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Haley v Haley: Family law arbitration and the new frontier of private ordering

Anna Heenan* 

Haley v Haley is required reading for anyone interested in family law dispute resolution or issues of access to justice. The case concerns family arbitration and, importantly, changes the test for challenging arbitral awards, making it easier to do so. This is connected to concerns about making arbitration more appealing in the family law context, which has implications for family law dispute resolution more broadly. Whilst separating couples have always been encouraged to settle outside of the court process, connected to an idea of private ordering, *Haley* marks a new frontier. Until now private ordering was also intended to ensure substantively better outcomes. This is no longer the case, and the attempt to divert more cases to arbitration in this judgment may compound existing issues of access to justice.

INTRODUCTION

The recent case of *Haley v Haley*¹ is required reading for anyone interested in family law dispute resolution or issues of access to justice. The case concerns family arbitration and considers the test that should apply when challenging an arbitrator's decision. The judgment is important for several reasons. Crucially, it changes the test for challenging arbitral awards, making it easier to do so. This is connected to concerns about making arbitration more appealing in the family law context, which has implications for family law dispute resolution more broadly. Whilst separating couples have always been encouraged to settle outside of the court process, connected to an idea of private ordering which is discussed in the next section, *Haley* marks an important new frontier. Whereas diverting cases from court has always been an inherent concern of private ordering, until now private ordering was also intended to ensure substantively better outcomes. This is no longer the case, and, as will be discussed, attempts to divert more cases to arbitration may compound existing issues of access to justice.

This article begins by outlining how ideas of private ordering have influenced family law dispute resolution to provide important context for understanding the decision in *Haley*. The piece goes on to set out the factual background in *Haley* and how this relates to this broader framework of family law dispute resolution. Next, it considers the Court of Appeal's decision and reasoning,

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1 [2020] EWCA Civ 1369.

before exploring the implications of that decision both for family arbitration as a method of dispute resolution and for the nature of family justice more widely.

BACKGROUND: PRIVATE ORDERING IN FAMILY LAW

Private ordering, the idea that individuals should be free to create legal obligations outside of the court process and have those agreements recognised by the state and the courts,² has long been a feature of family law. This concept, which encompasses negotiations directly between the parties as well as alternative methods of dispute resolution such as mediation³ and arbitration, is tied to the idea that the courts are often not the best place to resolve family law disputes.⁴ Justifications for private ordering also include that parties have the best knowledge of their own interests,⁵ that private agreements avoid the stress and hostility of court proceedings,⁶ and that such agreements tend to be more flexible and adaptive to changing circumstances.⁷ Whereas respect for party autonomy has featured as one of several justifications for private ordering for some time,⁸ increasingly ideas of autonomy have come to dominate family law dispute resolution.⁹

Following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012), with limited exceptions for applicants who can evidence domestic abuse,¹⁰ legal aid funding is no longer available for private family law matters. While couples were encouraged to resolve their disputes outside the courts even before LASPO 2012, the removal of legal aid and particular emphasis on mediation¹¹ has made other options increasingly inaccessible to anyone who cannot pay privately. The rationale for this development is couched in neoliberal ideas of autonomy and responsibility.¹²

2 B. Bix, 'Private Ordering and Family Law' (2010) 23 *Journal of the American Academy of Matrimonial Lawyers* 249; S. Cretney, 'Private Ordering and Divorce – How far can we go?' [2003] *Fam Law* 399.

3 *ibid.*

4 Cretney, n 2 above; J. Eekelaar, "'Not of the Highest Importance": Family Justice Under Threat' (2011) 33 *JSWFL* 311.

5 n 2 above.

6 A. Barlow et al 'Mapping Paths to Family Justice' (London: Palgrave Socio-Legal Studies, 2017) 4; Ministry of Justice, Department for Education and the Welsh Government, *Family justice review final report* November 2011 at <https://www.gov.uk/government/publications/family-justice-review-final-report> (last accessed 11 December 2020); F. Kaganas, 'Justifying the LASPO Act: authenticity, necessity, suitability, responsibility and autonomy' (2017) 39 *JSWFL* 168, 180.

7 *ibid.*

8 Bix, n 2 above; Barlow et al, n 6 above, 4.

9 See for example A. Diduck, 'Autonomy and family justice' (2016) 28 *CFLQ* 133; Barlow et al, *ibid.*; E. Hitchings, 'Official, operative and outsider justice: the ties that (may not) bind in family financial disputes' (2017) 29 *CFLQ* 359.

