on the conduct of the proceedings in the absence of (full) representation and in particular:

- the overall duration of the proceedings;
- the stage at which settlement is reached, if at all (whether after the first appointment, the Financial Dispute Resolution stage or at/ prior to the final hearing);
- the contents of the order (periodical payments, fixed-term periodical payments, nominal payments, lump sum orders, property adjustment orders, pension sharing, orders for the benefit of children, clean breaks precluding further applications under the Matrimonial Causes Act 1973 and applications under the Inheritance (Provision for Family and Dependents) Act 1975 in the event of one party's death);

- any obstructive behaviour from litigants (such as the non-disclosure of assets, non-attendance of court appointments, failure to cooperate in the valuation/ sale of family property);
- any difficulties in correctly serving the paperwork.

For each case, we recorded whether either party was legally represented, for the whole or part of the proceedings, and explored any associations between (partial) representation and the other variables listed above. For most cases, the paper-based court files allowed us to determine whether a litigant had representation throughout the proceedings, at the commencement of proceedings only (preparation of form A, FDA, but not subsequently), only at a contested final hearing stage where the judge made an order under ss. 23-24B Matrimonial Causes Act 1973, or at a final hearing where the judge scrutinised the parties' proposed agreement and made a consent order (whichever applicable). In some cases, it was possible to ascertain that a litigant had been represented or advised at various stages but not throughout the proceedings. (See [Appendix A.1](#) for a flowchart of financial provision proceedings pursuant to Part 9 of the Family Procedure Rules.)

This approach has not previously been utilised by existing LIP research, which appears to have concentrated on court hearing observations and follow-up interviews,<sup>9</sup> rather than purely on detailed examination of the actual court files; although some court files appear also to have been perused as an adjunct to the main methodology, there has certainly been no prior focus entirely in low-value financial provision, which appeared to the Committee contemplating the present project to be particularly important to address.

<sup>9</sup> Of practitioners, parties and other court users, including judiciary and Cafcass social workers, individually and in focus groups. See e.g. Liz Trinder et al, *Litigants in person in private family law cases*, Ministry of Justice Analytical Series, 2014, a much wider study of the Family Court in both financial and children cases, which majored in court hearings, focus groups and follow-up interviews, but with only some ancillary examination of files, focussing on the experience of the LIPs rather than on the process.

### **3 Statistical Analysis and Empirical Results**

#### **Preliminary Remarks: The Standard Process for Financial and Property Issues on Divorce**

The courts' discretion in redistributing assets is governed by s. 25 Matrimonial Causes Act 1973 (with mirroring guidelines in Schedule 5, Part 5 of the Civil Partnership Act 2004), which requires regard to be had to all the circumstances of the case, including the welfare of any minor children of the family (the court's first consideration), the parties' resources and future earning capacity, the parties' needs and responsibilities, the standard of living enjoyed during the marriage, the duration of the marriage and the age of the parties at the time of the proceedings, any disability (where applicable), the contribution of each party (present and anticipated) to the welfare of the family (including domestic contributions), conduct of either party where to disregard it would be inequitable, and any future loss (such as the loss of a pension) resulting from the termination of the marriage. Courts are also expected, pursuant to s. 25A Matrimonial Causes Act 1973, to consider the feasibility of a clean break (i.e. orders avoiding future financial dependency between the former spouses). However, there is no presumption in favour of a clean break, and s. 25A remains subordinated to the overarching aim of achieving fairness between the parties.

The case law has cast further light on the meaning of the factors listed in s. 25 Matrimonial Causes Act 1973 and their complex interplay.<sup>10</sup> For instance, the case law has clarified that the notion of 'resources' may include pre-marital and inherited assets (especially where the parties' needs cannot be otherwise satisfied); 'responsibilities' encompass housing needs, maintenance, responsibilities towards a new family etc. The same standard of living may not be expected after a very short marriage, and, save for the 'big money' cases, it may not be sustainable after divorce, since the same pool of resources must support two households. The function of the 'duration' factor provides that the longer the marriage, and the more the assets become amalgamated, there is less scope for departure from the yardstick of equality, which should be the court's starting point for redistribution of assets. As regards 'contributions', there is no discrimination between the home-maker's and breadwinner's contributions from their respective spheres of activity. Landmark judgments have further established that the parties should share the fruits of the matrimonial partnership, regardless of which spouse brought the assets into the marriage (albeit not necessarily according to an equal division), and that a party should be compensated

<sup>10</sup> Whilst these principles were developed under the Matrimonial Causes Act 1973, the case law has confirmed that they also apply in cases decided under the more recent Civil Partnership Act 2004.

for any economic detriment suffered as a result of marital arrangements (e.g. where their future earning capacity has been impaired in consequence of giving up a career in order to look after the home and the children of the couple).

Notwithstanding the statutory guidance contained in s. 25 Matrimonial Causes Act 1973 and the development of a vast body of case-law interpreting this provision, each case is intended largely to turn on its own facts, and there is to be no pre-determined formula or rigid application of precedent. The system is therefore based on flexibility in the redistribution of assets, and hence a tailored solution in each individual case; at the same time, this entails a certain amount of unpredictability of the outcome of court proceedings, which tends to foster litigation.

While the parties also have the option to decide on the reallocation of their assets through mutual agreement without the intervention of the courts, for enforcement purposes it is advisable to seek a consent order under s. 33A Matrimonial Causes Act 1973, whereby the judge endorses the privately negotiated agreement, whether as presented by the parties or with amendments. In some circumstances, the agreement can only be brought into effect if it is incorporated within an order of the court (e.g. where a pension-sharing order is required). The judge scrutinises the proposed agreement in light of the statutory guidance and has the power to alter it, if it appears to him/her that its terms are outside the bracket of orders that might be made applying the statutory criteria. In many cases, however, the out-of-court agreement is only reached after the commencement of contentious legal proceedings. The experience of CCFLR practitioners is that there is considerable variation in active judicial intervention to call in for query a lodged consent order.

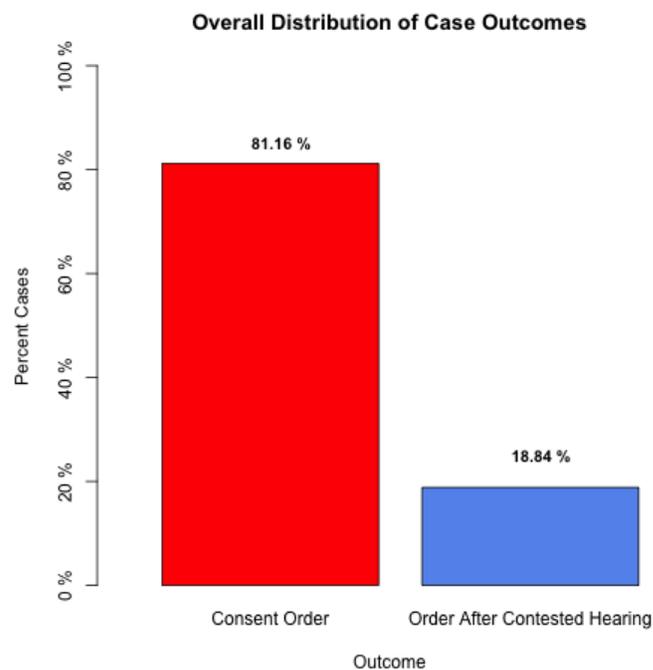
Our project initially stemmed from the concern of the practitioners making up the majority of the CCFLR Committee over the ability of litigants in person to navigate court proceedings independently and without undue delays in the absence of formerly available legal aid; this further raises access to justice issues, to the extent that litigants in person struggle to secure their entitlements without legal aid for representation. In particular, it was thought that the complexity of Family Court proceedings and the limited guidance available to litigants in person may translate into procedural deficiencies, for instance as regards the parties' timely and full financial disclosure, the incorrect filing of paperwork, the misunderstanding of the purpose of the various stages of the process, or a lack of focus in case preparation so as to narrow down the important issues and achieve agreement at an early stage where feasible.

### 3.1 Descriptive Statistics

The results of the study undertaken on the basis of the methodology outlined above support the following quantitative observations.<sup>11</sup>

#### 3.1.1 Distribution of Case Outcomes

In 81.16 % of the cases examined, the parties were eventually able to reach an agreement, endorsed by the court in the form of a consent order. Only in a small percentage of cases (18.84 %) was the dispute resolved by a judge's order following a contested hearing (see [Figure 1](#)).



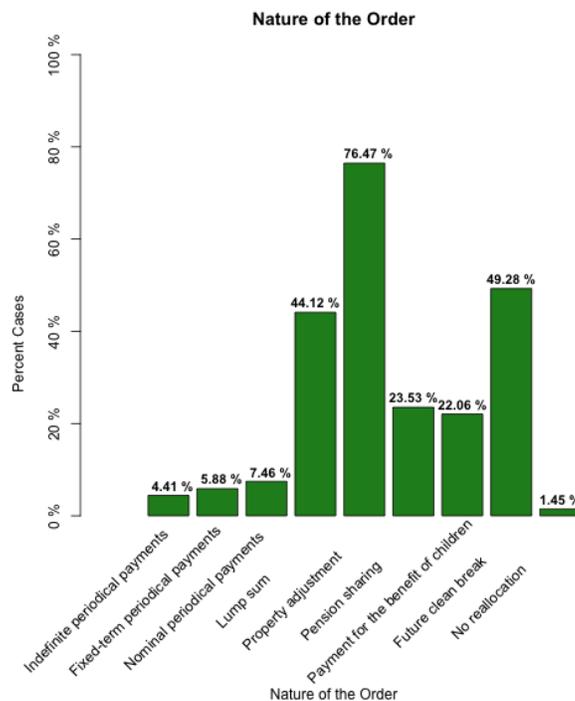
**Figure 1: Overall Distribution of Case Outcomes.** Proportions computed on whole sample across all five courts. Sample size is 69 observations; there are no missing values on this variable.

#### 3.1.2 Distribution of Types of Order

The empirical results further show that the orders made predominantly focused on property adjustment, typically the apportioning of equitable shares in the former marital homes after the sale of the home, which was in our sample for most litigants the sole or main asset. This occurred in 76.47% of the cases surveyed (see [Figure 2](#)). A lump sum order featured in 44.12% of the cases surveyed. By contrast, periodical payments orders were recorded in only 17.75% of all cases

<sup>11</sup> The qualitative analysis in section 4 further supports and fleshes out the quantitative data.

considered (4.41% + 5.88% + 7.46%); out of the total number of such cases, in approximately 7.5% a mere nominal order was made.<sup>12</sup> The total number of periodical payments orders made other than on a nominal basis is therefore limited to 11.87% of cases, over half of which were made for a fixed term (5.88% of the total number of cases considered). An indefinite-term periodical payments order was made in less than 5% of the cases. Pension sharing orders were made in 23.53% of applications. Payments for the benefit of children were ordered in 22.06% of the cases. Finally, future clean break in life and death was ordered in approximately half (49.28%) of the cases. Only in 1.45% was there no reallocation of assets at all at the end of the case. The categories of orders surveyed in **Figure 2** are not mutually exclusive; several categories sometimes apply in the same case (see **Table 1** below for the respective frequency of combinations of orders).



**Figure 2: Nature of the Order.** Proportions computed on whole sample across all five courts. Data extracted as an array of binary ('yes'/'no') variables corresponding to each type of order. Sample sizes vary between 67 and 69 observations (there are 1-2 missing values on some of the variables). The term 'indefinite' is used to distinguish periodical payments without a specified termination date from 'fixed-term' payments (orders made for a certain number of years), with the caveat that all periodical payments orders terminate upon the recipient's remarriage (see s. 28 Matrimonial Causes Act 1973).

<sup>12</sup> In some cases, the court will order a party to make periodical payments to the other party on a nominal basis (e.g. five pence per year) merely to maintain jurisdiction over the case, i.e. the order is made so that it can be varied (increased) in the event of a change in the parties' circumstances at a later date.

The results have further shown that the most frequent orders tend to be those containing a property adjustment order (see [Table 1](#)), either alone or in combination with a lump sum (both categories with very similar percentages, around 28% of the sample). Cumulatively, cases ending in one or the other of these types of order make up over 50% of the sample. The third most common arrangement is a free-standing pension sharing order with no other disposition on reallocation; this accounts for under 8% of the cases, although an order including the redistribution of a pension together with other orders features in 20.89% of the cases examined (7.46+5.97+2.99+2.99+1.49+1.49+1.49 %). Periodical payments orders in favour of a spouse are not particularly common, presumably because respondents rarely have financial means to meet needs beyond supporting themselves and spouses are expected to realise their earning capacity, pursuant to s. 25 (2) (a) Matrimonial Causes Act 1973; the parties may also have had a comparable level of income (a conjecture supported by [Figure 9b](#) on joint distribution of incomes below).

