

TOWARDS THE LIGHT

A way through divorce and separation



PREFACE

We have long seen separation as the event likely to be the most challenging in the lives of those for whom we work: who, whilst reeling from the events of separation, are expected to manage a new environment of Alice-in-Wonderland strangeness. We, alongside many colleagues within the family law professions, believe that many aspects of the system are flawed. However, change is slow and the system we have now is the one that must be faced up to. And with the right advice and support we find that everyone does make it through... some even flourish! But then there is the cost of that support to consider.

All of our professional lives have been spent seeking to give our clients the best help we can whilst trying to make the structures suitable for their circumstances. We aim to be at the forefront of practice: up to date with the latest case law and procedure; understanding how children or their parents are likely to react to the challenge of separation, conflict and change; and tailoring advice to individual circumstances.

Towards The Light is the latest brick in that build. It seeks to set out in accessible form what we would most like to tell clients (if they had the time and the headspace to take it all in). We think that in written form it may be easier. It frees us up as advisors to do more of what our clients really need, which is to understand their worries and identify their hopes and fears, so that we can help them to move forward. Meanwhile this basic information remains in written form for clients to return to and check back upon as the process rolls forward.

We can't cover everything and some of what we have written may not fit your situation, but this booklet aims to answer the question 'what, when I have got to the end of all of this, are likely to be the key things that I will wish that I had known at the beginning?' Whether you are working with FLiP as your professionals or not, we hope that it will help set you off in the right direction with the best chance of finding your way out into the light.

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INTRODUCTION

THE TRANSITION

There is a point when you realise you are facing separation, with all of its ugly uncertainties, and feel a sickening lurch of panic. You feel lost, up in the hills in the fog and the rain. You worry about whether you have the skills and resources to cope, and are aware of the profound implications if things don't turn out well.

Over two hundred thousand married people find their way out of the fog each year and many are able to migrate to a more fulfilling future (however unlikely it may seem to you right now). This book is intended to ensure that you are able to find your way out too.

There is no one best way out of the clouds. It all depends on you, your situation, your family and, in particular, your partner. The chances are best when you are able to get advice and identify – out of all of the choices that you have – what process offers the best way forward for you and your family, and you start to take control of how matters will progress.

So the intention of this book is to provide a foundation for that advice, so you are able to make the most of the professionals you use, and to help you start to build an understanding of:

- What are the issues that usually arise?
- How might the court deal with them?
- When and at what cost?
- What are the other options for addressing those issues and what might be the likely longer-term consequences of those choices?
- What information and help might be needed to decide between these options?
- And in the light of all that, what strategies and approaches might you start to consider to give you the best chance of securing better outcomes?

COMPLEXITY AND IMPORTANCE

The immediate challenge facing people separating is that almost everything needs resolving – and everything seems to be connected to everything else. For example:

- how the separation is managed...
- affects how well each party comes through it...
- which affects their willingness to work out solutions...
- which impacts on how much will be spent in the process...
- and affects how they will be able to co-parent any children...
- which will impact the resources that then need to be committed to supporting and stabilising the children...
- which is an end in itself, but which might also impact upon jobs and thus what is likely to be earned...
- which affects housing, lifestyle and perhaps schooling choices...
- which affects the children – and of course the parents... and the ripples go on and on, impacting and rebounding off each other.

In trying to pull out one element, whilst addressing its myriad connections, you may find that, pretty soon, instead of pulling out one strand to sort out, you have a knotted jumble of ropes that are impossible to understand, much less use.

So if everything is connected to everything, how best to address the issues that you face and how can you focus on each aspect sufficiently well to build a robust plan to tackle one aspect of the situation, much less reach out to resolve it all?

If the parts of this difficult mess were colour-coded then it becomes immediately easier to separate out each theme and to see how they relate to each other in the whole, and that is the structure we use in this book:



There is a blurring between the elements of this rainbow. However, approached in this way, you are able to focus on each component before then assessing emerging solutions through the lens of the other aspects, and as an interconnected whole. This makes it so much more likely that you will come up with ideas that carry matters forward positively and safely.

Let's start to unpack the seven strands further.

1) YOU AND THE RELATIONSHIP

Every step will involve choice. Whilst good professional help will identify the options for you and enable you to think through the consequences of those choices, ultimately they will be made by you. However, the neurobiologists will tell us that the crisis of separation is very likely to make it harder for us to see fully the consequences of each option and to make the best decisions possible.

So, for many, a crucial first step is the restoration of your well-being and sense of equilibrium, so that you can start to operate effectively again in response to this new set of challenges.

From that better place, the next step may be to assess whether separation is inevitable... sometimes there are options. Might there be a way of recovering a fulfilling future together despite the current difficulties? If that is possible, what help might be needed for that to be achieved and for the relationship to be successful and sustainable in a more secure way? On page 16 there are some contact details for organisations that can help answer those questions.

But if separation is inevitable then how should it be managed for each of you to come through it well – and yes, despite the way that you may feel about him or her right now, you are likely to be affected if your partner does not progress well, so building a future that works for them will be likely to benefit you too. On the other hand, it is easy for the reactions to separation to create a long-lasting habit of negative interactions with each other, making it harder to create positive parenting and harder to resolve the financial and other questions pragmatically, affordably and fairly. Bear in mind that it costs a lot more to have a court impose a solution than it takes to agree one, and some solutions simply cannot be secured from the court at all.

2) EMERGENCIES

There may be a whole range of urgent, protective steps to be taken at court. For example:

- Personal safety for you or for any children.
- Perhaps because of your nationality or domicile there is a need to race to secure jurisdiction in England & Wales, or abroad, without which you may find yourself having to negotiate at a disadvantage.
- There may be information or assets at risk of being hidden or destroyed, and that may require immediate action to protect and preserve, or there may be debt or income needs to address.

3) CHILDREN AND THE WIDER FAMILY

The issues that have brought you to the point of separation are likely to be impacting on your children. What steps are needed to help them?

Having worked out the sort of future that would be for the best for your children, how then can you reach agreement over these issues?

Whether or not there are children, there are still likely to be concerns about the management of the situation in so far as it impacts on your respective families and your circle of friends and contacts (and perhaps your workplace). Is there a way in which the separation can be managed so as to preserve, so far as possible, those relationships with third parties that are important to you, including, perhaps, your partner's family? Your approach to these aspects will be informed by the guidance given in the rest of this book.

4) FINANCES

The court has wide powers to rearrange the assets and incomes and will exercise those powers to promote its view of a fair outcome.

So what does the law say and how are its principles likely to apply to you? What costs and delay are likely before the court would have a chance to impose its outcome? Against that backdrop:

- What future do you seek for yourself and any children?
- How can that future be provided from the available resources?
- What steps need to be taken to improve the chances of this outcome being achieved?

5) DIVORCE AND SEPARATION

Separation may have happened already or you may feel confident that it can be achieved co-operatively (once structured well for any children – see the **yellow** strand above). But for others, for example in coercive relationships, separation may be the aspect that fills the horizon, eclipsing everything else. Managing it well may be the most important task for you at this stage.