10 Legal Aid Sentencing and Punishment of Offenders Act 2012, s 9 and Sched 1, para 12.

11 See, for example, R. Hunter, 'Inducing demand for family mediation – before and after LASPO' (2017) 30 *JSWFL* 189; *Family justice review final report* n 6 above; Eekelaar, n 4 above; R. Blakey, 'Cracking the code: the role of mediators and flexibility post-LASPO' (2020) 32 *CFLQ* 53; Kaganas, n 6 above.

12 Kaganas, *ibid.*

The influence of neoliberal ideas will be explored further in the final section of this piece, but for present purposes, it is important to note that policies influenced by neoliberalism have a particular vision for both individuals and the state. Such policies consider individuals to be autonomous and responsible,¹³ and assume those individuals are economically rational¹⁴ and have freedom of choice.¹⁵ When it comes to the role of the state, neoliberal policies envisage a limited role for the state,¹⁶ and draw on market principles in social life, as well as in political and economic matters.¹⁷ Both dimensions can be seen to have influenced LASPO 2012.

The Consultation Paper preceding LASPO 2012 suggested that private family law matters arise from individuals' 'personal choices';¹⁸ choice is a key aspect of neoliberal ideas of autonomy.¹⁹ The Consultation Paper also refers explicitly to the idea of taking responsibility, for example: 'The Government's view is that people should take responsibility for resolving such issues themselves, and that this is best for both the parents and the children involved.'²⁰

This increasing emphasis on autonomy and responsibility did not, however, entirely supplant previous rationales for private ordering based on the idea that such resolutions are actively better. The extract above explicitly links the idea of responsibility to this being 'best' for those involved. Likewise, the consultation paper suggests that 'using mediation and keeping court proceedings to the minimum necessary'²¹ will be 'in the best interests of those involved in private family cases which do not involve domestic violence'.²² Nevertheless, this trend has led Diduck to describe the 'creation of an autonomous system of dispute resolution that is separate from and runs parallel with the formal justice system',²³ something she suggests is indicative of autonomy having become almost the 'very essence'²⁴ of justice.

Haley marks an important new stage in this development. Whereas LASPO 2012 involved a significant encroachment of narratives of autonomy and responsibility into family dispute resolution, there remained some continuity in previous narratives around private ordering as a better form of dispute resolution. *Haley* is different. The judgment explicitly links the use of arbitration, a private process, to a need to clear backlogs in the courts.²⁵ This is indicative

13 *ibid.*, 180.

14 Barlow et al, n 6 above, 159; W. Brown, 'American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization' (2006) 34 *Political Theory* 690, 694.

15 See, for example, A. Heenan, 'Neoliberal autonomy and financial remedy reform: lessons from Sweden' (2020) CFLQ 263; M. Fineman, *The Autonomy Myth* (New York, NY, London: New Press, 2004).

16 W. Larner, 'Neo-liberalism: Policy, Ideology, Governmentality' (2000) 63 *Studies in Political Economy* 5; Barlow et al, n 6 above, 2.

17 Brown, n 14 above; Larner, *ibid.*

18 *Proposals for the Reform of Legal Aid in England and Wales* Consultation Paper CP12/10 (2010), 4.18-4.19; Eekelaar, n 4 above.

19 n 15 above.

20 *Proposals for the Reform of Legal Aid in England and Wales* n 18 above, 4.210.

21 *ibid.*, 4.69.

22 *ibid.*

23 Diduck, n 9 above, 134.

24 *ibid.*

25 *Haley* n 1 above at [5]-[6].

of a new phase in what Diduck has called ‘the privatisation, individualisation and delegalisation of family disputes’.²⁶ Private ordering is no longer a better alternative to be encouraged, but increasingly the default expectation for the resolution of family law disputes.

HALEY: THE FACTUAL BACKGROUND

Haley concerned the wife’s application for financial remedies on divorce. In such cases, as in all family law disputes, parties are strongly encouraged to settle privately. Indeed, since 2011 it has been a requirement that everyone issuing court proceedings in such cases attend a Mediation Information and Assessment Meeting (MIAM), at which the parties’ suitability for mediation will be assessed, before issuing court applications²⁷ (before 2011, this requirement only applied to those in receipt of legal aid funding). Whilst a MIAM does not require attendance at mediation, it does require the applicant to engage with an assessment of suitability for that process. Parties are also encouraged to settle through the court process, and the court is required to consider non-court dispute resolution at every stage of proceedings.²⁸ In *Haley*, the parties were unable to settle, so their case was listed for a final hearing, the last stage of financial remedy proceedings at which a judge ultimately decides the case.