Nature of the Order	Percent Cases
1 Lump sum & Property adjustment	28.36%
2 Property adjustment	28.36%
3 Pension sharing	7.46%
4 Property adjustment & Pension sharing	5.97%
5 Periodical payments & Property adjustment	4.48%
6 Lump sum	4.48%
7 Lump sum & Property adjustment & Pension sharing	2.99%
8 Periodical payments & Property adjustment & Pension sharing	2.99%
9 Periodical payments & Lump sum	2.99%
10 Periodical payments	2.99%
11 None of these categories	2.99%
12 Periodical payments & Lump sum & Property adjustment & Pension sharing	1.49%
13 Periodical payments & Lump sum & Property adjustment	1.49%
14 Lump sum & Pension sharing	1.49%
15 Periodical payments & Pension sharing	1.49%
16 Periodical payments & Lump sum & Pension sharing	0%
<b>Total</b>	<b>100.00%</b>

**Table 1: Nature of the Order (recategorised).** The cases were grouped according to whether the final outcome included one or more of the following four types of order: spousal periodical payments (including fixed-term and nominal periodical payments), a lump sum, property adjustment and pension order; there are 16 possible combinations.<sup>13</sup> This table shows the percentage of cases for each possible combination of orders, listed from the most to the least frequent outcome.

### 3.1.3 Duration of Proceedings

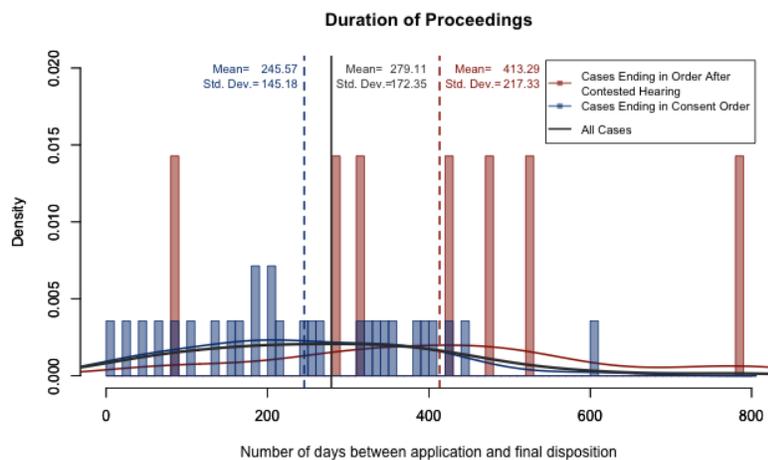
The duration of proceedings is computed as the time elapsed (in days) from the application date (i.e., the date Form A was lodged with the Court) as the starting point. As for the end point, we use the following algorithm: (1) for cases ending in an order made after a contested hearing, we use the making of the judge's order; (2) for cases ending in a consent order, we use the date on

<sup>13</sup> The formula giving all possible such combinations is:  $\sum_{k=0}^4 \binom{4}{k} = 16$ .

which the consent order was approved by the judge; where this is not available, we used the date on which the consent order was submitted by the parties to the judge or came before the judge. The cases where either or both relevant dates that enable the computation of time elapsed between stages could not be retrieved from the Court files resulted in 49.28% missing data on this variable, primarily attributable to missing Form A dates.

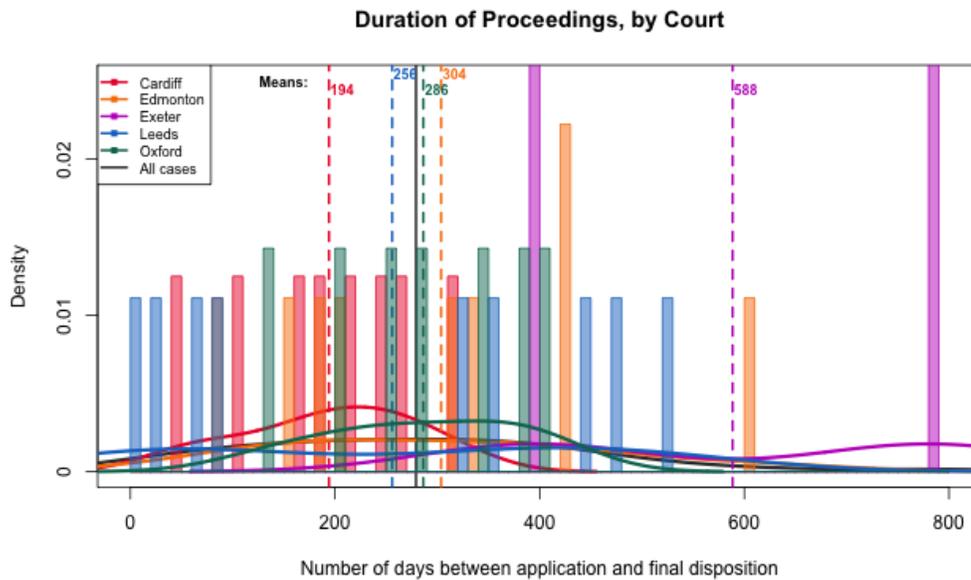
The expected duration of proceedings for a given case, regardless of whether it ends in a consent order or otherwise, is 279.11 days, with a standard deviation of 172.35. On average, the duration of proceedings for cases ending in a consent order is 245.57 days, with a standard deviation of 145.18. Cases ending with an order made after a contested hearing have longer expected duration (413.29 days), and exhibit higher variability in the duration of the proceedings (standard deviation is 217.33). (See [Figure 3a](#).)

Although for this particular question we had to work with a significantly narrower subset of cases, for which we had both the commencement date of the case and the date of the final order, the missing information was evenly distributed across the 5 courts, and hence the resulting smaller sample preserves its representativeness.



**Figure 3a: Duration of Proceedings (in days).** Histograms (bin size=10 days) by case outcome, with superimposed density curves corresponding to each subset (as defined by case outcome), and across all cases. Mean and standard deviation estimates for the two subsets and the whole sample also displayed on the graph. There are 34 missing values on this variable. Of the valid 35 cases, only 7 correspond to cases ending in a judicial order after a contested hearing.

It is worth noting that, as shown in [Figure 3b](#), the small sample available at the Exeter Court is driving the statistics up, with two atypically drawn-out cases.



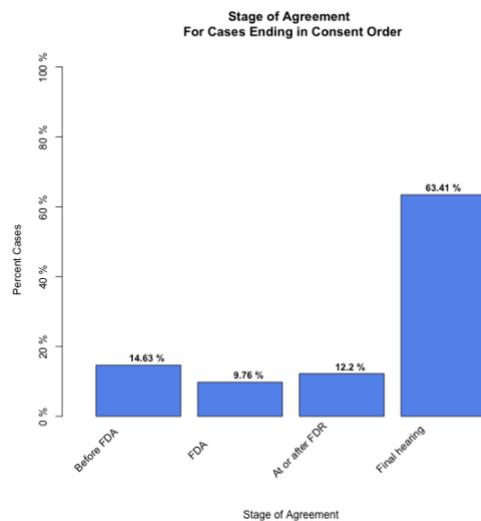
**Figure 3b: Duration of Proceedings, by Court (in days).** Histograms (bin size=10 days) by court, with superimposed density curves corresponding to each subset (as defined by court), and across all cases. Mean and standard deviation estimates for the 5 subsets and the whole sample also displayed on the graph. There are 34 missing values on this variable.

### 3.1.4 Stage at Which Agreement Was Reached

Although in the overwhelming majority of cases the parties ultimately reach an agreement (over 81%, as noted in section 3.1.1), in a substantial proportion of cases ending in a consent order (63.41%) they tend to settle towards the end of the procedural route, with the draft consent order submitted on the final hearing date or shortly before the court date, and in 12.2% of cases there is evidence of the parties reaching an agreement at or shortly after the FDR hearing (see [Figure 4a](#)) although there are more cases (in the 63% category) where it is unclear how and when agreement was reached and the inference from the 63%-12% pattern is that there may be other reasons for the parties' eventually reaching agreement and presenting a draft consent order for approval at final hearing stage, e.g. that the parties have quickly become disillusioned with the court's standard process. Only 9.76% of cases settle at FDA stage, obviating the need for an FDR, which seems to support the possible inference drawn from the 63%-12% gap, especially when taken with the qualitative data. In 14.63% of the cases surveyed, the parties settled between the filing of form A and the date listed for FDA, which was subsequently vacated as a result. (See flowchart in [Appendix A.1](#).)

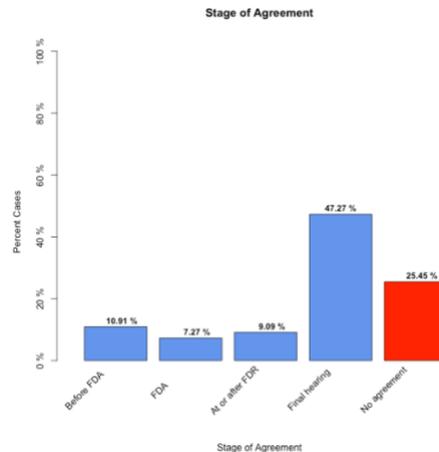
The challenge in reconstructing the dynamics of the case and pinpointing the exact stage where an agreement was reached lies in the fact that the reading of the paper files does not always allow us to determine if the final hearing was expected to be a contentious hearing (following an

unsuccessful FDR appointment) and the parties settled shortly before it, or if it was already clear at the FDR stage that the parties were largely in agreement and the final court hearing was meant to be merely a formal approval hearing (the ‘Agreement Scrutiny’ box in [Appendix A.1](#)). We were, in most cases, able to ascertain whether an FDR meeting was held at all, or if there was a record of an order made at FDA or FDR, and what that order was anticipating. The most obvious indication of early settlement was that the process started with the FDA and there was no further record of an FDR taking place, but later the parties filed a draft consent order and obtained a hearing date for it to be perused by the Court. This, too, seems to support the inference that the parties often started the court process, not apparently realising they could go direct to a s 33A consent order for judicial approval, or perhaps in fact realising they could and filing Form A as a ‘starting gun’ for their own process to such an order.



**Figure 4a: Stage at Which Agreement Between Parties Was Reached (excluding no agreement).** Proportions computed on whole sample across all five courts (sample size N= 42 observations; 14 missing values and 13 cases where no agreement was reached not included in the percentage base).

A similar analysis, performed including cases with missing values on the relevant variable, and cases in which no agreement between parties could be reached (rather than on the subset of cases ending in a consent order), is illustrated in [Figure 4b](#).

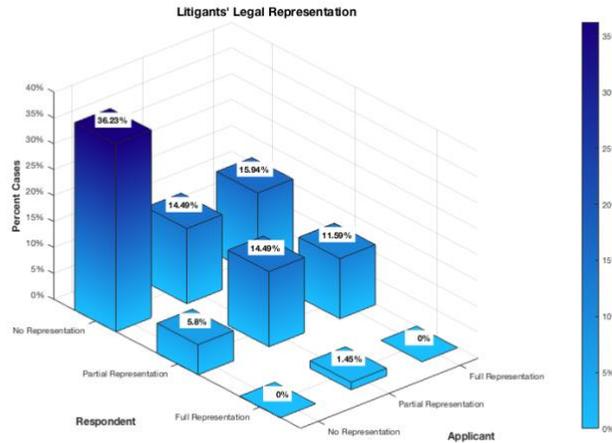


**Figure 4b: Stage at Which Agreement Between Parties Was Reached (including no agreement).** Proportions computed on whole sample across all five courts (sample size N= 55 observations; 14 missing values).

This seems to suggest that, although in the vast majority of cases there is potential for a privately agreed solution, there is insufficient use of earlier stages as an opportunity to settle, which in turn indicates that the administration of the judicial system could better facilitate litigants' understanding of the possible use of the first court appointment for these purposes and encourage early settlement. It may be that mediation services are being insufficiently drawn to the parties' attention by the court, which seems to be supported by the fact that in the files we saw rarely indicated that agreement had been achieved in mediation (a situation in which such an acknowledgement was seen in only one file).