The legal process of ending the marriage requires completion of various forms and is likely to take six months, even with co-operation from your partner. It is usually routine

and ought to be managed inexpensively. How should this issue best be raised and managed so as to best promote that co-operation?

6) PROCESS AND COSTS

'Process' is the means by which you will secure the substantive outcomes to the issues you face. Whenever solutions are to be reached and implemented with professional help, there will be issues over how the costs of that help are going to be funded.

CASE STUDY: Sophie and Sebastian

In 2016, Sophie was troubled by Sebastian's increasingly erratic behaviour, staying away from home for days at a time and making trips back to his family in Greece (both were from Greek families). They had been in marriage counselling for three months, which appeared to be making no progress at all. Sebastian made commitments in the sessions that were broken within a week. Sophie wanted to show Sebastian that she was serious in her concerns about the state of the marriage and consulted solicitors about sending a letter giving Sebastian an ultimatum, asking him to change if proceedings were to be avoided.

The trouble with this plan was that if Sebastian consulted lawyers, they would advise him that his best interests might lie in issuing proceedings in Greece, which would provide far lower levels of financial security for Sophie than she would obtain in England. Whichever of them issued 'first in time' would determine which court would have jurisdiction to make orders under EU regulations. This is likely to remain the case for some time while UK and EU law realign post-Brexit.

Sophie had to decide whether to issue divorce proceedings in England without warning Sebastian that she was going to do this and so had to wrestle between:

- *her aspirations about the relationship (the **red** strand)*
- *her concerns to proceed safely towards a fair financial outcome (the **orange** strand); and also*
- *whether pre-emptively issuing proceedings in England would cause irreversible damage to her hopes for a constructive resolution (**indigo**) and hopes for a constructive child-focused parenting relationship (**yellow**).*

Generally, process is one of the most important first questions – get it right and the right answer will usually follow. Get it wrong and there is a risk of exacerbating tensions and incurring costs that may put some of the best solutions out of reach because of the impact of legal fees on the available resources.

For some, a court application is the best and safest way forward: the court will seek fair outcomes that promote the interests of minor children and provide fairly (so far as is possible) for everyone. Court may be the only route by which one party can be compelled to behave properly and by which fair solutions can be imposed... and sometimes it is only by engaging the court's assistance early on that there is any real chance of encouraging the other person into reasonable and realistic negotiation.

For others, the court structures are slow, intrusive, expensive and crude. They corrode the common ground that exists between parties (where there is a decent measure of overlap about what is needed). The court process can take extra time, involve considerable expense and terminates the parties' search for their own solutions that may work for the best. Such spouses will ask themselves, against the backdrop of what the court offers, what alternatives might be more suitable?

It might be useful here to think of an example that shows how the emotional and aspirational elements of relationship problems get tangled up with legal and financial elements (see Sophie and Sebastian's story on page 9).

So some clients will find themselves in the bind of preferring to move slowly to really explore the possibilities of recovery in the relationship but feeling compelled to move quickly to secure jurisdiction or protection. Separating out these elements in the way described enables these different options to be weighed up more carefully and successfully.

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7) MISCELLANEOUS

We tie ourselves together in marriage in a host of ways – are there other aspects requiring attention?

CASE STUDY: Dorian and Georges

Dorian, a famous Puerto Rican model, had married his business partner, Georges. The relationship was in crisis over reports of Dorian being in a new relationship and drug use at a Paris party. From this simple example arise a number of potential issues which all impact on the way the separation is managed and the outcome of the process:

- *media issues around imminent stories that Dorian's 'clean' PR persona was a sham;*
- *criminal issues around the alleged drug use;*
- *employment, business and tax issues arising from Dorian and Georges's corporate trading vehicle, and ownership of the brand it represented; and*
- *immigration issues given that Dorian had not yet acquired indefinite leave to remain in the UK.*

In addition to the above, there would be important issues to address over a valued (rather than valuable) art collection and their dog.

In some cases the faith of one or other party may impact on how the divorce itself is to be managed.

Because of the huge range of specific circumstances individual clients face – as seen in the one simple enough example above – the **Miscellaneous** section of this book does not go into great detail, but it is nonetheless a vitally important strand of the rainbow that you need to consider carefully.

1) YOU AND THE RELATIONSHIP

This chapter looks at how you can get your feet on solid ground to make good decisions, how you can assess what matters to you and your partner, and asks you to consider whether there is a possibility that the relationship can recover. A key and difficult point here is whether you can become well-intentioned towards your partner. Where you have initiated the separation, managing it all with kindness is more likely to lead your ex to move forward. Where it feels that the separation is being imposed on you, take care to get up to speed if you can, so that the post-separation arrangements are not all finalised before you have had a chance to formulate what you need for your future.

The first strand in the rainbow of issues involves personal and relationship questions. Almost everyone benefits from counselling help during their divorce (and those who think that they won't probably need it most). Guard against using your lawyer as a counsellor. Most lawyers will recognise the importance of meeting this need and have good working relationships with trusted contacts.

THE EVEN KEEL

Equilibrium is the priority. Decisions made at the early stages often set the tone as well as having major impacts on your future well-being and that of your children. Get help to ensure that the choices you make are the ones that you can look back on in years to come and say, 'I did the best I could in the circumstances'. In some situations there is little luxury to delay: our partners have bounced us into a situation requiring an immediate response. But, whatever time you have, use it to get your head straight about what are going to be your priorities going forward.

From there, the next step is usually about having clarity over what you want from life. Only then can you move towards clarity over the relationship. You need to reflect on whether you are each capable (always assuming your partner is actually offering you the choice) of the sacrifices and changes required to make your life goals realistically achievable. For many, by the time they are visiting the solicitor, they will have clarity, either because they are certain they can be more the person they want to be by separating, or because the decision to separate has come from their partner who has, in effect, long since 'left the building' of the relationship.

GOOD INTENTIONS TOWARDS YOUR PARTNER

This final step can be very challenging indeed. The fuel of emotions to cause us to exit the gravitational pull of a relationship is likely to have been pretty strong. However, to make the best progress towards agreement on the issues of separation and to co-parent your children, you may need to make what may feel like a 180-degree turn. Ideally you

will start to find your way towards a new type of relationship with your partner that involves some trust, and which will involve at least some level of empathy, respect and a willingness to listen to them. You are unlikely to get the best from them if the only communication you have is combative. You will need to find a better relationship for the ongoing dealings that you need to have (for example in relation to the children) even if it is only a business/working-style relationship.

Where these cannot be summonsed or constructed in the ashes of upset, then there are a range of consequences. People who do not feel heard are unlikely to listen and are likely to remain caught in a loop of self-justification. Progress towards any sort of agreement will be hard. With hostile attitudes each way, there will be a consequential denial of the rights of the other to a fair share of the assets and a share of time with any children. This makes a court-imposed outcome, with its cost, delay and hurt, all the more likely and across a wider range of issues. The approach of the court will be to aim to be fair to both parties and to make decisions about the children with their best interests at the forefront, but the court can't necessarily change attitudes and there is a real risk that court-imposed outcomes will feel hard-edged when flexibility is needed to manage change. The antagonistic court process is likely to entrench our beliefs that we are in the right, when our children actually need parents who speak to each other and build common ground.