Unfortunately, the parties were contacted a week before the timetabled hearing to be told there was no judge available and that their case would be re-listed for an unspecified future date. To speed up the process, Mr and Mrs Haley therefore agreed to attend arbitration under the Institute of Family Law Arbitrators (IFLA) scheme. Disputes under the scheme are arbitrated in accordance with the Arbitration Act 1996 (AA 1996), the Family Law Arbitration Financial Scheme Rules, and the agreement of the parties insofar as that modifies either.²⁹ However, arbitrators must apply English and Welsh law.³⁰

The husband was unhappy with the arbitrator’s decision and applied to the High Court, first, for an order setting aside the award for ‘serious irregularity affecting the tribunal, the proceedings or the award’ under section 68 of the AA 1996; second, for permission to appeal under section 69 of the AA 1996 on the basis that the award was wrong on a question of law; and thirdly, for an order that the award should not be made into a final order by the court under Matrimonial Causes Act 1973 (MCA 1973).

The judge dismissed the first two applications. No appeal was made to the Court of Appeal in respect of the first ground and, because the judge had refused permission to appeal in respect of the second, it was common ground that the

26 Diduck, n 9 above, 143.

27 Children and Families Act 2014, s 10(1); Family Procedure Rules 2010, r 3.6.

28 Family Procedure Rules 2010, r 3.3.

29 Family Law Arbitration Financial Scheme Arbitration Rules 2018 (6th edition, effective 1 January 2018) Art 1(3) at <http://ifla.org.uk/divi/wp-content/uploads/Financial-Scheme-Rules.pdf> (last accessed 11 December 2020).

30 *ibid*, Art 3.

Court of Appeal could not grant permission. Therefore, the Court of Appeal decision is only concerned with the third ground.

HALEY: THE COURT OF APPEAL DECISION

The key issues for the Court of Appeal are outlined in the judgment:

The question, therefore, is what is the test to be applied by the court in those cases where the parties have agreed to arbitration but are dissatisfied with the award?

- i. Is it limited to those matters in the AA 1996, save where there has been a supervening event or mistake (per Mostyn J in *J v B*, see below); or,
- ii. Is it the appeals test under the MCA 1973?

If the appeals test is the proper approach, where does the fact that the parties signed a contractual agreement fit in?³¹

The distinction between the approach under the AA 1996 and MCA 1973 is significant. Arbitration awards can generally only be challenged on the grounds set out in sections 68 and 69 of the AA 1996, serious irregularity and wrong on a question of law (see above), and section of the 67 AA, that the arbitrator ‘lacked substantive jurisdiction’. Further, under section 69 of the AA 1996, the test applies to the facts as found by the arbitrator and, as the Court of Appeal explains:

The party challenging the award requires leave and must show that the decision on the question of law was “obviously wrong”, unless the question is one of general public importance, in which case it must be shown to be at least open to serious doubt. Fairness as a concept has no place in a challenge to an arbitral award; arbitration being a procedure designed to provide certainty across the international commercial world.³²

In contrast, while leave is required to appeal the decision of a court in financial remedy proceedings under MCA 1973:

... permission will be given if the judge concludes that there is a real prospect that the proposed appellant can satisfy the appeal court that the order made was: (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. Fairness will be central to the court’s determination.³³

The Court of Appeal ultimately concluded that the appeals test under MCA 1973 applied in such cases. King LJ, giving the judgment of the Court considered that previous case law, discussed in the next section, had afforded

³¹ *Haley* n 1 above at [51]–[52].

³² *ibid* at [14].

³³ *ibid* at [15].

significant weight to the fact of an agreement to arbitrate, and more weight than to an agreement reached between the parties themselves.³⁴ King LJ disagreed with this approach, observing that an agreement to arbitrate was merely an agreement for a third party to determine the outcome, ‘not, at the time the agreement is reached, an agreement to any particular terms’.³⁵ Further:

An agreement as between the parties themselves is, albeit often reached with the assistance of legal advisors, by contrast an agreement to the actual terms; the parties, therefore, know precisely the outcome and have agreed to it. That is not the case in arbitration, where the parties have agreed to nominate a third party to determine fair terms intended to be final and binding, but subject to the court’s ultimate discretion.