### 3.1.5 Litigants' Legal Representation

In over a third of the cases surveyed (36.23% or 25 out of 69), both parties were litigants in person. The figures reveal an imbalance between the parties in terms of legal assistance across the investigated sample of cases. In approx. 31% of cases, the applicant is either partially or fully represented, whereas the respondent is a litigant in person (see [Figure 5](#); this value is the sum of 14.49% partial representation vs. none and 15.96% full representation vs none). 'Partial representation' is constructed by merging the following categories: initially (at Form A and/or FDA stage); nearly all stages; for hearings; at final hearing stage; at agreement scrutiny stage (see [Table 2](#) for a more detailed representation by litigant). 'No representation' is equivalent to a party having acted as a litigant in person for the entire duration of the proceedings. By contrast, in less than 6% of cases the applicants had no representation, whereas respondents had partial representation. This would suggest that respondents are far less likely to seek legal representation as a response to being served with the application.



**Figure 5: Litigants’ Legal Representation.** Proportions computed on whole sample across all five courts. Reported figures are constructed as a 3x3 matrix giving all possible combinations of amount of legal representation (none, partial, and full, respectively) for applicant and respondent in a given case, as a percentage of total cases. The combination corresponding to both litigants having full legal representation is structurally 0% by sample selection design. Sample size is 69 observations; there are no missing values on these variables.

Applicant			
	Representation	Frequency	Percentage
	At final hearing stage	4	5.80%
	For part of the proceedings	12	17.39%
	Initially, at Form A and/or FDA stage	1	1.45%
	Nearly all stages	4	5.80%
	None	29	42.03%
	Throughout	19	27.54%

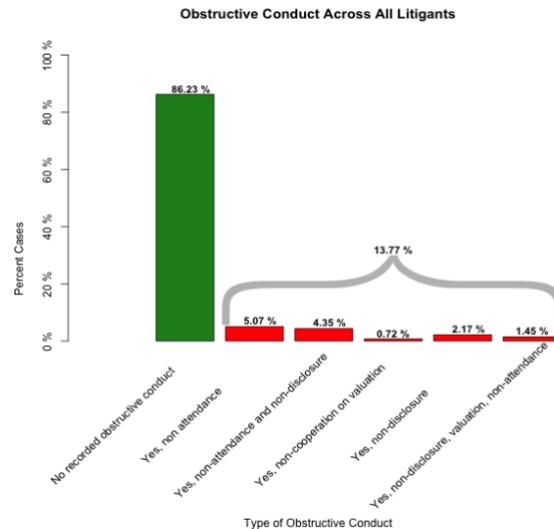
Respondent			
	Representation	Frequency	Percentage
	At final hearing stage	3	4.35%
	For hearings	2	2.90%
	For part of the proceedings	15	21.74%
	Nearly all stages	2	2.90%
	None	46	66.67%
	Throughout	1	1.45%

**Table 2. Litigants’ Legal Representation (detailed categorisation).**

**3.1.6 Litigants’ Obstructive Conduct and/or Incorrect Service of Paperwork During the Proceedings**

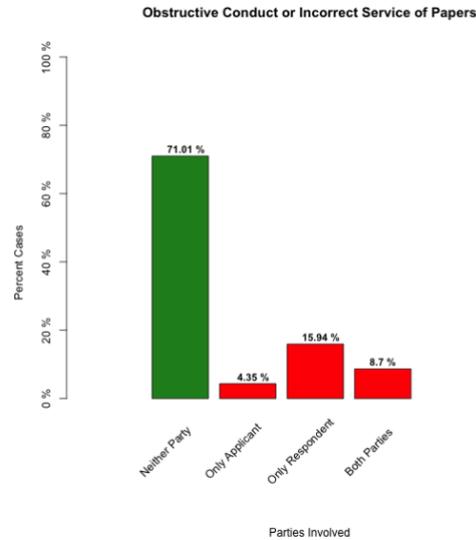
In 14% of the cases included in the survey, the records show a lack of cooperation from the litigants; in fact, in some cases the judge had to issue an order re-requiring full disclosure or a penal notice for failure to disclose assets, or to re-issue a request for valuation or indeed a penal notice for failure to comply with valuation requests (see Figure 6). The qualitative data,

however, shows in some cases that unrepresented parties' failure to comply with such interlocutory orders is sometimes a direct result of either or both parties' apparently obstructive conduct, particularly in not serving documentation properly or at all, and that this is often because they have misunderstood what was required rather than demonstrating wilful non-compliance. This is an example of how the quantitative and qualitative approaches taken together are quite informative.



**Figure 6: Litigants' Obstructive Conduct During the Proceedings.** Proportions computed on the whole sample of litigants (applicants and respondents) across all five courts. Sample size is  $N=138$  ( $=2*69$ ) observations; there are no missing values on this variable for either applicant or respondent.

The percentage of cases with difficulties in the conduct of the proceedings increases if we add situations in which the records showed the litigants' frustration of the court process through the incorrect service of paperwork, with a total of approximately 29% of cases where either or both litigants engage in obstructive behaviour and/or struggle to understand their responsibilities in terms of service. (See [Figure 7](#).)



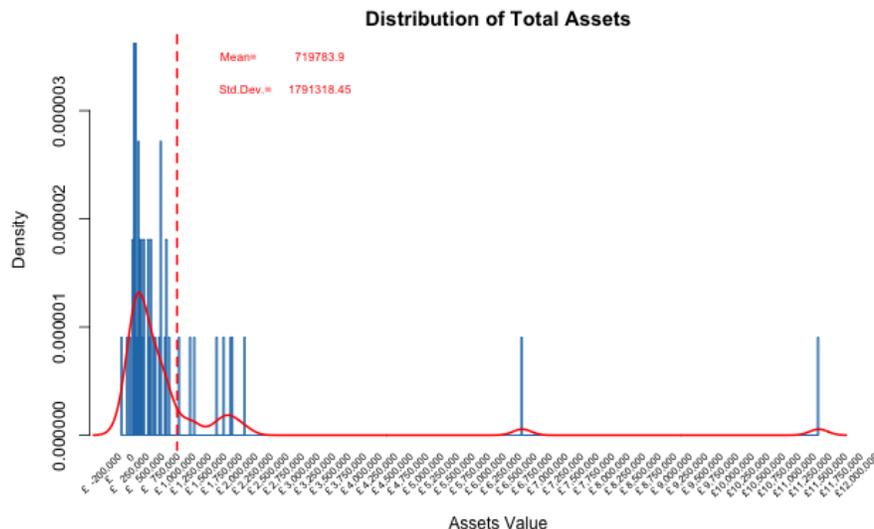
**Figure 7: Litigants' Obstructive Conduct or Incorrect Service of Papers During the Proceedings.** Reported variable categories were constructed from the 4 possible combinations of two binary variables corresponding to applicant and respondent, respectively. Each of these binary variables takes on value 1 ('yes') if there is a record on file of respective litigant either engaging in obstructive conduct (of the nature detailed in Figure 6) or performing incorrect service of papers, and 0 ('no') otherwise. There are no missing values on the relevant variables for either applicant or respondent; sample size is N=69.

### 3.1.7. Distribution of Litigants' Asset Values

The data collected aimed at monitoring the following financial aspects of the case: the distribution (including summary statistics such as the average) of the value of liquid assets of the parties, the net value of the matrimonial home (usually the couple's most significant asset, especially if there is no or only insignificant pension available) and any other significant illiquid assets, as well as the annual income of the former spouses. In each case, we considered the overall stakes of the dispute, by looking at the pool of assets available for redistribution: capital, value of real and personal property after the deduction of liabilities, any pension funds (e.g. in some cases, the files indicated jewellery and vehicles as significant personal property and in others pension funds appeared to be a major driver in going to court since a court order is required for such an order, whereas in no other category of asset is it essential to have a court order to divide property up in any way the parties choose; other than of course in those cases where it is desired to secure a clean break order so as to preclude further later claims).

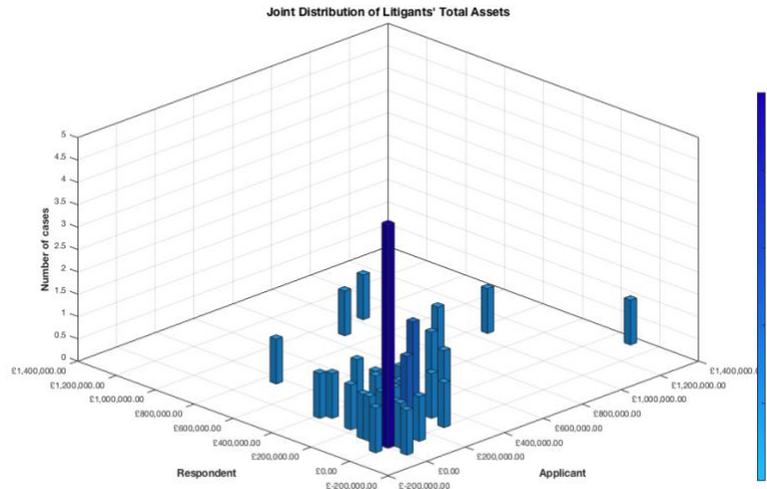
The detailed financial information available was often somewhat sparse when compared to the rest of our data, either because litigants did not disclose uniformly or because the paper files did not include any information (and access to the FamilyMan files was not granted, as already mentioned, owing to data protection concerns, lack of HMCTS resources for training researchers granted access, and protection of the system from inadvertent damage or deletion of data occasioned through untrained access). We were also mindful of discrepancies found in different sources, presumably because the values changed at various stages of the process or simply that the parties informal estimates were imprecise, particularly at the start of the case; indeed, it is often the case that figures will not remain static up to the final consent order, with the statement of information at that stage differing from Form Es because of the obligation to update continually.

The average value of the total amount of assets a couple had, calculated as the sum of liquid assets, significant personal property and pension funds (but excluding the matrimonial home), from which liabilities are subtracted, was under £720,000 (see [Figure 8a](#)). There are, however, two notable outliers, which are biasing the estimate upwards (and increase the assets dispersion, as reflected in the standard deviation), in particular two cases totalling substantial assets, approximately £6m and £11m, respectively, which probably would not fit the description of 'low value'. Excluding those two values out of line with the rest of the sample, the average total is £381,455 (with a much smaller standard deviation).



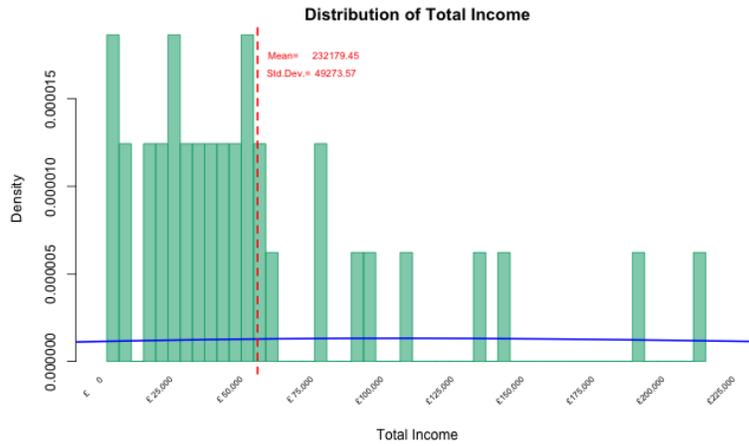
**Figure 8a.** Distribution of total assets per case, other than the matrimonial home. The sample size for this inquiry was 49 cases. The total was calculated by adding up both parties' liquid assets, significant personal property, and pension funds, and subtracting liabilities from the total.

Figure 8b illustrates the respective value of the applicant's and respondent's assets (as defined above) in each case.