DIFFERENT EXPERIENCES

There are a minority of couples who find themselves at the same point in the road at the same time and are able to conclude with a reasonable degree of kindness and co-operation that it is time to go their separate ways. They may even be able to agree structures for how they sort out and unravel their interconnected lives. For others, the history of arguments and upsets has left both parties happy to terminate the relationship and move forward. But in most situations it is not a level playing field...

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Often, one person has taken a lead: they have signified through their actions that they have left the relationship, or made this clear in their words. It is not all easy for them. Whatever brighter future they might think will exist for them 'down the road', they are likely to carry a burden of:

- upset that the relationship did not live up to their hopes;
- fear about what the future will hold and how they will be perceived by their friends, family and colleagues; and
- guilt about what they are imposing on the person they committed to being their life partner.

Meanwhile, more obviously, the other party is likely to be in a storm of emotions, feeling wounded, wronged, bewildered and abandoned, and in all likelihood furious at having had an unwelcome situation dropped on them from out of the blue.

Our lives are intricately connected with those of our partners and, if upended, we are likely to find that, each day, we are confronted by something new, demanding immediate responses but which instead are likely to be left to pile up in the too-difficult-to-contemplate heap, interacting with each other and generating a toxic mass of increasing complexity. Financial issues pile onto health and social issues. Children will add a whole other dimension of challenge. The usual preferred response is to go to bed, pull up the duvet and not get up again.

THE PRACTICAL IMPORTANCE OF RECOVERY

Those being left might hope that the unfairness of having this change imposed on them, with seemingly no chance to negotiate or option of reprieve, would result in a more generous set of arrangements for them as the practical consequences are addressed: surely justice demands that their future should be a little easier than that of the leaving partner? After all, it was that person's choice – should they not be the ones to bear more of the consequences?

The reality at court is different. The left spouse is treated no differently from the leaver. This highlights the problems you may face if you do not prepare properly. The tasks that need addressing have very long-term implications – it only takes a second to recognise the risks of trying to manage some of those tasks if you are locked within the early stages of recovery.

The risk that you face if you fail to manage the psychological side of your separation is that you will be ill-prepared to deal with the practical issues. These may rain down at a time when you are just not ready. In short, getting 'match-fit' to deal with what is likely to come may well prove to be vital.

PROGRESS TO A BETTER PLACE

Most of the hundreds of thousands of people (each year, in the UK alone) who have to confront this morass do make it through. Some time later, most are pulling the strands together into a coherent future with sustainable structures that offer lives of calm and purpose, with even a little happiness beginning to peek through.

In the 1960s, psychiatrist Elizabeth Kubler-Ross charted hundreds of individuals experiencing trauma and was unable to avoid seeing them fall into a pattern. There was not necessarily a steady march through the stages (as the diagram below shows) – some might leap forward a stage and then go back, and each stage could be long or short, but bit by bit they all seemed to advance through these same chapters.

When shown this model, many people laugh and are embarrassed that they are so 'textbook' but they also say that they felt helped by the sense that there is a progression and that what is happening now will pass.

EXPERIENCE OF TRAUMA

Separation

Shock and denial

- Avoidance
- Confusion
- Fear
- Numbness
- Blame

Anger

- Frustration
- Anxiety
- Irritation
- Embarrassment
- Shame

Depression and detachment

- Overwhelmed
- Lack of energy
- Helplessness

Recovery

Acceptance

- Exploring options
- A new plan in place

Dialogue and bargaining

- Reaching out to others
- Desire to tell one's story
- Struggle to find meaning for what has happened

- Empowerment
- Security
- Self-esteem
- Meaning

INDIVIDUAL AND EMOTIONAL SUPPORT

Some people have said that taking the first step of considering the relationship aspects of their emerging separation with a professional counsellor was the best professional time and money they spent in their divorce.

The right professional can help you to understand what decisions really need to be pushed back and postponed so that you are not bounced into making decisions at a time when you are not yet ready to have really thought through all the long-term implications.

There is a wealth of information on the web but good starting points might include:

www.relate.org.uk/relationship-help

www.counselling-directory.org.uk

www.professional-counselling.com

And you might also be interested in a website where we have collected the experiences of divorce and separation that some clients have shared with us: www.divorcediaries.co.uk.

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SOME FUNDAMENTALS TO HOLD IN MIND

Relationships are infinitely complex and unique but, even so, it can be helpful to have a list of the top ten things to remember close to hand. It is easy to lose sight of what, in hindsight, should have been so obvious.

- 1) **Don't separate as an alternative to having difficult conversations.** For some, resolving key issues is very challenging. The nub of the issues are ignored and put to one side day after day, until the problems acquire a different level of difficulty. The consequences of separation are visceral and likely to be far, far harder than the challenges of those initial conversations. Help is available – you should try to secure it early on.
- 2) **If you are initiating the separation, make your choices with wisdom and integrity.** People form new attachments for all sorts of spur-of-the-moment reasons only to find themselves regretting later what they have thrown away. You always have choices. You may be facing a betrayal (for example a partner's adultery) that seems so enormous that there is no questioning whether there is to be a separation. However, people can and do rebuild from this point.
- 3) **Get help to rebuild.** If you have been to the edge of separation and divorce and managed to turn back, avoid complacency: there was a reason why you found yourself in that place and the root causes should be understood and addressed.
- 4) **But don't hang on for a change that is never going to happen.** Other people hold back endlessly, hoping for a change that, in their circumstances, is never going to happen. Many people in that position come to regret the lost years from not having faced up to the realities sooner.
- 5) **In a troubled relationship, where there are children,** consider how the adult and parenting models that exist by continuing the relationship may affect the children's futures.
- 6) **Prepare.** Find out first the likely shape of your post-separation future in terms of parenting structure, financial arrangements and so on before you take irreversible steps. Take care who you confide in and don't burden your children with your secrets.
- 7) **Above all, be safe.** Get help if you think that you or your children could be at risk in the situation. Taking care with these arrangements is crucial. There is a higher incidence of partner violence at the end of a relationship than at any other time. In an already coercive relationship, there is a risk that these behaviours will escalate.
- 8) **How?** Whatever you do, do it with kindness and empathy for what your partner is going through, whilst keeping safe. Time it well and manage it in accordance with the needs of any children.

- 9) If you are instigating the separation, then whilst protecting yourself and any children, **consider how you can give your partner and children time to catch up**. You have had time to plan and prepare. They are likely to feel bounced into a situation that will be challenging, wounding and they may in consequence have a wider set of emotional responses compressed into a shorter time frame.
- 10) **If you have made the decision then be resolute** – get the journey of change underway. You have been forced to choose a new future. You are most likely to be able to lay the best foundations for it where you start promptly and follow through, in an ethical way, holding to your principles and seeking to see everything resolved as promptly as you can but without 'sweating the small stuff'.