Even if I am wrong about that ... family cases are different from civil cases. Court orders embodying the terms of commercial and civil arbitrations awards derive their authority from the arbitration agreement, and the enforcement of that agreement under the mandatory provisions of the AA 1996. The enforceable order following family arbitration ultimately derives its authority from the court and not from the arbitration agreement ...³⁶

This decision marks a significant step-change from recent case law and, as will be discussed in the next section, has important implications for the nature of family arbitration.

THE NATURE OF FAMILY ARBITRATION

It is clear following *Haley* that family arbitration is a very different creature from its commercial cousin. Indeed, one commercial practitioner has argued that what the case does ‘is to end arbitration in the Family Courts’.³⁷ Prior case law had suggested a more stringent test for challenging arbitral awards. In *S v S, Munby P*, obiter, suggested that where one party sought to challenge the award, not only would ‘the parties almost invariably forfeit the right to anything other than a most abbreviated hearing’,³⁸ but:

Where the attempt to resile is plainly lacking in merit the court may take the view that the appropriate remedy is to proceed without more ado summarily to make an order reflecting the award and, if needs be, providing for its enforcement. Even if there is a need for a somewhat more elaborate hearing, the court will be appropriately robust in defining the issues which are properly in dispute and confining the parties to a hearing which is short and focused. In most such cases

³⁴ *ibid* at [67].

³⁵ *ibid*.

³⁶ *ibid* at [67]-[68].

³⁷ S. Barrett, ‘Whatever the Family Division is now doing is not arbitration’ *Family Arbitrator* 3 November 2020 at <https://www.familyarbitrator.com/whatever-the-family-division-is-now-doing-is-not-arbitration> (last accessed 11 December 2020).

³⁸ *S v S* [2014] EWHC 7 (Fam) at [25].

the focus is likely to be on whether the party seeking to resile is able to make good one of the limited grounds of challenge or appeal permitted by the Arbitration Act 1996. If they can, then so be it. If on the other hand they can not, then it may well be that the court will again feel able to proceed without more to make an order reflecting the award and, if needs be, providing for its enforcement.³⁹

This decision, therefore, envisages a very restrictive approach, based only on the provisions of AA 1996, and akin to that in commercial arbitration. Mostyn J took a slightly more generous approach in *DB v DLJ* (referred to as *J v B* in the Court of Appeal judgment above), accepting the possibility that an arbitral award might be challenged on the grounds of mistake or supervening event, as well as the grounds set out in AA 1996. He added: ‘An assertion that the award was “wrong” or “unjust” will almost never get off the ground: in such a case the error must be so blatant and extreme that it leaps off the page’.⁴⁰

King LJ’s reasoning, set out in the previous section of this piece, outlines two justifications for the change of approach in *Haley*. First, that in arbitration, unlike in a case of an agreement between the parties, the parties do not know the terms they are agreeing to. This marks a departure from the approaches in *S v S* and *DB v DLJ*, in which the judges suggested that an agreement to arbitrate carried even more weight than an agreement reached between the parties.⁴¹ The Court of Appeal’s approach is perhaps understandable when thinking about the nature of private ordering in family law up until now and how this decision potentially changes things. As outlined above, to date private ordering in family law cases has focused on encouraging agreement between the parties. Arbitration is different because it involves a decision made by a third party: the only decision made jointly between the parties is the decision to go to arbitration. It is, therefore, possible to see King LJ’s reasoning as a recognition of this step-change: because the traditional justifications centre on agreement, there is a need for additional safeguards where this is not the case. This links to the idea that arbitration marks a departure from previous approaches to private ordering, which will be discussed further in the next section.

This first aspect of the Court of Appeal’s reasoning is less convincing, however, if assumptions about private ordering in family law cases are examined more critically. Kennett observes that arbitration typically assumes ‘that the parties are of equal bargaining power and their personal autonomy should be respected’.⁴² In the family law context, these assumptions are controversial. Power imbalances between parties can be grounded in abusive relationships⁴³ or

39 *ibid* at [26].

40 *DB v DLJ* [2016] EWHC 324 (Fam) at [28].

41 See, for example, *ibid* at [27].

42 W. Kennett, ‘It’s Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution’ (2016) 30 *International Journal of Law Policy and the Family* 1, 3.