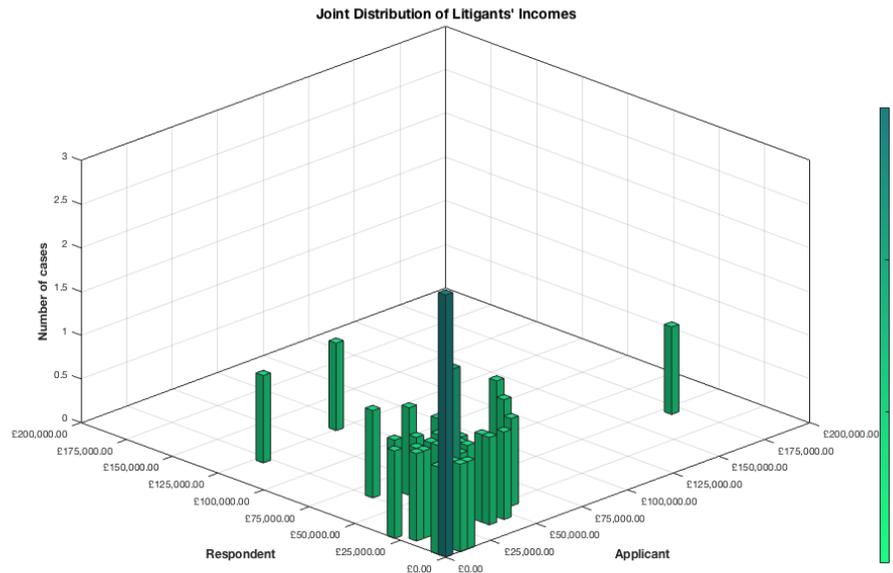
**Figure 8b. Joint distribution of litigants' total assets** (excluding the marital home). The total for each party was calculated by adding up their liquid assets, significant personal property, and pension funds, and subtracting liabilities from the sum. Figures reported within the subset of valid pairs only (i.e. cases where data for both applicant and respondent are available); 49 cases. Outliers not included. The 45-degree line from the origin traversing the xy-plane (the horizontal Applicant x Respondent-plane) corresponds to equal values for applicant and respondent; datapoints on the left side of this line correspond to higher (relative) values for respondent, and lower (relative) values for applicant; the reverse holds for datapoints on the right side of this line.

As regards future resources, it can be observed that the average cumulative annual income of the applicant and respondent is around £232,179, but in this instance, too, there were a few cases of significantly higher income driving the average up, whereas most cases are concentrated below the £65,000 mark, as illustrated in Figure 9a. In fact, the total annual income in 75% of cases is under £62,000. The top 10% earners have a combined income ranging between approximately £110,000-215,000.



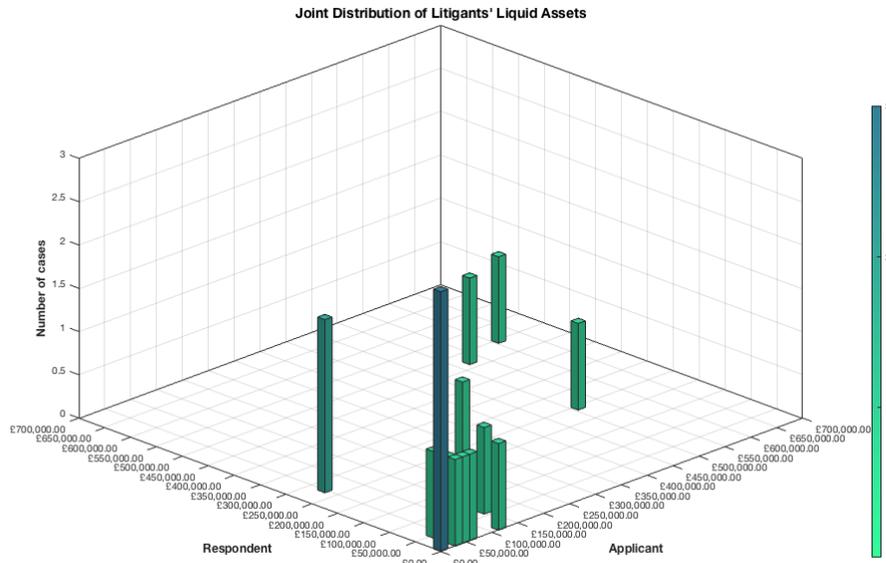
**Figure 9a.** Distribution of total income per case. The sample size for this inquiry was 49 cases.

We also considered the litigants’ respective annual disposable income. As shown in **Figure 9b**, the level of income of the applicant and the respondent tends to be similar, which may explain the scarcity of maintenance orders observed above, and concentrated below £75,000 for either party; the highest percentage is that of couples in which neither party earned in excess of £50,000.



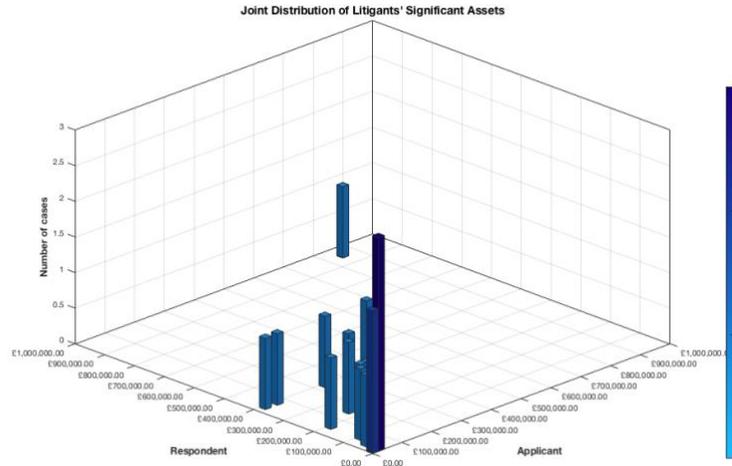
**Figure 9b.** Joint distribution of litigants’ total annual income (including but not limited to salaries). Figures reported within the subset of valid pairs only (i.e. cases where data for both applicant and respondent are available); 37 cases. The 45-degree line from the origin traversing the xy-plane (the horizontal Applicant x Respondent-plane) corresponds to equal values for applicant and respondent; datapoints on the left side of this line correspond to higher (relative) values for respondent, and lower (relative) values for applicant; the reverse holds for datapoints on the right side of this line.

As regards capital, in most cases the applicant has more substantial assets (see [Figure 9c](#)). This may account for the low number of lump sum orders and the highest percentage of orders containing property adjustment dispositions.



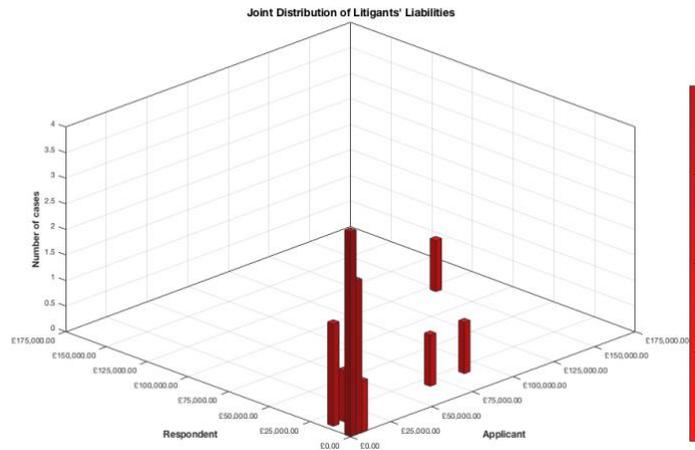
**Figure 9c. Joint distribution of litigants' liquid assets.** Figures reported within the subset of valid pairs only (i.e. cases where data for both applicant and respondent are available); 17 cases. The 45-degree line from the origin traversing the  $xy$ -plane (the horizontal Applicant x Respondent-plane) corresponds to equal values for applicant and respondent; datapoints on the left side of this line correspond to higher (relative) values for respondent, and lower (relative) values for applicant; the reverse holds for datapoints on the right side of this line.

With reference to the distribution of significant assets (personal property, such as jewellery or cars, real property other than the former matrimonial home), the respondent is the holder of the larger share of assets in the overwhelming majority of cases (see [Figure 9d](#)).



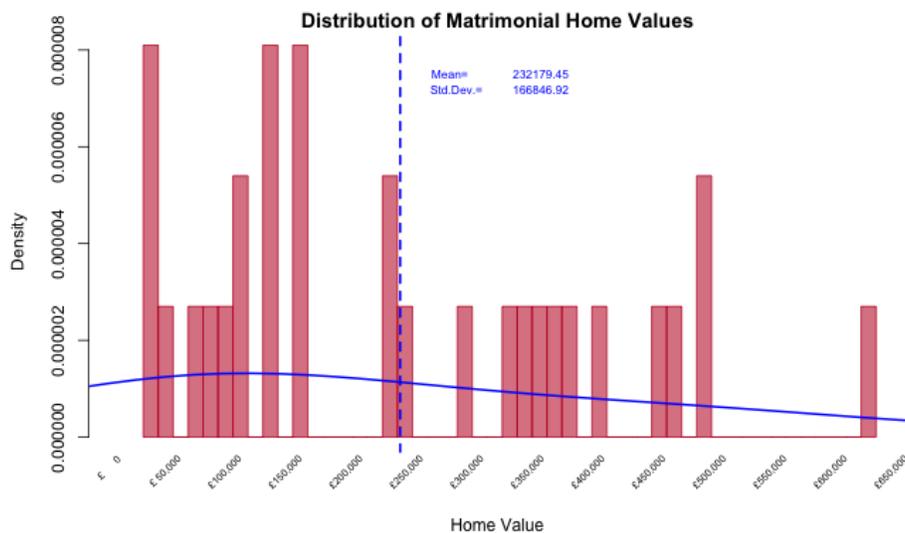
**Figure 9d.** Joint distribution of litigants’ significant assets. Figures reported within the subset of valid pairs only (i.e. cases where data for both applicant and respondent are available); 22 cases. The 45-degree line from the origin traversing the xy-plane (the horizontal Applicant x Respondent-plane) corresponds to equal values for applicant and respondent; datapoints on the left side of this line correspond to higher (relative) values for respondent, and lower (relative) values for applicant; the reverse holds for datapoints on the right side of this line.

In terms of liabilities, situations in which the applicant has significantly greater liabilities (such as a mortgage, credit card debt or a personal loan) are prevalent (see Figure 9e), which may explain why they took the initiative of legal proceedings.



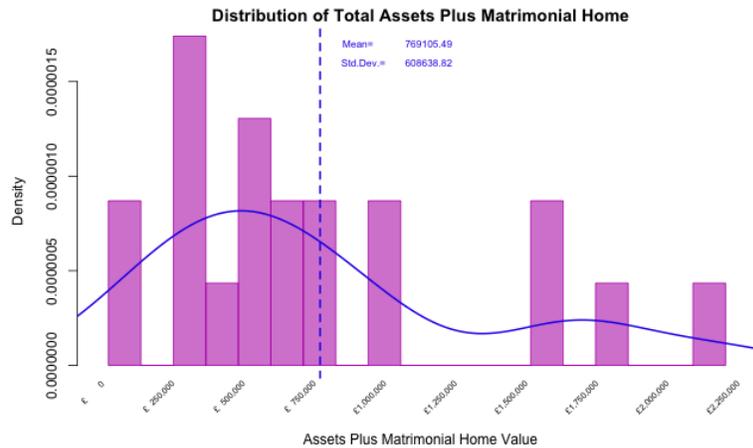
**Figure 9e.** Joint distribution of litigants’ liabilities. Figures reported within the subset of valid pairs only (i.e. cases where data for both applicant and respondent are available); 18 cases. The 45-degree line from the origin traversing the xy-plane (the horizontal Applicant x Respondent-plane) corresponds to equal values for applicant and respondent; datapoints on the left side of this line correspond to higher (relative) values for respondent, and lower (relative) values for applicant; the reverse holds for datapoints on the right side of this line.

Finally, we examined the worth of the real property at stake in the proceedings separately (see [Figure 10](#)). We took into account the net value of the property in case of encumbered titles, rather than its market value, in order to reflect the actual equity more accurately (in a few cases, sums were owed to private creditors, typically family members having assisted with the purchase of the property, rather than a mortgagee). The figures show that the average net value of the former matrimonial home across the sample considered was £232,179.



**Figure 10. Distribution of values of the former matrimonial home.** A subset of 30 cases was available for this inquiry. In cases where a valuation range was provided, the higher value was recorded.

On a smaller subset from our sample (20 cases), we were able to also compute the total value of all liquid and illiquid assets, including the net worth of the former matrimonial home. (See [Figure 11](#)). The average was £769,105, with the caveat above regarding a few outliers driving up the means.



**Figure 11. Distribution of values of total assets** (capital, significant personal property, pension funds, former matrimonial home). Sample size: 20 cases.

### 3.2 Exploring Patterns of Association

This section explores questions such as the following: (1) Is the lack of representation associated with a failure to comply with the judge’s directions and other obstructive conduct on the part of litigants?; (2) Is there any relationship between legal representation and early settlement (i.e., settlement at mediation, pre-FDA, or FDA)?; (3) Is there any relationship between representation and case outcome (i.e., consent order or judicial order after a contested hearing)? (4) Is there any relationship between the value of assets and/or litigants’ total income and the duration of proceedings (possibly exhibiting Court-specific patterns)? (5) Is there any connection between parties’ legal representation and the value of assets at stake?