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2) EMERGENCIES

The emergencies can – and should – be identified pretty swiftly... they are largely the things that:

- apply in only a minority of circumstances;
- usually need immediate attention... (so why are you reading this book? Get in touch with someone able to help!);
- usually involve an application to court; so
- involve a relatively technical set of considerations which are better talked through face-to-face with a lawyer. If in doubt, contact a specialist family lawyer right away.

Circumstances that might require action include jurisdiction, forum, personal protection, children, asset identification (and the imperative of respecting confidentiality), asset protection, capital gains tax deadlines, severing a joint tenancy, and writing a will (usually more of a priority than an emergency). Let's look at them individually.

JURISDICTION

Where your spouse may be able to issue proceedings in a foreign country, seek advice on whether this is a real risk (ie whether the foreign court would accept the proceedings), and whether it would disadvantage you to allow such proceedings to advance.

Usually, your English/Welsh lawyer will not be able to give you guidance on all these points. A lawyer in the other country will be needed too so that you are better able to compare the likely outcomes (generally financial) in the two jurisdictions and assess whether you are at risk. Outcomes can vary greatly from one jurisdiction to another.

If protective action is needed then you should move with all speed. The first person to issue divorce proceedings may be determinative of which jurisdiction (country) will be the one that deals with the divorce and financial issues. This is not always the case so check if more than one country could be relevant. For example, a French national married to an American but living in England may need to weigh up quickly the potential outcome in three different jurisdictions.

Where immediate action is recommended, you will also need to assess the wider impacts of taking pre-emptive steps, for example on your parenting relationship and the likelihood of being able to reach agreement through direct discussion or negotiation. Your spouse may feel you have taken advantage and may feel less inclined to co-operate in seeking solutions.

FORUM

You may be better in one court within a jurisdiction rather than another. In England & Wales all divorce petitions are issued in a handful of regional family courts. When it comes to having the financial issues determined by the court then the regional family court will assign the case to a court local to the parties or to the applicant if the parties live in different places. It can sometimes be an advantage then to issue the financial application before your spouse does. It is also possible, in cases where the financial position is complex, to have the case dealt with by particularly experienced financial judges. For this to happen, certain features have to be present in your circumstances. It is important therefore to get advice about the options.

PERSONAL PROTECTION

Where you are at risk of coercive or violent behaviour, a range of actions may be needed. For some, it will simply be a matter of preparation and awareness or perhaps adopting a range of strategies to take themselves out of the higher-risk situations. For others, taking advice from the police or seeking police protection will be needed. There will be some for whom the situation is so serious that they will need to obtain an injunction from the court so that the threat of imprisonment to the perpetrator will better ensure safety.

There is a strong overlap here with the **blue** strand of separation, as risk of aggressive behaviour is heightened when separation takes place or is threatened and the perpetrator seeks to maintain coercive control. Sadly, domestic violence is prevalent through all strands of society, but it is given wide attention and considerable resources. Take the opportunity of discussing with your advisors how your safety can be promoted.

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CHILD WELFARE

The high emotions and fear of loss at the point of separation can also put children at risk. Protective measures may be needed for them too. The local authority may have concerns if a parent fails or is unable to ensure that their children are safe, which may propel you to take action.

Other parents will need to take pre-emptive actions to protect against a child being abducted out of the UK. Whilst there are criminal sanctions against parental abduction (and opportunities to require a child's immediate return by court order in the foreign jurisdiction), preventative rather than recovery actions are less damaging. Take expert advice immediately and if none is available start with www.reunite.org.

ASSET IDENTIFICATION AND PROTECTION

The court has set its face firmly against the sort of 'self-help' measures that were formerly taken routinely by those who were unsure about the extent of their spouse's resources. This would include raking through documents (paper or digital) and taking copies to evidence assets that might not be disclosed by the other spouse. This evidence may now be refused by the court, and there may be orders against the self-help party, including court proceedings for damages. The court insists though that it will listen sympathetically to applications for orders that would enable information to be collected that might otherwise be hidden.

So, where there is evidence that assets may be hidden or disposed of, thus preventing the court from making a fair distribution of assets, you can ask the court to grant an injunction that is served on the disposing party, but also all the relevant banks and account holders etc, prohibiting the movement of money.

CAPITAL GAINS TAX DEADLINES

A different sort of emergency can arise towards the end of the tax year (5 April) where there are assets that have significant latent capital gain within them and that will, as part of the overall resolution, be transferred between spouses. Here it should be borne in mind that:

- Spousal disposals (transfers of assets from one spouse to the other) during the marriage are (in effect) ignored for capital gains tax purposes.
- This benefit carries on after separation but terminates on the following 5 April.
- So where a transfer is likely to be needed, married couples may need to take action in good time to ensure that they don't accidentally bring down a capital gains tax charge that might have been postponed or avoided entirely.

EMERGENCY CASE STUDY 1:

preparing to separate when domestic violence may be at issue

Deirdre said that husband Steve was domineering and constantly on at her about, it seemed, every aspect of her life. He kept her short of funds and, on one occasion when drunk, had pushed her against a wall. She says that she avoids things getting out of hand by never really standing up to him and being careful to ensure that no one is aware of what is going on. She thinks that she protects their 11-year-old as well as can be, but she just can't imagine what it will be like when Steve hears that she is leaving him.

There is no one clear answer in these situations. Many, but not all, judges could be persuaded to make a 'non-molestation' order on the basis of the case that Deirdre could put forward. However, exposing the side of Steve's character that he requires her to keep secret might inflame the situation and lead to Steve being very difficult over the other issues.

There is a theory that sometimes how they are perceived is the dominant driver for 'the persuasive blamer'. So, in this example, knowing that the lid is coming off the secrets held within the family might cause Steve to self-regulate, providing more effective protection for Deirdre and the child than a court order ever could.

After taking legal advice and talking matters through with her family, Deirdre elects to adopt a range of measures, including:

- *Managing carefully how the information about the separation was going to be imparted to Steve.*
- *Choosing a non-court process to negotiate parenting and financial issues (mediation and collaborative).*
- *Making back-up plans involving her mother coming to stay and the local police alerted to the risk of escalation.*
- *Careful management plans for the child.*

Stories from those speaking out against domestic violence can be read at:

[*www.refuge.org.uk/get-help-now/true-stories/*](http://www.refuge.org.uk/get-help-now/true-stories/)

SEVERING A JOINT TENANCY AND WRITING A WILL

Before focusing on the financial negotiations, it is worth also, at a preliminary stage, thinking about the potential impacts if one party were to die before the distribution of assets is concluded following an agreement or court award. Where a property is in joint names as 'joint tenants' (the norm for married couples) one side's death will result in the survivor automatically owning 100% of the property. The deceased partner's share does not become part of their estate.