43 See, for example, R. Hunter, ‘Doing Violence to Family Law’ (2011) 33 *JSWFL* 343; Rights of Women, *Women’s access to justice a research report 2011* at https://rightsofwomen.org.uk/wp-content/uploads/2014/10/Womens_access_to_Justice-a_research_report-2011.pdf (last accessed 11 December 2020).

economic imbalances.⁴⁴ The latter can be grounded in the way in which couples structure their lives, decisions that are often shaped by societal norms. For example, it is still the case that women are more likely to work part-time than men and to perform a greater share of childcare responsibilities.⁴⁵ However, it is not clear that the Court of Appeal suggestion that arbitration is of more cause for concern than private agreements is borne out. With increasing numbers reaching agreement without legal advice,⁴⁶ arguably a third party reaching a decision offers a better check on power imbalances than private negotiations.

The second justification for the change of approach in *Haley* centres on the fact that family arbitration derives its authority from the court, rather than the agreement itself, which is the case with civil arbitration. John, however, points out that the need for a court order is not unique to family law. For example, where real property is at issue a court order may be required to fully implement the award.⁴⁷ The more interesting question, perhaps, is whether there is something inherently different about family law that necessitates a greater level of scrutiny. This is dangerous territory: the Supreme Court has been clear that the Family Division must apply the same law as other courts.⁴⁸ Nevertheless, there is force in the arguments about the power imbalances, discussed above, that are often inherent in family law cases (albeit that they might exist in commercial cases too).

As John recognises,⁴⁹ however, accepting such arguments creates difficulties in borderline areas such as trusts of land disputes. When cohabiting couples separate, unlike the position for married couples, there is no bespoke legal regime that applies. They are, therefore, treated in the same way as any other co-owners of land, even though their relationship is a family one and not a commercial

44 See, for example, J. Kelly, 'Power imbalance in divorce and interpersonal mediation: Assessment and intervention' (1995) 13 *Mediation Quarterly* 85, on the impact of such imbalances on mediation, J. Pahl, *Money and Marriage* (Basingstoke: Macmillan, 1989) on such imbalances on intact relationships and S. Thompson, *Pre-nuptial Agreements and the Presumption of Free Choice* (Oxford: Hart, 2017) 81 for a discussion of how such imbalances affect negotiations for pre-nuptial agreements.

45 See, for example, ONS, 'Women shoulder the responsibility of unpaid work' ONS *Digital* 10 November 2016 at <http://visual.ons.gov.uk/the-value-of-your-unpaid-work/>; ONS, 'Women in the labour market: 2013' 25 September 2013 at www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25; and ONS, 'Families in the labour market, UK: 2019' 24 October 2019 at www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/familiesandthelabourmarketengland/2019; Eurostat, 'Part-time employment as percentage of the total employment, by sex and age' at <https://bit.ly/2ZAMqbe> (all last accessed 17 December 2020).

46 'Family Court Statistics Quarterly: July to September 2020' Ministry of Justice, 17 December 2020 at <https://www.gov.uk/government/publications/family-court-statistics-quarterly-july-to-september-2020/family-court-statistics-quarterly-july-to-september-2020> (last accessed 17 December 2020).

47 C. John, 'Letting the cat out of the bag? What are the implications of *Haley v Haley* for the arbitration of TOLATA disputes, 1975 Act claims and Schedule 1 matters?' 2 November 2020 at <https://hardwicke.co.uk/letting-the-cat-out-of-the-bag-what-are-the-implications-of-haley-v-haley-for-the-arbitration-of-tolata-disputes-1975-act-claims-and-schedule-1-matters/> (last accessed 17 December 2020).

48 *ibid*; *Prest v Petrodel Resources Limited and others* [2013] UKSC 43.

49 n 47 above.

one. Given the overwhelming calls for greater protection for cohabiting couples from both academics and practitioners,⁵⁰ there is certainly an argument that consistency in the law is better achieved by improving protections for cohabiting couples than downgrading those for married couples.

Haley makes more sense when understood in the wider context of diverting cases from the court process. As will be discussed further in the next section, arbitration offers an alternative to court for cases where agreement cannot be reached. Such an alternative is, however, far less palatable if the outcomes cannot be challenged in the same way as a court decision. As a basis for considering these issues in more detail in the next section, it is worth setting out the relevant paragraphs of the *Haley* decision in full:

There is a common misconception that the use of arbitration, as an alternative to the court process in financial remedy cases, is the purview only of the rich who seek privacy away from the courts and the eyes of the media. If that was ever the position, it is no more. The court was told during the course of argument, that it is widely anticipated that parties in modest asset cases (including litigants in person) will increasingly use the arbitration process in the aftermath of the Covid-19 crisis as the courts cope with the backlog of cases, which is the inevitable consequence of ‘lockdown’.