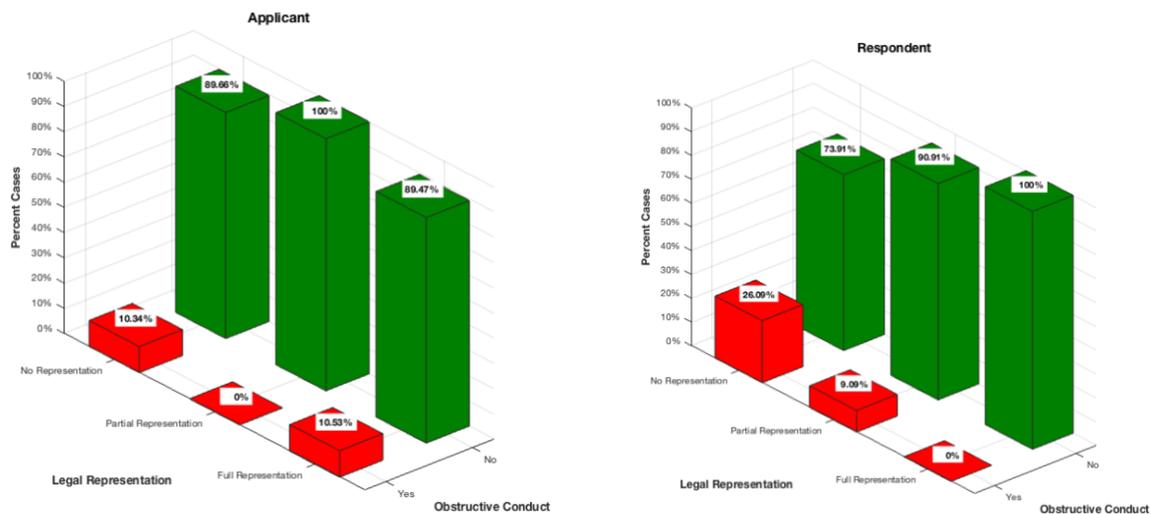
Before proceeding, a disclaimer is in order. The subsequent analyses are not performed within the causal inference framework. Randomisation procedures applied in experimental settings that enable the formulation and testing of causal hypotheses and statements are infeasible in this context, as there are both practical and ethical considerations precluding random assignment of litigants to case circumstances. Consequently, the identified patterns of association presented herein do not necessarily warrant a causal interpretation. Bearing in mind these caveats, the following subsections proceed to address the array of questions formulated above.

#### 3.2.1 The Connection Between Lack of Representation and Obstructive Conduct

This subsection investigates the connection between the degree of legal representation and litigants’ obstructive conduct, disaggregated by the status of the litigant in the proceedings

(applicant or respondent). **Figure 12** reports, for both applicants and respondents, the proportion of litigants who engaged and did not engage in some form of obstructive conduct during the proceedings, within each category defined by the degree of legal representation (none, partial, and full, respectively). For a detailed description of the full range of obstructive behaviours observed across the investigated cases, and combinations thereof, see **Figure 6** in **Section 3.1.6**. Given the reduced proportion of litigants who exhibited each type of obstructive behaviour displayed in the referenced figure, we resort to the dichotomization of the variable recording obstructive conduct, such that only two categories ('yes' and 'no') are possible.

As can be observed from **Figure 12**, there exists a tendency among respondents (right panel) to exhibit some or multiple forms of obstructionism during the proceedings that increases as the degree of legal representation available to them diminishes. Accordingly, 12 out of the 46 respondents with no legal representation at any stage during the proceedings (i.e., 26.09% within this category) engaged in some form of obstructive behaviour. Among the 20 respondents with only partial representation, only two (i.e., 9.09% within this category) showed some obstructionism. There is no obstructive behaviour on the subset of respondents who benefitted from legal representation throughout the duration of the proceedings; the sample size is only one in this case, however, so due caution should be exercised when interpreting the results.

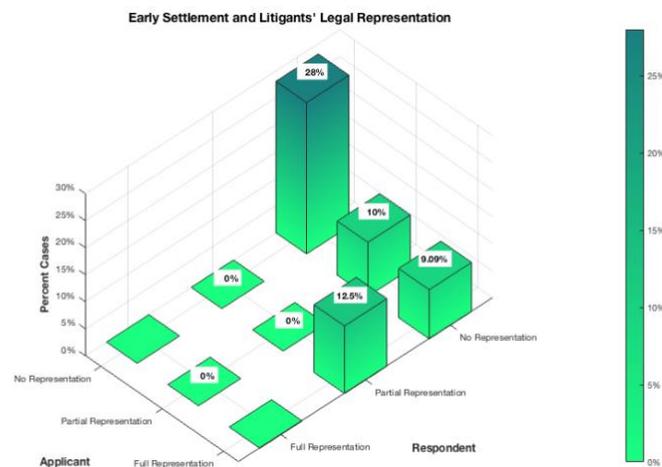


**Figure 12: Litigants' Obstructive Conduct During the Proceedings as a Function of Their Legal Representation.** Proportions computed within each category of litigants: applicants (left panel) and respondents (right panel) across all five courts, and within each category defined by the degree of legal representation (none, partial, and full, respectively). Sample size is N=69 observations for each of the two data subsets; there are no missing values on this variable for either applicant or respondent.

The above noted pattern is less prominent among applicants (left panel), whose propensity to engage in obstructive conduct during the proceedings does not appear to be linked to their degree of legal representation in a linear fashion. Thus, two of the 17 applicants with full legal representation (or 10.53% within this category), and three of the 26 applicants with no legal representation (or 10.34% within this category), exhibited some form of obstructive conduct; no form of obstructive behaviour was recorded in the case files for any of the 21 applicants having only partial representation during the proceedings. The same caveat regarding the small samples size applies here as well.

### 3.2.2 The Connection Between Legal Representation and Early Settlement

For the purposes of exploring the possible association between legal representation and the swift resolution of the dispute, we define ‘early settlement’ as agreement between the parties reached prior to the FDR stage. This includes cases in which the First Appointment was treated as an FDR, and cases settling after the filing of Form A and before the date set for the FDA.



**Figure 13: Early Settlement as a Function of Litigants' Legal Representation.** Percentages of cases settling at an early stage (as opposed to FDR or final hearing) are reported. Proportions are computed on whole sample across all five courts. Reported figures are constructed as a 3x3 matrix giving all possible combinations of amount of legal representation (none, partial, and full, respectively) for applicant and respondent in a given case, and the corresponding proportion of cases ending in early settlement as a percentage of all cases within the considered combination defined in terms of representation. The combination corresponding to both litigants having full legal representation is structurally 0% by sample selection design. There are no missing values on any of the three relevant variables.

The results suggest that early settlement is the most frequent outcome when both parties are litigants in person (28%), which may occur either because the parties do not deem the legal

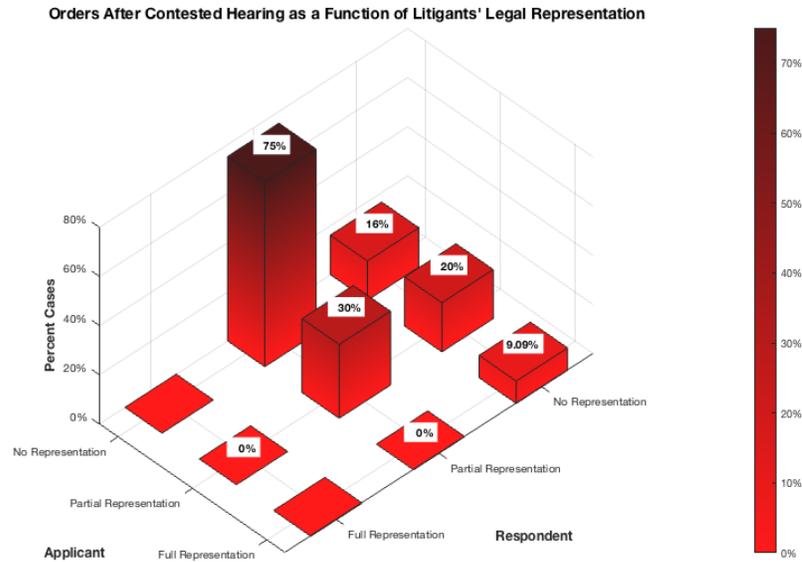
process cost-effective, they find it daunting and are more prepared to compromise, they have an amicable post-separation relationship, or there are fewer assets at stake. The fact that early settlement is not a likely outcome when both parties are represented to some degree may be explained by the more complex nature of the case, requiring legal advice or representation; these complexities also tend to be associated with a longer duration of proceedings.

### **3.2.3. The Connection Between Legal Representation and Case Outcome**

Next, we investigate the bivariate relationship between the various combinations of litigants' representation and the case outcome (judicial order after contested hearing versus draft consent order presented for judicial approval). A visual representation of the results is provided in [Figure 14](#). Since there are no missing values on the case outcome variable, the difference between 100% and the displayed percentage on each bar can, on seven out of nine possible combinations, be interpreted as the percentage of cases ending in consent order within the considered category (as defined by the combination of particular levels of applicant's and respondent's legal representation). The exceptions are (i) the combination corresponding to both parties having full legal representation, which structurally contains zero observations, as the study design precludes the selection of such cases; and (ii) the category corresponding to applicant having no representation and respondent having full representation, which empirically turns out to have zero observations; the computation of distributions of case outcomes on these zero-count categories is obviously mathematically impossible.

We caution the reader again on the small sample sizes in certain categories. See [Figures 5a](#) and [Table 2](#) for further information regarding distributional properties of litigants' legal representation; [Figure 14](#) should be read and interpreted in conjunction with the indicated figure and table.

At this stage, we are not accounting for any other relevant factors that could potentially modify the relationship between legal representation and case outcome, such as the value of, and the difficulty of separating, the assets, or the presence of obstructive conduct on the part of either or both litigants.



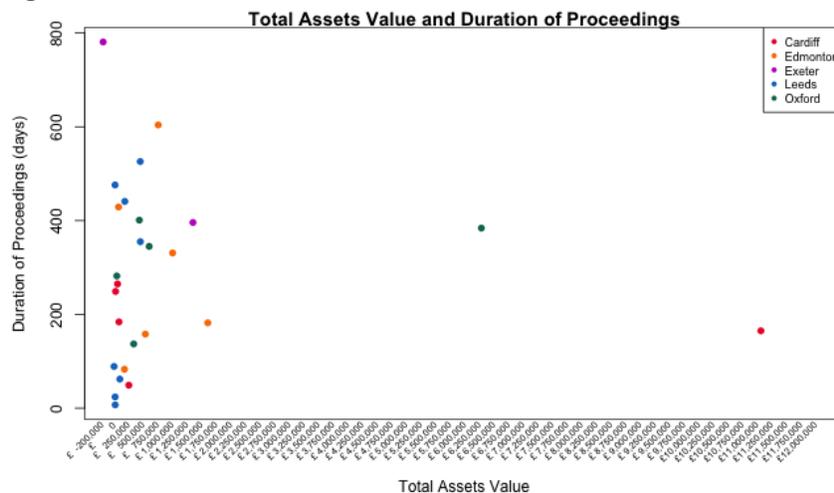
**Figure 14: Case Outcome as a Function of Litigants' Legal Representation.** Percentages of cases ending in judicial order after a contested hearing (as opposed to consent order) are reported (since there are no missing values on the case outcome variable, the difference between 100% and the displayed percentage can be interpreted as percentage of cases ending in consent order within the considered category, except in zero-count categories). Proportions are computed on whole sample across all five courts. Reported figures are constructed as a 3x3 matrix giving all possible combinations of amount of legal representation (none, partial, and full, respectively) for applicant and respondent in a given case, and the corresponding proportion of cases ending in judicial order after a contested hearing as a percentage of all cases within the considered combination defined in terms of representation. The combination corresponding to both litigants having full legal representation is structurally 0% by sample selection design. There are no missing values on any of the three relevant variables.

As **Figure 14** indicates, across the subset of 25 cases where both parties are litigants-in-person, only four cases (i.e., 16%) end in judicial order at a contested hearing, the remaining 21 cases being concluded with an agreement reached between parties and formalised through a consent order. In three out of the four cases where the applicant is a litigant in person and the respondent has partial representation (or 75% of cases within this category), no agreement could be reached between the parties prior to the final hearing, and the proceedings were concluded through a judicial order made after a contested hearing. There is only one case in which the applicant had partial representation and the respondent had full representation; this case ended in a consent order. In the other 20 cases where the applicant had partial representation and the respondent had partial or no representation (10 cases each), 40% and 20%, respectively, ended in an order made after a contested hearing. Finally, in the cases where the applicant had full representation and the respondent either had partial representation or was LIP, 0% (=0/8) and 9.09% (=1/11), respectively, were concluded via a judicial order following a contested hearing.