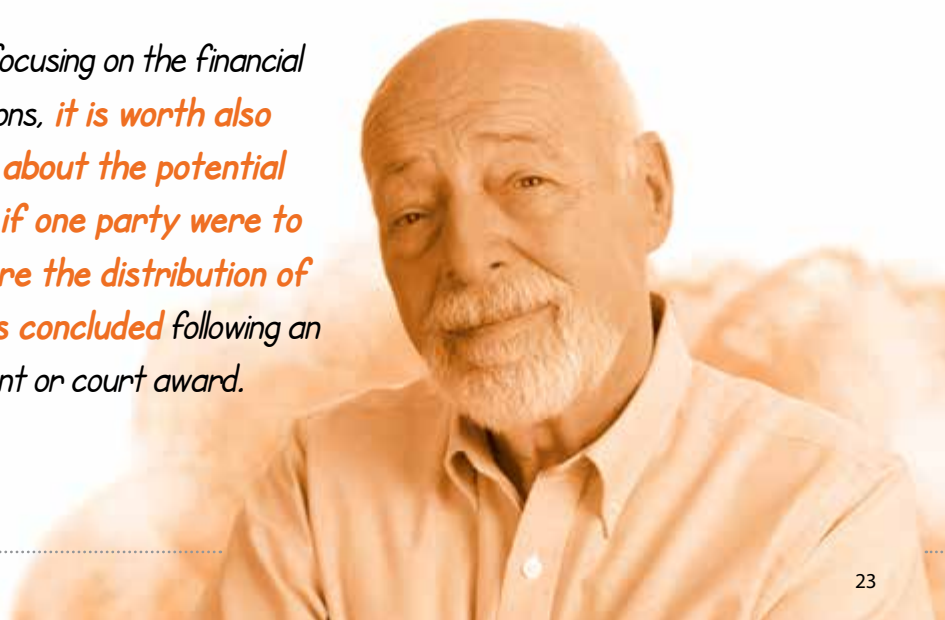
Action may be needed to 'sever' the joint tenancy and write a will, which will result in the property being owned by the couple as 'tenants in common', so each party owns 50% of the property and on their deaths they can leave their share, for example to children.

Other action may be needed in relation to powers of attorney, changing death in service nominations, or trust arrangements for life policies. A fuller list of actions can be found on the resources section of the FLiP website.

PROTECTING YOUR POSITION

Many of these emergency aspects involve taking steps early on to protect your position. You will be putting a set of facts before the court with which your partner is unlikely to agree, and/or you are seeking to prevent your partner from taking actions that may disadvantage you but which they wish to take.

*Before focusing on the financial negotiations, **it is worth also thinking about the potential impacts if one party were to die before the distribution of assets is concluded** following an agreement or court award.*



Most emergency steps involve unilateral action, quick steps in court and often assertions about the other person's behaviour and intentions. Little wonder that they can raise the emotional temperature. So they must be thought through carefully as regards, for example, the risks of increased litigation (where solutions might otherwise have been agreed), the erosion of trust and the capacity to communicate and agree things, and/or making agreement over arrangements for the children harder. For some though, robust steps are actually the first step towards creating a more balanced relationship for the future. As you will realise, there is no one answer to any of these issues. What is right for one family can be disastrous in another situation. It is for this reason that it is important to take stock, take advice from an experienced family lawyer, and make decisions based on the realities of your situation.

EMERGENCY CASE STUDY 2: assets at risk

Amanda had concerns that the £300,000 'emergency money' accumulated during the marriage in husband John's accounts would be spirited away by him and hidden from view, as he had always threatened.

However, living in the £800,000 home, she thought that the court would criticise her if she brought an application to freeze it (on the basis that she was in control of so much of their combined worth). In the event no application was made but it was later discovered that John had frittered away £75,000 of the assets.

At the final hearing of their case, Amanda was unable to convince the court to give John less of the remaining cash, having spent these assets. Perhaps she should have had a go at protecting it at the outset. It is always a difficult judgement call and sometimes only in hindsight can the choice that one should have made become clear.

3) CHILDREN

A small percentage of separating parents seem to get it right instinctively (or perhaps they just tell you this!). But when it comes to managing separation and its impact on your children, you should not assume you will always get every choice and step right so that everything falls into place for the best straight away.

Little wonder: the spouse who was your partner at the birth of your children and upon whom you could depend completely has, sometimes without warning, likely turned into someone about whom you feel very differently. It can be hard for a parent bounced into separation by the choices of their spouse, and wrestling with the devastation caused to the family, to feel willing for this alien being now to share centrally and equally in the upbringing of their children. Even if you can get past 'payback', you are likely to be left at least questioning your spouse's judgement and commitment to your children. Some parents will worry about being excluded from their children's future and seek to maximise the time they spend with them, whether this is a practical structure that works well for the child or not. There are a wide range of responses at different stages of the separation, many of which will be at odds with the goal of creating good outcomes for the children.

DOESN'T THE COURT PROVIDE A GUIDE?

One might think that it would help if there were a detailed set of court norms provided to rely upon. But it only takes a moment to realise that if (as is the case) the imperative is to create structures that prioritise the well-being of each child, then a norm is going to be impossible to propose. Each child is different, with different needs and relationships, and each family is different. What is viable and necessary in the reconfigured future will vary widely from family to family.

This reality is centre stage in the court's structure: section 1(5) of the Children Act 1989 tells us:

Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

In 2013, the President of the Family Division said 'it is for the parents, as the parents, to decide what is to be done... it is a matter for them'. The court 'simply cannot micro-manage the relationship between the parents and their handling of the child' (T v S [2013]).

So, whilst there are some rules operating at court, first there are a wide range of outcomes that might reasonably be adopted, and secondly, the policy of the statute was

to place decision-making firmly back with those with parental responsibility – the ones who know their children best – with the court providing a fairly low-lying safety net.

HOW THEN WILL THE ANSWERS BE FOUND?

In consequence, when it comes to working out the arrangements for the children post-separation, there are going to be a variety of components that you will need to bring together:

Legal: What is the guidance provided by the court when it becomes involved? Are any of these principles helpful?

Psychological and research-based: What knowledge and tips do psychotherapy, neurobiology and other research fields have for us regarding the hallmarks of good outcomes for children?

Practical and personal: You know your children better than anyone. When you are able to put yourself in their shoes you are better placed to assess the practicality of the various options and work out what is going to be the best option for them.

Achievable: So you have worked out 'the answer'. But in many situations it is going to be a question of working out what can be agreed with the other parent. Parents who use the court to make decisions for them regarding their children are likely to continue to return there for review as circumstances change. The court process tends to emphasise difference and make it more likely that conflict is continued between the parents. This in turn makes

You know your children better than anyone. When you are able to put yourself in their shoes you are better placed to assess the practicality of the various options and work out what is going to be the best option for them.



the atmosphere of conflict more likely, which will create the worst of arrangements for the children. How can you put forward a plan in a way that is more likely to be agreed?

WHAT ARE THE COURT'S RULES AND ITS GUIDANCE?