It goes without saying that it is of the utmost importance that potential users of the arbitration process are not deterred from using this valuable service; either, on the one hand, because the outcome is not seen as sufficiently certain or, on the other, because arbitration is regarded as providing no adequate remedy in circumstances where one of the parties believes there to have been an unjust outcome.⁵¹

At this early stage of the decision, the Court of Appeal makes this wider context explicit. Arbitration is seen as a solution to the increasing backlog of cases in the family courts, and the Court is acutely aware of the need to ensure the process is not unappealing to those who might make use of it. Understood in this way, the Court of Appeal decision in *Haley* makes complete sense. However, it also marks a new frontier for private ordering in family law.

HALEY AND THE NEW FRONTIER OF PRIVATE ORDERING

In addition to *Haley*'s significance in shaping the nature of a particular type of private ordering – arbitration – *Haley* marks a shift in the nature of private ordering in family law more generally, and a new high watermark for the

50 See for example A. Barlow and G. James, ‘Regulating Marriage and Cohabitation in 21st Century Britain’ (2004) 67 MLR 143; Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* Law Com No 307 (2007); G. Douglas, J. Pearce and H. Woodward, ‘Cohabitants, Property and the Law: A Study of Injustice’ (2008) 72 MLR 24; Resolution, ‘Resolution calls for “fairness for families” for election pledge’ 14 November 2019 at <https://resolution.org.uk/news/resolution-calls-for-fairness-for-families-election-pledge/> (last accessed 17 December 2020).

51 *Haley* n 1 above at [5]–[6].

influence of neoliberal ideas. There is no doubt that private ordering under LASPO 2012 is heavily influenced by neoliberal ideas: in particular reducing the cost of government spending can be seen as connected to reducing the role of the state,⁵² and the idea that people should resolve these disputes for themselves is linked to ideas of autonomy and responsibility.⁵³ However, until now these developments have also been tied to an emphasis on collaboration between former partners.⁵⁴ For example, the emphasis on mediation as an alternative to the court process in the policy documents surrounding legal aid cuts was explained in the following terms:

Given the wider benefits that mediation offers, both to those involved, by creating a less stressful environment in which to reach resolution, and to the taxpayer, by reducing the volume of business that ends up in court, we therefore propose that family mediation services currently funded by legal aid remain in scope.⁵⁵

There are dual rationales here. Whilst there is a clear emphasis on saving money in the reference to benefits to the taxpayer, this passage also emphasises the less stressful environment created by mediation. Elsewhere in the document, out of court dispute resolution is explained as being in the best interests of children.⁵⁶ Thus, while the neoliberal underpinnings of legal aid reform are evident in this document, and the increasingly diverse clientele and presence of more complex disputes post-LASPO 2012 present new challenges for mediators,⁵⁷ there remains a positive case for directing parties to mediation: it may improve communication, reduce stress and result in more durable outcomes.

Arbitration is different from mediation. The only joint decision of the parties is to refer the matter to a third party for decision. This is different from the approach to date, which Hitchings describes as '[s]ettlement between individuals ... [which has] the status of a new practice norm in family justice'.⁵⁸ Arbitration is not about settlement *between* individuals. There is no suggestion that the parties need to work together to reach the decision or that the process will inherently improve communication. Instead, the merits have traditionally been the privacy it offers or the potential for conferring 'dignity' by giving the parties 'ownership' of the process⁵⁹ or, as illustrated by the facts of *Haley*, the speed of the process; while these are also cited as benefits of mediation, improved communication is typically cited as a benefit too.⁶⁰ Even early advocates of arbitration recognised this. Singer, for example, suggests that arbitration for preliminary matters 'may well open up a passage towards an earlier and more

52 Barlow et al, n 6 above, 2; J. Mant, 'Neoliberalism, family law and the cost of access to justice' (2017) 39 JSWFL 246.

53 Kaganas, n 6 above.

54 Hitchings, n 9 above.

55 *Proposals for the Reform of Legal Aid in England and Wales* n 18 above, 4.72.

56 *ibid.*, 4.214, see also the table *ibid.*, 178.

57 R. Blakey, n 11 above; A. Barlow, 'Rising to the post-LASPO challenge: How *should* mediation respond?' (2017) 39 JSWFL 203.