Thus, no clearly defined bivariate pattern of association emerges. Having made the small sample size disclaimer, we may conjecture that representational imbalance in favour of the applicant is associated with a higher likelihood for the parties to reach an agreement and the case to end in a consent order. Conversely, where the representational imbalance is detrimental to the applicant, there appears to be a lower probability of reaching an agreement prior to the final hearing, and correspondingly a higher probability of the case ending in an order made by the judge after a contested hearing. A possible explanation for the observed pattern is that the applicant, as presumably the party disadvantaged by the *status quo* and seeking a financial remedy, faces a more challenging endeavour in exacting the voluntary agreement of a respondent with comparable or higher level of legal representation. In any event, it is difficult to extrapolate on the basis of these preliminary analyses on small sample sizes; the relationship between legal representation and case outcome is likely modified by the interplay of several factors that cannot be adequately adjusted for in the context of bivariate analyses.

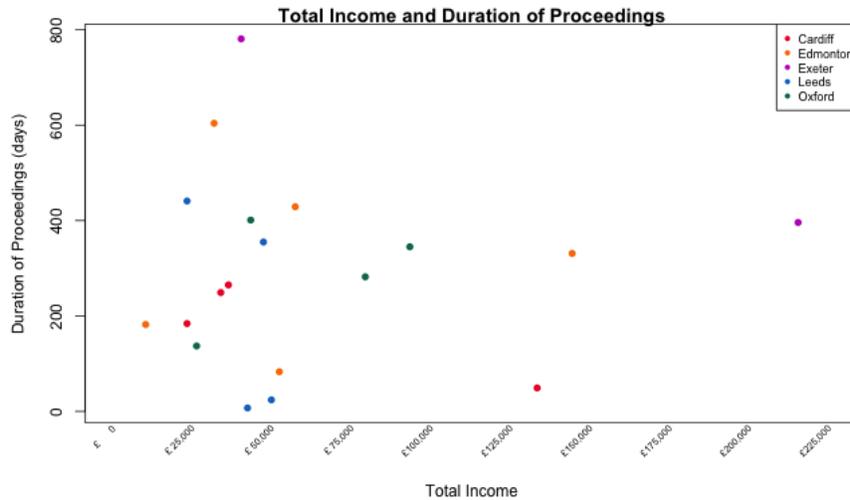
**3.2.4. The Connection Between Value of Assets/ Income and Duration of Proceedings**

There were no discernible patterns of association between the value of the assets at stake and the duration of the proceedings (see scatterplot in Figure 15). This seems to suggest that the length of proceedings, which, as shown above, tends to be notable, is not attributable to the complexity or high stakes of the case.



**Figure 15.** Variation of the duration of the proceedings with the total value of the assets.

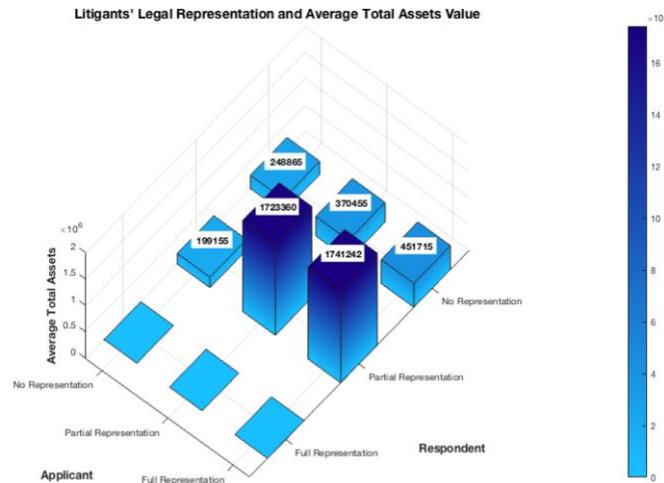
Similarly, there seems to be no particular relationship between the value of the future income available for reallocation and the duration of the proceedings, nor is there any distinguishable Court-specific pattern (see Figure 16).



**Figure 16.** Variation of the duration of the proceedings with the total income available.

### ***3.2.5. The Connection Between the Parties' Legal Representation and the Value of the Assets at Stake***

As expected, both parties appear to be at least partially represented during the course of proceedings when the pool of assets available for redistribution is higher (see Figure 17). Thus, the approximate average value of assets in cases where applicant has full and respondent has partial representation is £1,741,242 (six cases with valid assets data). The average value of assets in cases where both applicants had partial representation is approximately £1,723,360 (eight cases with valid assets data). The average value of assets in cases where the respondent was not represented and the applicant was fully represented (eight cases) is approximately £451,715. The average value of assets where both parties are litigants in person (17 cases) is approximately £248,865. Finally, the average value of litigants' combined assets in cases where the respondent is partially represented and the applicant is not represented (three cases) is under £200,000. No assets value data are available for the only case where the respondent had full representation, and the applicant had only partial representation. As previously indicated, cases where both applicants had full representation were excluded by the sample selection design.



**Figure 17.** Variation of applicants' and respondents' respective legal representation with the total value of the assets. While all 69 case files offered information on representation, only 49 cases included information on the total value of assets.

#### 4 The Qualitative Analysis

The qualitative analysis of the sample of the 69 cases randomly selected from the five courts accessed disclosed further informative patterns.

The first two issues which argued for response in this work were the apparent absence of strong signposting to out of court dispute resolution, which we had expected to find regularly practised, because (since the Children and Families Act 2014) MIAMs are now compulsory rather than advisory, as formerly under the FPR 2010 r3A and associated PD, unless an exception is engaged; and, while there are often valid exceptions applying, at least the information aspect of the MIAM should alert the parties to the existence of mediation or alternative methodologies, and (we thought) would be followed up by the judiciary at the first appointment. This (it seemed to us) would also clearly have some appeal to LIPs with no funding for representation, since a settlement at mediation can still be legally aided and the statutory charge will not apply if the parties are financially eligible for funded mediation in the first place. However, we were struck by the absence of much mention of mediation at all in most of the files we accessed.

Six categories of cases appeared particularly problematic from the viewpoint of the conduct of the proceedings.

**4.1 Cases in which the parties would have benefited from Non-Court Dispute Resolution (as the label was coined by the immediate Past President of the Family Division, 'N-CDR') where no information or reference was apparently offered by the court.**

Five of these were randomly selected to illustrate this category, two from Wales, one from the Midlands, two from the North:

(1) A professional couple with £1m assets to divide, incomes of over £70,000 (nearly 3 times the national average income) applicant represented, respondent in person: would have been able to afford and to have benefited from IFLA (Institute of Family Law Arbitrators) family arbitration, as approved as an alternative to court by *Munby P in S v S* [2012 EWHC 7; and where they could have chosen their own arbitrator from the IFLA website, and had the resolution of their case customised by a skilled arbitrator more quickly and inexpensively than via the court route with only one party represented. Both parties would have needed initial legal advice on the binding nature of arbitration unless error of law or flaw in procedure, but this might have been obtained at a free or fixed fee first interview with a Resolution solicitor, and once within the IFLA process they would not have needed to comply with the technical rules of the court on bundles and preparation of evidence, since the IFLA trained arbitrator could have been relied upon to handle the case management appropriately and the savings over the cost of the court process should have been able also to fund some limited legal advice for both parties while they conducted the actual arbitration hearing themselves.

(2) A business couple, another case suitable for IFLA arbitration, £10m of assets divided £7m/3m (interesting that this was thought by the parties to be too low value for much representation, the Accountant involved, uncertain whether and if so when H was represented; W initially was but then an LIP, and the only order actually obtained from the court was periodical payments for the children, the remainder of reorganisation of assets apparently agreed externally to the court, no details of how achieved. No sign of referral to any form of N-CDR.

(3) A case where the applicant was represented and the respondent not, which need never have gone to court, since no pension order was apparently required, there was no DR referral, and it appears that the case went straight from Form A to consent order, the parties settling the case by agreement without assistance from any source other than the parties and their solicitors, although the respondent wife had the assistance of counsel to attend to drafting of the Consent Order on her behalf.

(4) A complex low value case with the applicant wife represented and the respondent husband not, and endless problems with engagement, disclosure and attendance at hearings, i.e. the sort of case which if civil would go to the small claims jurisdiction for an interactive hearing with a District Judge. A case in which the disclosure issue identified in the qualitative data could be addressed by the suggestion at 5.1 below where a court official took the financial disclosure details, the case benefited from ENE and did not enter the existing court process at all.

(5) Another professional couple, this time with very low value assets, both represented but by solicitors who appeared to have difficulty with paperwork, e.g. failing to sign and date forms, commented upon by the court, so that the court and the parties were left to do all the work. In logic, this case should have gone to N-CDR on the basis of low value alone, but it seems there

was no signposting to DR services of any kind, although the researcher was aware that there are local practitioners with expertise in financial provision.

**4.2 Cases with limited assets, and little or no information on means, which would clearly have benefited from avoiding the court process altogether owing also to other indications of unsuitability for court processes, and being better suited for DR of whatever type, but particularly for ENE when representation not available.**

19 cases were randomly selected in this category, six from Wales, one from the Midlands, seven from North London (representing the South East) and four from the North. These were all what might be called 'sad' cases where the cumulative non-legal problems were making a court process only another instance of an existing stress-filled life:

(1) Respondent husband out of work, no representation, applicant wife represented, SSN (severely subnormal) child, FMH (former matrimonial home) at most valued at £500,000, parties somehow brokered a consent order on very frugal costs. No signposting to mediation which would have been more suitable.

(2) Applicant husband had profound hearing loss, which was also deteriorating, though had secured representation, respondent wife had not, although she had originally been represented by a charity, but which had been discontinued. 1<sup>st</sup> appointment vacated in absence of information from applicant husband. Rescheduled but case then ended at that appointment as the final hearing since so few assets to divide (Basically only the FMH and small pension - not worth the court process and would have benefited from both N-CDR signposting and ENE as suggested above at 4.1(4)).

(3) Similar case, assets so low that the case would have benefited from avoiding court altogether.

(4) Similar again, only the applicant wife represented, low assets not worth the court process but no suggestion to this end for any N-CDR process, although early Heads of Agreement could have directed to a s33A consent order, especially if ENE has been available.

(5) A rare case where both parties LIPs, but a consent order was agreed owing to really low assets, however no indication on file as to how the parties arrived at that disposal: the final order being for a really low payment and the FMH to the wife, appearing that the court was only used to obtain a clean break order dismissing all other claims, which could have been effected on the basis that an out of court agreement was then embodied in a s33A consent order approved by the court.

(6) Another case of really low assets resolved through mediation and proceeding by consent order; although the court process not needed for a pension order, so possibly court only again used for achieving dismissal for a clean break.

(7) Another case of really limited assets, all in the hands of the husband, but involving a forced pension, not a matrimonial asset. Thus, no pension order involved but only a lump sum by consent payable out of his end of service gratuity. Wife had limited representation only after final hearing, otherwise both LIPs. A case which would have benefited from strong signposting to N-CDR and also ENE had it been available, since not worth the full court process.

(8) A low value case in which the court nevertheless insisted on minor court rules e.g. refusal to proceed before an Amended Petition was formally relabelled as such (when clearly was Amended, and equally clear the financial substance was not worth the court's attention, but no sign of direction to N-CDR).

(9) Very low assets, both parties unrepresented, and court exasperated: but in complete contrast to the previous case came before a creative DJ, who gave the parties a copy of s25, plus very simple explanations, dispensed with a trial bundle, and directed listing before any judge once the basic information had been assembled. A clear example of how such a case could be handled if clearly not really suitable for court process and for some reason not directed to N-CDR.

(10) A very similar case where the parties did not understand the process for amending with red ink and a D84 form + re-service, which like case (8) above could have benefited from swift redirection to N-CDR of which there was no sign on the file.

(11) Another case of very low assets more suitably resolved by N-CDR but no sign of such signposting.

(12) Similar very low assets, respondent husband in supported housing, applicant wife taking all responsibilities for the children, husband very difficult and non-engaging, even tried to run over the process server! Skilled mediator might have resolved the issues but no sign of such direction to N-CDR.

(13) Another similar which cried out to go straight to N-CDR.

(14) Unusually for the court, located in a very poor area, this was not really a low value case, since there was £1.75m to divide, but only one party represented. With this at stake, ENE if it had been available, followed by an IFLA arbitrator, or a high street firm mediator, might have been the alternative to court procedure, but no sign of direction to N-CDR.