JURISDICTION: which legal system decides?

Where children and their parents are based in this jurisdiction (England & Wales) then it will be the principles established in those courts that will apply, administered by one of its courts. Where they are based abroad ('habitually resident' in another jurisdiction) then it will generally be that country's courts that make the decisions.

PROTECTION: what steps does the court take to protect children?

Each local authority has a responsibility to protect the children in its area and there is a whole range of means by which a child might come to the notice of a local authority. However, only in extreme circumstances and when there is no alternative will an authority intervene, ultimately by taking the children into its care.

Protection is also provided by the general law, in that children may not be permanently removed from the UK without the permission of both parents or the approval of the court. Where this is breached, a criminal offence is usually committed.

Children have a right to be safe, and the court will be swift to intervene to make orders for a child's safety.

PARENTAL RESPONSIBILITY: how does the court view the rights and responsibilities of parents towards their children?

Each parent is generally equal in the eyes of the law. Parents should consult each other over decisions concerning their children unless this is unrealistic (for example, if there is an emergency).

Parental responsibility was so named to emphasise the responsibility, rather than the rights of parents (as the rights are seen as those of the child). It is defined as:

All the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

Where the mother and father of a child are married then they each have parental responsibility for their children. Step-parents acquire parental responsibility only if a court order has been made providing for this.

It gives the parents rights to take an equal part in major decisions affecting the child, for example the child's religious upbringing, schooling and the name by which they are known. In addition, a parent would have to be consulted should the other parent wish to remove the child permanently from England or Wales. Even if one parent wishes to move

with the child within England & Wales the other parent may have to be consulted and their agreement sought, depending on where it is proposed they move to.

Non-intervention

Generally, the court does not intervene unless asked and even then will only be able to make orders if doing so is better than not doing so, applying the welfare checklist (see below).

The court says that only in exceptional circumstances will it make orders for a child who has reached the age of 16. The exceptional circumstances usually concern children with mental or physical disabilities.

WELFARE OF THE CHILD

If it comes to intervention, then the court is required to impose the outcome that is in the best interests of the child, by promoting its welfare. This is the sole criterion for identifying what steps the court is to take.

The welfare checklist

To identify what is best for each child, the court must work through the following factors or checklist:

- Delay: the assumption being that delay is prejudicial to a child's welfare.
- The child: their wishes and feelings (in the light of their age and understanding), their physical, emotional and educational needs, their age, sex and background, any harm they have suffered or are at risk of suffering, and the effects of any change on them.
- The parents: how capable are each of the parents in meeting the child's needs?
- The powers that the court has.

And the court must proceed on the assumption that 'unless the contrary is shown, the involvement of a parent in the life of a child will further the child's interests'. This does not mandate equal time spent with each parent, but it does carry the assumption that involvement directly or indirectly is likely to be treated as advancing the child's welfare, provided that the involvement 'does not put the child at risk of suffering harm'. Finally, the court must assume that involvement is safe unless there is evidence to the contrary.

Most of the welfare checklist elements are common sense but two should be explained:

Growing independence and increasing say

Among the most important considerations on the list of things the court will have to look to are the wishes and feelings of the child in the light of their age and understanding. As

children become older their voices will increasingly be given weight in the assessment process. If a parent issues a court application asking a judge to determine arrangements for the children, the practice in London is that children from the age of nine (and potentially any younger siblings) should attend court for the first court hearing. This is not the case in other courts round the country. In any event, and in whichever court, the child's voice will be heard through the appointment of a CAFCASS (Child and Family Court Advisory Support Service) officer or an independent social worker.

The powers the court has to manage its interventions

The powers of the court are often more limited than might be thought ideal. The old terminology for these orders (originally 'custody' and 'access', and more recently 'residence' and 'contact') is no longer used. Now the court must address the child's needs through one of the orders set out below. The names of the orders are somewhat clunky. This may have been deliberate to avoid a parent vying for an order or label simply to avoid feeling marginalised in the child's life.

A Child Arrangements Order, which regulates arrangements as to with whom a child is to live, spend time or otherwise have contact; and when a child is to live, spend time or otherwise have contact with any person. The court will be thinking broadly in terms of:

- 'living with' orders, which define the main home of the child (with one parent, or the other, or both); and
- 'spending time with' orders, defining the arrangements for the child to be spending time with the other parent, to maintain their relationship with that other parent

A Prohibited Steps Order, which limits how a parent is permitted to exercise their parental responsibility (for example, preventing them from taking the child to a particular country).

A Specific Issue Order to determine one-off issues such as, for example, where a child will go to school or whether they should have a particular medical treatment.

The court may attach conditions to any of these orders. Such orders tend to end when the child is 16, unless the circumstances are exceptional.

REFLECTIONS ON THE COURT'S RULES

One might say that the welfare checklist provides little usable guidance. It seems to be more like a list of ingredients without measurements or method to indicate what the recipe should actually look and taste like in the end. Page 30 shows what one of our most senior and respected judges published as guidance for those approaching his court. On page 31 is another formulation of what should guide the court, this time based upon work done by the Family Justice Young People's Board.



MIDLAND REGION FAMILY JUDGES AND MAGISTRATES

What the Family Courts expect from Parents

The courts consider that these guidelines apply to all children and all parents. Please don't think that your case is an exception.

Are you a parent thinking of asking for a court order?

The court wants you to think about these things first:

- As parents, you share responsibility for your children and have a duty to talk to each other and make every effort to agree about how you will bring them up;
- Even when you separate this duty continues.
- Try to agree the arrangements for your child. If talking to each other is difficult, ask for help. Trained mediators can help you talk to each other and find solutions, even when things are hard. The court staff can give you details.
- If you cannot agree you can ask the court to decide for you. The law says that the court must always put the welfare of your child first. What you want may not be the best thing for your child. The court has to put your child first, however hard that is for the adults.
- Experience suggests that court-imposed orders work less well than agreements made between you as parents.

The court therefore expects you to do what is best for your child:

- Encourage your child to have a good relationship with both of you.
- Try to have a good enough relationship with each other as parents, even though you are no longer together as a couple.
- Arrange for your child to spend time with each of you.

Remember, the court expects you to do what is best for your child even when you find that difficult:

- It is the law that a child has a right to regular personal contact with both parents unless there is a very good reason to the contrary. Denial of contact is very unusual and in most cases contact will be frequent and substantial.
- The court may deny contact if it is satisfied that your or your child's safety is at risk.
- Sometimes a parent stops contact because she/he feels that she/he is not getting enough money from the other parent to look after the child. This is not a reason to stop contact.

Your child needs to:

- Understand what is happening to their family. It is your job to explain.

- Have a loving, open relationship with both parents. It is your job to encourage this. You may be separating from each other, but your child needs to know that he/she is not being separated from either of you.
- Show love, affection and respect for both parents.

Your child should not be made to:

- Blame him/herself for the break up.
- Hear you running down the other parent (or anyone else involved).
- Turn against the other parent because they think that is what you want.