58 n 9 above, 359.

59 P. Singer, 'Arbitration in family financial proceedings: the IFLA Scheme: Part I' [2012] Fam Law 1353.

60 n 9 above. See also Barlow et al, n 6 above, 4.

agreeable destination than could be achieved via the courts with their existing listing overload'.⁶¹

It is, perhaps, conceivable that improved communication might be a by-product of avoiding delay, or that the flexibility available in the arbitration procedure⁶² might make the process less stressful than court proceedings. However, these benefits are tentative, and not the main aims of the process. Arbitration also creates difficulties for the narrative that family disputes are 'essentially personal matters,' and thus best resolved between the parties.⁶³ If these matters are essentially private, it is hard to see why an arbitrator's award is more palatable than the decision of a judge.

Haley therefore marks a further encroachment of neoliberal ideas into family dispute resolution; increasingly autonomy has become synonymous with what Diduck terms 'autonomous dispute resolution'.⁶⁴ While ideas of autonomy have been inherent in the IFLA scheme since the outset,⁶⁵ autonomy was envisaged as offering a choice to the parties. The factual background to *Haley* illustrates the difficulty of this interpretation today: can we really say the parties have a meaningful choice between in court and out of court dispute resolution when court backlogs are so severe that they do not know when their case will be heard?

Relatedly, *Haley* appears to be associated with further privatisation of the family justice system, connected to neoliberal ideas about a limited role for the state.⁶⁶ Concerns about the role of arbitration in this context have been raised before. In 2016, Diduck commented of arbitration that:

It extends the autonomy principle from allowing the parties themselves to decide their matters, to allowing them to give up any role in the decision. Here, we have the President of the Family Division endorsing, on the grounds of party autonomy, a private, for profit, dispute resolution system that runs separate but parallel to the court system. The fact that it is privately funded and therefore available only to some, and is staffed by what could be seen as a self-regulated bench, accountable only to its own professional organisation and the parties who hire it, and whose decisions are confidential and reviewable by courts only on the narrowest of grounds, appears unimportant.⁶⁷

Haley makes Diduck's concerns even more pressing. While the decision goes some way to addressing her concerns about accountability by broadening the grounds of challenge for an arbitral award (see further above), the emphasis on arbitration as a more mainstream alternative exacerbates existing distinctions between those who can and cannot afford to opt out of the court process. It is, therefore, important to reflect on who this decision is aimed at, before going on to consider the impact of the decision on access to justice more widely.

61 n 59 above, 1353.

62 *ibid.*

63 Proposals for the Reform of Legal Aid in England and Wales n 18 above.

64 n 9 above, 135.

65 Kennett, n 42 above, 6, Singer, n 59 above, 1496 ; Diduck, n 9 above, 139.

66 n 16 above.

67 Diduck, n 9 above, 140.

In *Haley* itself, the parties are described as being of ‘modest means’,⁶⁸ with Black LJ observing: ‘The husband, by virtue of a demanding commute and by working long hours, has a substantial income, but the parties’ capital assets amount to less than £400,000.’⁶⁹

In its judgment, quoted above, the Court of Appeal refers to agreements between the parties themselves being ‘often reached with the assistance of legal advisors’.⁷⁰ Whilst it is true that the Court of Appeal also suggests that litigants in person (LiPs) are among those expected to use arbitration, this is qualified by the descriptor ‘in modest asset cases’.⁷¹ The Court of Appeal is not, therefore, talking about the average case.

First, Mr and Mrs Haley’s ‘modest’ assets exceed those in very many cases. In a review of court files in financial remedy cases, Hitchings and Miles found that the median wealth in these cases was £117,080 in non-pension assets and £72,437 in pension assets:⁷² considerably less than Mr and Mrs Haley’s £400,000. While the mean figures identified by Hitchings and Miles were higher, £583,035 and £192,834 respectively, such figures are much more susceptible to distortion by outliers and so are less representative of ‘average’ case. It is also important to note the suggestion from that research that those who seek formalised outcomes in the first place may be wealthier than the general population.⁷³ A second indicator that the Court of Appeal is not talking about average cases lies in the reference to legal representation in reaching agreements. Legal advice is no longer the norm.⁷⁴ Third, and relatedly, the discussion of LiPs in modest asset cases may suggest that the Court of Appeal has in mind the pre-LASPO 2012 litigant in person. Whereas previously, LiPs tended to be those who failed to meet the legal aid means test but were unable to afford a lawyer,⁷⁵ LiPs now include those who would previously have been eligible for legal aid.⁷⁶ As Mant explains, whereas LiPs have always disproportionately had characteristics that make them vulnerable, such as health problems, learning difficulties, language issues or experiencing domestic abuse, these characteristics are even more prevalent in this new group of LiPs.⁷⁷ It seems unlikely that these groups will be able to afford arbitration, given that anecdotal evidence suggests costs upwards of £3,500,⁷⁸ and, given the well-documented difficulties they

68 n 1 above at [31].