(15) Very low asset value case, parties actually advised to settle out of court but no sign of actual direction to mediation or other DR methodology. However, a consent order finally presented for approval, which was approved with amendment, though no evidence of how achieved: perhaps as no indication of representation a DIY agreement between parties.

(16) Very similar to (15).

(17) Very similar to (15) and (16), again no sign of referral to N-CDR.

(18) Very similar to (15) to (18) but in this case a 20-minute hearing was held when the case was transferred in from a court outside the city (as had occurred in cases (15) to (18) but in those cases without the initial short hearing). However, after this hopeful start in assessing the dynamics of a case, apparently a methodology often used at this court where at least one party was unrepresented, there was again no specific direction to N-CDR.

(19) Another case with no assets of significance, ideally suitable to N-CDR, but no such signposting.

#### **4.3 Cases where both unrepresented parties struggle with the court process, sometimes abusively.**

Eight cases were randomly selected in this category: five from Wales, one from the Midlands and one from the North:

(1) Both parties unrepresented in this case, but somehow (although of which the file contained no details) they achieved agreement for a consent order, following which they had counsel for the approval hearing, although the order was not complied with; endless correspondence on the file, taking up a disproportionate amount of the court's time in which the respondent wife participated by email owing to ill health. The court was clearly not at all happy with this, insisting on applications in due form plus the usual fee for any change of hearing and use of the correct form for an application to enforce. Clearly, she did not understand any of these forms, starting with her Form A being returned since that used was an old version, and the history of difficulties got no better.

(2) This case similar, both parties unrepresented, same sort of problems.

(3) Another case similar: both parties LIPs, difficulties getting them to court, letters to court on the backs of brown envelopes, little court process from early appointments to a consent order 6 months later. While this might seem a speedy process from start to consent order, throughout the court was not helping in the parties' obvious struggle through unfamiliar territory, the parties were thus not cooperating, but the court again insisting on forms and fees in due process to change appointments a party could not possibly attend as in hospital.

(4) Yet another similar, the parties classically incompetent and uncooperative, both unrepresented, no proper disclosure and a pitched battle even to get the process started; offensive communications in texts and again on the back of brown envelopes (in this case orders actually made that the parties were not to do that!)

(5) In this case the assets were only a low value FMH and a pension, but (to the court's visible annoyance) the parties did not understand any court paperwork, for example, the difference between a surveyor's report on a property's value (which was what was ordered) and a market appraisal (such as from a selling agent) although they did appear to have grasped the meaning

and effect of balancing a capital order against a 15% share of a pension, suggesting that if the court had had been the benefit of the creative DJ who addressed such unfamiliarity issues in 4.1.2(9) above.

(6) A case with completely uncooperative parties, the respondent husband simply not engaging, (not even attending the final hearing). With only about £200,000 in assets, the FMH to be sold and a lump sum paid if he could not secure release of the applicant wife from the mortgage covenants, and with no pension to share so no pension order required, the court only needed to be involved because a clean break order was required, in life and on death: a classic case for an abbreviated process, benefitting from an early ENE had it been available and signposting to some form of N-CDR, leading without delay to a s33A court order to be approved by the court.

(7) Another case of neither party represented with catastrophic results. The applicant wife was unaware of how to serve the respondent husband, so while he knew of the proceedings he did not prepare for the 1<sup>st</sup> appointment or file Form E; and this situation continued with the respondent wife still not attending, while the court (not knowing the reason for his non-appearance) was offering information to the wife about how to seek committal for his breach of orders! Perhaps suspecting that non-service might be the problem, the Judge also told her to consult the CAB. In fact, it later turned out that she did not understand 'file and serve', so that this meant she should serve the *husband* (as well as the Court) so he knew of hearings i.e. when to turn up! No final order on paper file as the file peters out before that stage is reached, but a clear indication of what happens if LIPs are left to fend for themselves with no help from the court. However, as the case also seems one with very low assets, this case should also have avoided the court and been signposted to DR, and had it been available to ENE so that the parties knew at the earliest opportunity that their case was not one for the court process.

(8) Both parties unrepresented, the respondent husband obstructive and harassing the applicant wife who had had to have a confidential address from the start for the petition. Obstruction continued, the respondent husband then not turning up to financial hearings, assets very low value, a case that would have been possibly easier to manage if the parties had automatically had basic information about the court process and the likely nature of their case, both through ENE had it been available to support signposting to N-CDR, and an effective financial provision experienced mediator been available.

**4.4 Cases where the only justification for use of the court appears to be the need for splitting a pension or obtaining dismissal of all other claims so as to create an effective clean break (for which a court order is naturally essential): but for which such an order could have been obtained under s 33A following N-CDR which might have been more suitable in the particular circumstances.**

Three cases were randomly selected for this category: two from Wales and one from the South Western region comprising the Western Circuit:

(1) The case with both parties as LIPs and the final disposal of a clean break in life and on death as noted above at 4.1.2 (5) above.

(2) Another case with low value assets, but pension split agreed for which a court order needed: however, this could, again, have been achieved by s 33A consent order if there had been a fast track N-CDR process, possibly with ENE available, and this pathway signposted.

(3) Another really low value assets case, with two sets of proceedings, one before 2013 for a pension order (wife on legal aid and husband in person) and one after the LASPO Act (for financial provision for the now teenage children (both parties now LIPs). A case illustrating how two LIPs can generate two years of grief for the court as both court and parties struggle through ineffective hearings (when the parties turn up) i.e. the sort of case where N-CDR, especially if skilled mediation was combined with ENE if available, would be more likely to be cost effective.

**4.5 Cases where there has been an obvious 'DIY' settlement agreement, no sign of formal mediation, or signpost to it by the court, but in effect the court was used as a postbox for later presentation of an agreed consent order for approval, either because the parties wanted dismissal of future claims on clean break or other reason.**

Four cases were randomly selected in this category, three from the North and one from North London representing the South Eastern Circuit:

(1) A case surprisingly involving (in this poor area) combined assets £3.3m, mostly property, much of it outside the jurisdiction of England and Wales. Only the applicant husband represented (by solicitors), the respondent wife communicating from the Congo entirely by email. The applicant husband resident between London and Florida. An agreed consent order was approved by court, sent in by the husband's solicitors.

(2) This was actually a Civil Partnership Act 2004 case, where the statute and the law mirrors that of the MCA 1973, but there were no assets to divide.

(3) This case one of low value assets apart from a pension, in respect of which the order transferred 67% of the husband's pension and he was to transfer his interest in the FMH; no other orders, so presumably his application was to obtain court's decision on these 2 assets. The FMH disposal could have been agreed but the court order needed for the pension. However, full court proceedings could have been avoided if a s 33A consent order had been sought for the agreed settlement, when the entire process could have been achieved on paper.

(4) A very low value assets case, where the parties seem to have gone straight for a consent order, rather than engaging with court process: no detail of how agreement was reached, the draft consent order simply presented for approval.

**4.6 Cases where LIP parties specifically ask the court for help but in the absence of counter staff there was no or delayed response received and then in unhelpful terms.**

Three cases typify these very basic problems, found in each region:

(1) AW struggling throughout, having had little or no legal representation or assistance, and giving up all such on approval of CO, did not know how to achieve implementation of an order for sale of the FMH; several letters asking for help, but she was only eventually told by a DJ to complete form D11 in triplicate (which might have been avoidable if the type of ready-made information pack that these case histories suggest is necessary in many instances had been available). This is one of many similar inquiries encountered about forms for achieving relatively simple actions, e.g. change of hearing date where the litigant is genuinely (and obviously) unable to attend an appointment owing to illness e.g. actually being in hospital.

(2) 4.3(5) above (Parties not understanding the difference between the surveyor's report (which they had been asked for) and the agent's market appraisal of a property (which they had supplied, thinking the two types the same thing).

(3) 4.2(9) above, in contrast (where the creative DJ involved instantly supplied the essential information for the parties to prepare their evidence).

## 5 Conclusions and recommendations

The quantitative analysis carried out on a sample of 69 recently concluded cases, randomly selected from the records of five different Family courts across England and Wales according to certain pre-established criteria, has disclosed a number of deficiencies in the litigant-in-person experience. This concluding section on the statistics offers a synthesis of the main problems we have identified, as supported by the statistics, and recommendations for practical ways to mitigate them, in light of two key policy priorities: *saving court time, and thus HMCTS/ MOJ expense including overhead resourcing, and avoiding injustice to the parties.*

First, *the length of the process*, averaging around 279 days (with a significantly higher average, around 413 days, for cases concluded in a contentious hearing, as opposed to 245 days for cases ending in a consent order), appears to be *disproportionate to the value of assets*. Moreover, this inordinate delay causes unfairness to the party who is dependent upon a lump sum order or the sale of the former matrimonial home and the division of the proceeds in order to be able to move on. Two factors seem to be primarily responsible for this unsatisfactory situation.

On the one hand, there is a clear *underutilisation of the first appointment as an opportunity for Financial Dispute Resolution and indeed of N-CDR, particularly mediation, generally*,<sup>14</sup> and the

<sup>14</sup> Including the fact that, if the parties qualify financially, a settlement at mediation will avoid the imposition of the statutory charge as mediation is still funded if parties do qualify financially.

Financial Dispute Resolution stage often fails to bring about an immediate compromise between the parties. Thus, although the vast majority of cases end in a consent order (over 81%), a private agreement is typically reached towards the final stage of the process (usually close to the final hearing), with a small percentage of cases settling before or shortly after the First Directions Appointment (around 10% only). While this can be explained, to some degree, by acrimony, risk aversion or unrealistic and irreconcilable claims, it may also be the case that the official guidance available to litigants in person on court premises and institutional websites does not convey with sufficient clarity that the sequence of court appointments normally associated with the process is not indispensable.<sup>15</sup> In the absence of information encouraging an expectation that, barring any difficulties, the FDA will be treated as an FDR and final hearing, the depiction of financial relief as a multi-stage process nourishes the parties' existing fear of committing to a particular solution early on. The presentation of settlement at FDA as the exception rather than the rule also facilitates the position of the party with an interest in stalling, instead of expediting, the proceedings. In short, the qualitative data supports the inference from the quantitative data here, viz that while so as to obtain a financial provision order the parties not only do not have to go through the entire process provided by the court, owing to the impression given by the present process that they should routinely go through all the stages of that process, they do not *realise* that they could agree a settlement themselves and have a consent order approved under s 33A of the Act; on the other hand, it also seems to be the case that they do not realise that if they do want to use the Court's full process they are unaware that they must engage with it rather than picking and choosing which appointments they will attend and which opportunities for assisted settlement they will utilise.

In addition, the lack of representation tends to be associated with a *failure to comply with the judge's directions and other obstructive conduct on the part of litigants*, such as non-attendance at hearings listed, failure to make full and frank disclosure in a timely fashion, or non-cooperation in the valuation or sale of the former marital home. This obstructive behaviour is usually observed in the respondent and operates to the detriment of the applicant; in fact, not only does it result in waste of court time and resources, but it potentially propels a consent order that is somewhat unfair to the applicant, but to which the latter eventually resigns in the face of non-cooperation and the prospect of endless litigation. From a pragmatic perspective, regrettably non-cooperative applicants cannot be incentivised to file papers diligently and to engage with the proceedings in good faith if there is no sanction, and the sanction usually intervenes late in the process, in the form of a penal notice issued for persistent defaulters or of an order requiring or re-requiring disclosure/ cooperation/ court attendance. Part of the problem might be that the guidance

<sup>15</sup> See, i.a., <https://www.judiciary.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp-annex4.pdf>.

available to litigants in person merely specifies what they are expected to do, without anticipating the consequences of failing to do so.

In this respect, we submit that asking litigants in person to produce reliable information and fill in the Form E documents independently and adequately is fundamentally flawed. Often the parties conflate what they own and what they claim (e.g., when property is held in one party's name and they state that they have 50% equity in the property, this percentage is in fact what they are claiming against an asset rather than the asset they actually own). In other cases, litigants knowingly attempt to withhold information in order to ring-fence property. In our judgment, a *court official in charge of gathering financial data through a means inquiry* would avoid the delays resulting from non-expert self-assessment and would warn the parties as to what is likely to happen if they do not provide the information requested.