You can help your child:

- Think about how he or she feels about the break up.
- Listen to what your child has to say:
- About how he/she is feeling
- About what he/she thinks of any arrangements that have to be made.
- Try to agree arrangements for your child (including contact) with the other parent.
- Talk to the other parent openly, honestly and respectfully.
- Explain your point of view to the other parent so that you don't misunderstand each other.
- Draw up a plan as to how you will share responsibility for your child.
- When you have different ideas from the other parent, do not talk about it when the children are with you.

If you want to change agreed arrangements (such as where the child lives or goes to school):

- Make sure the other parent agrees.
- If you cannot agree, go to mediation.
- If you still cannot agree, apply to the court.

If there is a court order in place:

- You must do what the court order says, even if you don't agree with it. If you want to do something different you have to apply to the court to have the court order varied or discharged.

***A SAMPLE MANIFESTO** based on the Family Justice Young People's Board*

We believe our children have the rights to...

A A safe and fulfilling childhood in which their privacy is respected:

- 1)** *a childhood, including freedom from the pressures of adult concerns such as financial worries;*
- 2)** *fulfilment, support and encouragement in all aspects of their lives, including their education, as well as their physical and mental well-being;*
- 3)** *privacy and respect for their feelings, including the way they feel about each of their parents; and*
- 4)** *protection from harm: from adults, information and material, including that found online.*

B In any decision-making processes, to be informed, helped to form views and be a central consideration:

- 5)** *be at the centre of any decisions made about their lives;*
- 6)** *form and express their own views on any matter affecting them; and*
- 7)** *be kept informed about matters in an age-appropriate manner.*

C Now and after the separation, to be supported, loved and cared for by both parts of the family:

- 8)** *feel and be loved and cared for by both parents;*
- 9)** *know and have contact with both sides of their families, including any siblings who may not live with them, as long as they are safe; and*
- 10)** *financial support and protection from poverty.*

WHAT HELP FROM THE PSYCHOLOGICAL PERSPECTIVE?

Parents who have managed well both their separation and their children's upbringing will usually have addressed positively the following ten tasks:

1) Safety

The non-negotiable for every child is ensuring their safety from emotional and physical harm and all of the other principles are subject to this over-arching requirement.

2) The parents themselves

You can only parent your children well if you are in a good place to do so. You need to attend to yourself and get the support you need, in particular to manage the trauma of the end of a relationship but also to acquire the skills that, whilst you were together, may have atrophied or not developed because of the skills or role of your co-parent.

3) The parents' relationship

Where your interactions with the other parent are driven by your own needs, based on the history of the relationship, you are likely to struggle to achieve the sort of working arrangement that will enable your child's needs to be addressed well. A child's needs are best met by parents continuing to work together as a team. Even where one parent can't do this, a child is still supported where the other parent can steer the steady course that is focused on the child's needs, rather than allow the child to witness tit-for-tat exchanges of hostility and blame.

4) Ground rules

As the separation takes place, and during the period that follows, a range of principles are likely to come to the surface that will operate as anchors to manage the many challenges as a child grows up. These are likely to include:

- maintaining proper boundaries – so that the child is not burdened with adult issues;
- being honest with the child over the issues that do concern the child (but in an age-appropriate way);
- putting oneself in the child's shoes and understanding their position, which will include recognising the difficulty for the child seeing their parents in conflict;
- understanding that the child is genetically half of each parent so that criticism of the other parent can seem to the child as criticism of them;
- being positive about the other parent; and
- ensuring that the child has a voice in the issues that concern them (not a voice to determine those issues but at least recognition of the right to be heard, appropriate to their age and stage).

5) Informing the child

Good management of the discussion where the child is told of the impending separation is important. Parents doing this well will, where possible, share the information together and will be clear about their love for the child, that they will always be their parents and that whatever their own differences, they will continue to prioritise the child's needs. Children need to know that the separation is not their responsibility or fault.

6) Staging the separation

The best possible preparation will give you insurance against things going wrong at the point of separation. Proper information, good timing, joint management, respect and being positive can deliver particular benefits as this will be the children's first real experience of what separation is going to be like. Making it as good as possible will bring significant longer term benefits too.

7) Goals

Many parents have found it helpful to pause and consider what sort of childhood they want their child to be able to look back upon. It has helped them to be clear about what to promote and what to avoid – it has informed the principles (point 4 above) by which they roll forward with their parenting.

8) Good arrangements

Such principles also provide a means of assessing different options for structuring the child's life between the two homes and how important times (holidays, Christmas

Good management of the discussion where the child is told of the impending separation is important. Parents doing this well will, where possible, share the information together and will be clear about their love for the child.



and birthdays) are to be managed. It is all too easy to sink into a blame culture, which colours the discussions, rather than focus on what would work best for the child. Some parents can become fixated with the percentage of time that the child is in their house. For them the percentage has become the goal, rather than what will work best for the child.

9) Family story

Increasingly parents are recognising the value of minimising what is said about the end of the relationship until they are able to create an appropriate explanation that helps the child to make sense of their position and which enables the wider circle of family and friends to remain intact. The alternative risks family and friends becoming polarised into different camps on one parent's side or the other, with important relationships and connections being lost. There are many stories of grandparents who do not see their grandchildren after their adult child's divorce. Third-party help can be particularly important in assisting parents to create a story giving the best chance of the extended circle remaining intact. Children will need it all the more following separation.

10) Changes

Families don't stand still – anticipating the challenges coming up (perhaps school choices, subject choices, introduction of new partners) will help parents to manage those challenges as well as possible, and enable the child to make the best of their situation. Too often it is easy to be bounced into immediate (sub-optimal) responses. When a change or challenge is inevitable then the earlier you start the discussion with the other parent about it the better.

*Increasingly parents are recognising the value of minimising what is said about the end of the relationship **until they are able to create an appropriate explanation** that helps the child to make sense of their position.*



Looking back on these first ten tasks gives a sense of how a child's needs might best be addressed. They provide a good leaping-off point for tackling other aspects of the separation – for example, the financial arrangements.

WHAT OTHER RESOURCES ARE AVAILABLE?

The amount of online and other resources for post-separation parenting may seem overwhelming but it is worth dipping your toe in the water rather than not venturing there at all. For one thing, reading some of this material will help you realise that you are not alone, that people have been there before and survived, and that there is a prospect of a better future for you and your children.

Start with finding one set of trustworthy resources of reasonable scale and scope that seem to work for you and then, if needs be, see what else you might need later.

The online resources are developing quickly but, right now, good starting points include:

theparentconnection.org.uk

www.resolution.org.uk/divorceandparenting

www.divorceandchildren.com

Another good source, easily found online, is Deidre Saunders' guide *Kids in the Middle*.

4) THE FINANCES

This chapter looks at financial questions.