69 n 1 above at [32].

70 n 34 above.

71 n 51 above.

72 J. Miles and E. Hitchings, ‘Financial Remedy Outcomes on Divorce in England & Wales: Not a “meal ticket for life”’ (2018) 31 *Australian Journal of Family Law* 43.

73 E. Hitchings and J. Miles, ‘Financial remedies on divorce: the need for evidence-based reform’ at <https://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> (last accessed 11 December 2020).

74 n 46 above.

75 J. Mant, ‘Placing LiPs at the centre of the post-LASPO Family Court Process’ (2020) 32 *CFLQ* 421.

76 *ibid.*

77 *ibid.*

78 S. Gold, ‘Procedure & Practice Civil Way’ (2020) 170 *New Law Journal* 7910.

face with the court process,⁷⁹ it is certainly not clear that the process, even if simplified, will be easy for them to navigate.

Haley, therefore, seems to be aimed at those who have always been able to access legal advice. This dichotomy between the well-off and the not so well-off is not new. As Kaganas explained in the aftermath of LASPO 2012, regardless of the benefits of mediation, the courts remained available to those who could pay lawyers.⁸⁰ *Haley* is significant, however, because it signals a shift in how this dichotomy plays out. The judgment suggests that responsibility now means avoiding the court altogether, except for the purposes of getting an agreement or arbitration order made into an order of the court or of challenging such an agreement or award. To use Hitchings' categorisations, it means a further shift, even for those who can afford lawyers, in how financial remedy disputes are resolved from 'official justice', meaning '[f]ormal justice using legal principles that are prescribed and recognised',⁸¹ to 'operative justice', meaning '[f]unctional justice – a pragmatic approach to achieving justice with some use of principle'.⁸²

For those who can afford to pay, arbitration offers a court-like, albeit privatised, option to resolve disputes. This leaves the courts as the preserve of those who cannot afford to pay. Given the well-documented challenges that many of these people face in navigating court procedures,⁸³ this may necessitate a radical change in court procedures. Less optimistically, given the low numbers of those in these groups who currently formalise the resolution of their financial matters,⁸⁴ continuing backlogs may simply mean that these people abandon any financial remedy claims altogether. Given the gendered division of caring responsibilities in society,⁸⁵ it is likely that the existing trends, which find women take longer to recover financially from separation,⁸⁶ will only worsen.

79 L. Trinder et al, *Litigants in person in private family law cases* Ministry of Justice, 2014 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf (last accessed 15 December 2020); R. Moorhead and M. Sefton, 'Litigants in person: Unrepresented litigants in first instance proceedings' DCA Research Series 2/05, March 2005 at <https://orca.cf.ac.uk/2956/1/1221.pdf> (last accessed 15 December 2020); n 75 above.

80 n 6 above, 180.

81 n 9 above, 377.

82 *ibid.*

83 n 79 above.

84 'Family Court Statistics Quarterly: April to June 2019' 26 September 2019, Table 13 at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2019> (last accessed 17 December 2020).

85 n 45 above.

86 H. Fisher and H. Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 *International Journal of Law, Policy and the Family* 338; M. Brewer and A. Nandi, 'Partnership dissolution: how does it affect income, employment and well-being?' Institute for Social & Economic Research, September 2014 at <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-30.pdf> (last accessed 18 December 2020).

CONCLUSION

Although Haley's new, less stringent, test for challenging arbitral awards is important, the decision is most notable for its potential consequences for family justice more broadly. The case marks a new stage in the encroachment of neoliberal ideas into family law, with diverting cases from the court being an end in itself, rather than being connected to achieving better outcomes. For those who can afford to pay, arbitration will continue to offer a privatised, court-like experience. Those who cannot will be left to contend with complex court procedures alone and, given court backlogs, this may result in increasing numbers of financial remedy claims being abandoned altogether.