Moreover, a mechanism akin to the US model of *early neutral evaluation (ENE)*, based on the referral of the case shortly after it was filed to a legally trained expert for unbiased evaluation and advice on the likely outcome of a trial (non-binding and without prejudice)<sup>16</sup> would help manage the parties' expectations and steer them towards early settlement. This would also address the concerns regarding the imbalance between the parties' level of legal representation, which usually places the respondent at a disadvantage. There is also an argument for making automatic mediation a pre-requisite for a court hearing as part of a pilot scheme. Referral would have to be automatic in the first instance, thus either supplementing or upgrading the present MIAMS system, since compulsory mediation is a contradiction in terms and also psychologically counter intuitive since an ethical mediator must inform the parties that they cannot be compelled to accept a mediated solution, despite the fact that American courts dealing with most cases at state level have for many years insisted that the parties attend a mediation session before litigation and that they use it genuinely to attempt a settlement.

One way in which more accurate disclosure could be achieved would be to adopt the suggestion of Lord Briggs in his Civil Courts Structure Review reports (Interim Report December 2015, Final Report July 2016) that there should be a new class of court official, the Delegated Judicial Officer, 'DJO', who would take the disclosure from the parties accurately at an initial appointment, which would obviate inaccurate disclosure at the start. This work might be done by the former clerks to the justices who now also sift divorce petitions and thus free the judiciary from much frustration with LIPs and non-specialist representation. The same court official might well conduct an

<sup>16</sup> See, e.g.,

[https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/early\\_neutral\\_evaluation/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/early_neutral_evaluation/) [last visited: July 29, 2019].

analysis of the case by way of the suggested ENE, thus further assisting unrepresented parties to be signposted towards the appropriate court process for them.

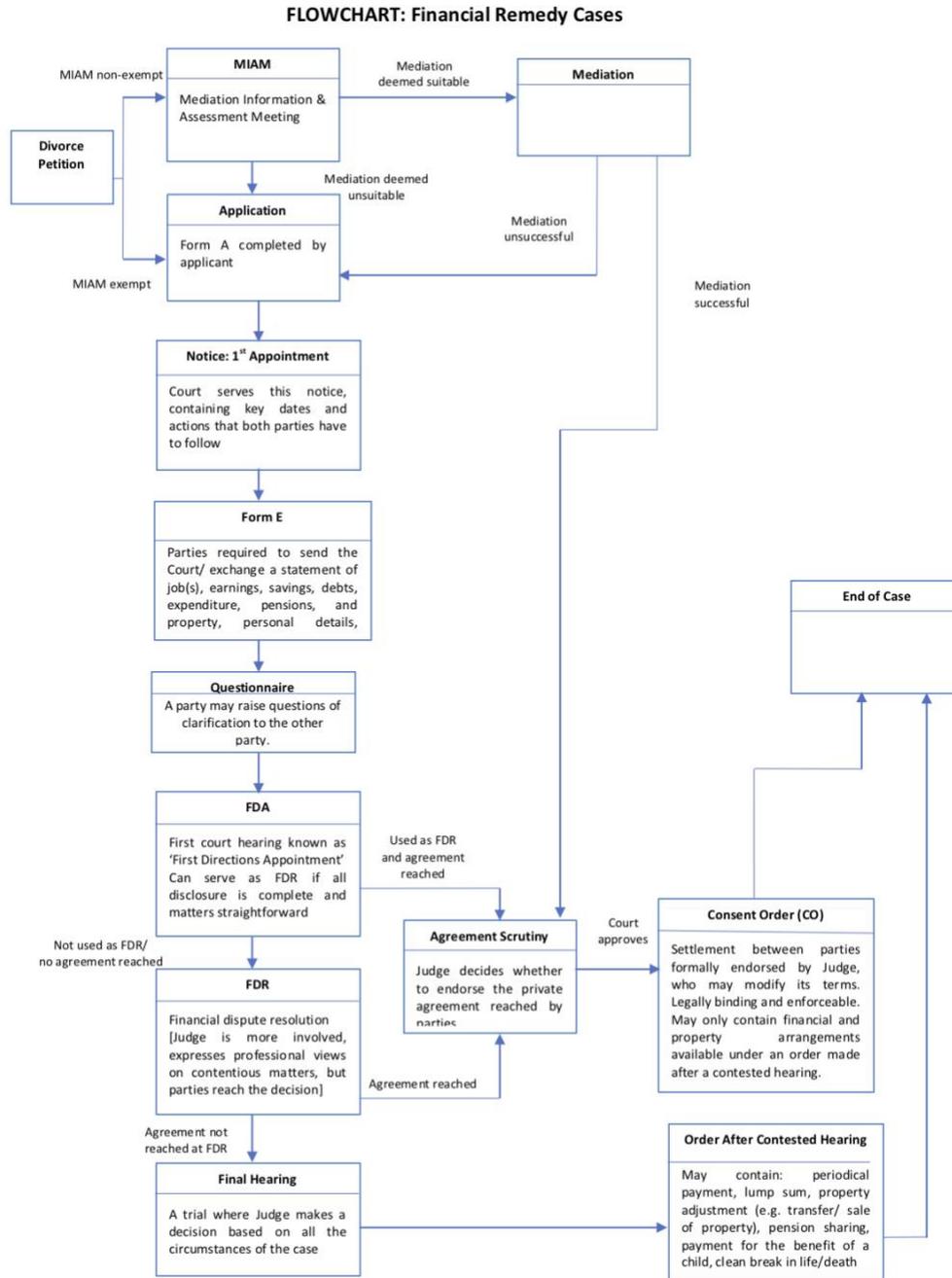
At the same time, bearing in mind the resources required by a separate means inquiry stage,<sup>17</sup> and focusing on fast-tracking low-value claims within the current budget constraints, the most cost-effective solution would be the introduction of *a different procedural route for low-value claims* (the exact threshold of which would fall to be determined by the Ministry of Justice),<sup>18</sup> specifically by *presumptively merging the FDA/ FDR/ final hearing in one appointment*; we envisage that this fast-track system would be coupled with discretion for the judge to schedule a further hearing if the complexity of the case at hand or the parties' fair trial rights so require. This would save court time by incorporating an inquisitorial process into the same hearing, in conjunction with more proactive judicial intervention. This would be consistent with the development of civil procedure in other financial matters, with a separate small claims track, and issue fees contingent upon the size of the claim. Indeed, there would be no element of discrimination in the treatment of low-value claims, insofar as the different, fast-track, route is justified by the different factual circumstances of the case.

Furthermore, the *coercive means that the judicial system has at its disposal to induce compliance* with the judge's directions or to by-pass hostile parties should be *visibly signalled at the start of the proceedings*, for instance through adequate *court leafletting*. In addition to explaining the potential recourse to penal notices, leafletting could also include information on the courts' powers to draw adverse inferences against a party whose declared income is not commensurate with their lifestyle; litigants should also be alerted to the prospect of an order being set aside, if it transpires that a party had not made full and frank disclosure, and of the relative costs penalty. Making litigants in persons fully aware from the outset that testing the limits of the system does not pay off would encourage engagement with court proceedings, save court time, and achieve an expedited and fairer outcome for the parties.

<sup>17</sup> Although, if consideration might have been given to finding resources for Lord Briggs' proposed DJOs, it is clear that the availability of such a cost-effective resource, if deployed in low value financial provision cases, might be the key catalyst to turn the ill effects of the LASPO limitations on legal aid, and the drastic cuts in former court counter staff, into a keenly workable system – and one that might not only address the particular LIP problems encountered, but also have lessons for other court contexts suffering from the same post LASPO limitations.

<sup>18</sup> Which might be difficult to quantify, although the MOJ has prior successful experience in this area, e.g. in quantifying the thresholds for the small claims court, and High Court and County Court jurisdictions. An alternative might be to adopt indicative thresholds but permit court users a free choice of fast track or full process.

## APPENDIX A.1: Structure of a Financial Provision Court Case



**Figure A.1.1: Structure of a Financial Provision Court Case.** *Source:* Reconstruction based on a brief guide summarising the procedure contained in Part 9 of the Family Procedure Rules available at <http://www.familycourtinfo.org.uk/i-need/how-court-works/flowchart-for-financial-remedy-cases/> [last visited: July 21<sup>st</sup>, 2019]

## APPENDIX A.2: Data Collection Brief

### Aims

The purpose of the project is to focus on a practice-orientated research question: Is the Family Court fit for purpose in low-value financial remedy proceedings?

### Methodology

Quantitative data will be obtained by inspection of court files and FamilyMan (the Family Court administrative system).<sup>19</sup> The researcher is asked to inspect the court files and FamilyMan with the following criteria:

- Must be a substantive application under Matrimonial Causes Act 1973 (i.e. not an application to vary an existing order)
- The case must be concluded, i.e. a final order must have been made (whether by consent or at a final hearing)
- The application must have proceeded beyond simply a Form A lodged concurrently with a final consent order and Form D81 (statement of information for a consent order)
- The Form A must have been lodged with the court between 1 January 2012 and 1 January 2016
- The researcher is to visit three family courts, one in each circuit/region as follows excluding the North & Wales: i.e. Midlands, South Eastern (to include Greater London South), and Western
- The number of court files to be inspected in each court is to be a matter for the researcher depending on the time available to him/her but if possible should not be less than 20 in each court

### Data to be obtained

The following information to be obtained from perusal of the file and FamilyMan:

#### Commencement of proceedings: Form A

Please consider the Form A, i.e. the application form used to commence or proceed with an application for a financial order:

- Date of Form A
- Was the Applicant represented?
- What specific orders are being sought in the Form A (page 1)?

#### Notice of First Appointment/Standard Directions on Issue

Please consider the notice of the first appointment and/or the standard directions order issued by the court when the Form A is lodged:

- What is the date fixed by the court for the Forms E to be filed?
- What is the date fixed by the court for the First Appointment?

#### Forms E

Please consider the applicant's and respondent's respective Forms E:

- Date upon which each party's Form E was received by the court
- Are any children of the family listed (box 1.10)?

<sup>19</sup> As explained in the Background section, the original brief for the researcher, which envisaged access to FamilyMan, had to be modified following the HMCTS decision only to grant data collection approval in respect of paper-based court files.

- Stated capital less liabilities (box 2.20: “*value of your assets LESS the value of your liabilities (Totals A+B+C+E+F+G – D)*”)
  - Applicant’s stated capital (to nearest £1,000)
  - Respondent’s stated capital (to nearest £1,000)
- Stated income (box 2.21: “*Estimated TOTAL income for the next 12 months (Totals H to L)*”)
  - Applicant’s stated income (to nearest £1,000)
  - Respondent’s stated income (to nearest £1,000)

#### First Appointment / first hearing / first order

Please inspect the court file and consider the first substantive order made:

- Date of First Appointment / first hearing / first order
- Representation
  - Applicant legally represented?
  - Respondent legally represented?
- What was the outcome of the first appointment / first hearing / first order
  - Not effective / further first appointment listed
  - FDR listed and directions given
  - Final Hearing listed and directions given
  - Referral to mediation/arbitration/other form of alternative dispute resolution (ADR) NB This is called N-CDR in the Family Court.
  - Final substantive order
- If directions were given for FDR, were there directions given for:
  - Housing particulars
  - Mortgage capacity
  - Valuation of real property, whether by surveyor or estate agent

#### Hearings prior to FDR

Please inspect the file and identify whether there were any further court hearings following the first appointment (other than the FDR or the final hearing):

- What was the date of that hearing?
- What was the outcome of that hearing?
  - Not effective / further first appointment listed
  - FDR listed / directions given
  - Final Hearing listed and directions given
  - Referral to mediation/arbitration/other form of alternative dispute resolution (ADR)
  - Final substantive order

Please repeat for all hearings prior to FDR

#### FDR

Please inspect the file and consider any order made at an FDR:

- Date of FDR
- Representation
  - Applicant legally represented?
  - Respondent legally represented?
- What was the outcome of the FDR?

- Not effective / further FDR listed
- Final Hearing list and directions given
- Referral to mediation/arbitration/other form of alternative dispute resolution (ADR)
- Final substantive order
- If directions were given for Final Hearing, were there directions given for:
  - Housing particulars
  - Mortgage capacity
  - Valuation of real property, whether by surveyor or estate agent or had these already been obtained?

Consent order submitted not at hearing

Please consider whether there was a consent order lodged with the court in correspondence (i.e. not at a hearing)

- Date of consent order submitted?
- Representation
  - Applicant legally represented?
  - Respondent legally represented?
- Was the consent order approved by the court?
- If not, was a reason given and, if so, what was it?

Nature of final order

Please consider the final substantive order at whatever stage it is made

- Was there an order for spousal periodical payments to be made by one party to another party?
- Was there a lump sum order?
- Was there an order for sale of a property?
- Was there a pension sharing order?