In 1973, Parliament laid down the principles that the court must apply where it is asked to intervene. There have been only a relatively modest set of changes to those rules since then. However, just as with the rules relating to children issues, these principles have permitted a wide variety of approaches. Recent years have seen the adoption of a more common-sense structure, that makes sense to many separating families. You remain free to reach your own agreements. Most people, however, will want any such agreement to be informed by an understanding of how these default principles of the court would apply to them.

First, those principles laid down by Parliament:

Section 25 Matrimonial Causes Act 1973

- (1) It shall be the duty of the court in deciding whether to exercise its [financial provision] powers under section 23, 24, 24A or 24B and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.*
- (2) As regards the exercise of the powers of the court under sections 23(1)(a), (b) or (c), 24, 24A or 24B in relation to a party to the marriage, the court shall in particular have regard to the following matters –*
 - a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;*
 - b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
 - c) the standard of living enjoyed by the family before the breakdown of the marriage;*
 - d) the age of each party to the marriage and the duration of the marriage;*
 - e) any physical or mental disability of either of the parties to the marriage;*
 - f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;*

- g) *the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;*
- h) *in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.*

S25A

- (1) *Where the court decides to exercise its powers, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.*
- (2) *Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.*

These core rules are backed up by myriad rules and precedents decided by all the cases since 1973, giving refinement to the task and powers. However, the guidance remains so wide that it still results in hundreds of cases a year being determined by the courts, as the parties find themselves too far apart to reach an agreement despite the cost, delay and uncertainty of going to court.

In 2006, the House of Lords handed down its views in the landmark case of *Miller v Miller; McFarlane v McFarlane* [2006], in which we acted for the successful Mrs McFarlane and which established a new approach to the law that remains the cornerstone of current practice, with:

- the goal of fairness; and
- the route to fairness lying in:
 - the **sharing** of the marital fruits;
 - an assessment of **need**; and
 - the safety net of **compensation**.

These principles can best be explained by reference to the diagram on page 38.

THE CARDINAL POINTS

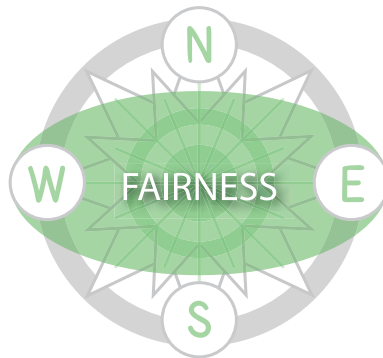
Needs

The court is guided by meeting the parties' needs (assessed against each other and in the light of the standard of living during the partnership and the length of time it went on)

Have the requirements of the Child Maintenance Service's formula been met?

We agreed...

A written agreement that meets the requirements of disclosure and informed decision-making will be highly influential



End

The court seeks to bring to an end the financial obligations through the 'clean break'

Sharing

The court seeks to share what was generated by the partnership – there is a magnetism of equality but

- inheritances
 - pre-acquired assets
 - post-generated assets
- may not 'count'*

Compensation for the person forgoing their career for the family?

FAMILY LAW FINANCES: THE CARDINAL POINTS

This diagram seeks to show a 'still point' at the centre of fairness. However, fairness for the court will usually be a response to four prevailing influences:

- **West...** a properly negotiated pre-marriage agreement will be highly influential.
- **South...** marriage is a partnership of equals; what has been built up by the marriage should ordinarily be shared and shared equally.
- **North...** but where those shares fail to enable each side to meet fairly their reasonable needs (assessed in the context of the standard of living during the marriage and the duration of the marriage) then intervention and further adjustment may be needed.
- **East...** but that intervention should aim to terminate the financial connection between the spouses.

You will notice that there are some wandering zephyrs around these main compass points:

- There is usually the need to honour, along the way, the rules and structures of the administrative Child Maintenance Service (CMS), which lays down a formula for the payment of regular financial support for children.
- There is the concept of compensation. This is not entered as a cardinal item because it occurs only rarely, as discussed below.

*In negotiations, knowing what the court would do provides a reference point. **You may want to borrow court-developed principles in deciding how to deal with the finances.***



Other aspects, such as bad behaviour by one party during the marriage, are highly unlikely to have any impact at all, which might seem to be at odds with the rule in s25(2)(g), set out on page 37, but does illustrate why it is important to have professional guidance on how the court is likely to approach your particular circumstances. Simply looking at the principles and rules given to the court and seeking to adopt a common-sense interpretation may well not get you to the answer.

'I want to reach agreement – why do I care what the court would do?'

By exploring the court's approach we are not seeking to condemn clients to using the court. But having a rough idea of the court's approach is important:

- In negotiations, knowing what the court would do provides a reference point.
- You may want to borrow court-developed principles in deciding how to deal with the finances.
- In any event, knowing first what you are entitled to (so far as that can be identified) and then making decisions understanding the parameters better enables you to feel content with your eventual decisions: none of us want to be lying awake at night in one, five or 15 years' time thinking... 'if only'.
- Finally, these principles may provide a way of delivering the final bricks to complete the bridge's span between two positions.

Perhaps the best way of understanding what the court does is to say that it is applying its discretion to adjust the couple's legal entitlements to achieve an outcome in accordance with its concept of fairness. People have various entitlements to property and other assets, depending upon who bought them, whether they were gifted, whose name they are in, whether they are married and so on. The court's job is to assess, through the exercise of its discretion, whether those entitlements should be adjusted because of the circumstances of the case.

1) The goal is **fairness**.

2) **Fairness** is achieved by the claimant receiving the greater of:

- a) **Sharing**: their one half (usually) entitlement to what was built up by the marriage.
- b) **Needs**: the resources required to enable them to meet their reasonable needs.
- c) **Compensation**: sums to compensate them for the family-sacrificed career (in the narrow band of cases where this is relevant).

So let us look at the three strands of the court's concept of fairness – sharing, needs and compensation – in more detail:

SHARING

What is it?

Sharing means dividing broadly equally what the marriage has generated. The court will make orders reallocating the assets so that each side has a broadly equal share of what has been built up during the marriage relationship (sometimes called the 'matrimonial acquest'). It will do this regardless of each side's apparent efforts in securing that build-up, and usually regardless of conduct or contribution. (There is a relatively rare exception to this approach where the couple have agreed to run their lives separately and in parallel. On a subsequent divorce the assets may simply be left to lie where they fall. There is no maintenance and any joint assets are divided equally.)

What might be in dispute?

The concept of sharing will throw up for particular consideration the following sorts of unmatched contributions:

- where either party has brought significant assets into the marriage;
- where there has been an inheritance or gift during the marriage received by one party; or
- where there has been a really significant event since the couple separated, for example reckless spending by one party or a new enterprise that has generated significant wealth – such areas of dispute will usually arise where the assets are substantial and the parties have been separated for a while without reaching resolution on their financial settlement.

When does the matrimonial acquest start?

'Marriage' is defined in an expansive way. Where cohabitation has migrated seamlessly into marriage then case law directs the judge to assess what has been built up during the entire relationship rather than only the build-up since the date of the wedding.

The changing character of property

'Matrimonial property' refers to the assets that are built up during the marriage to which the equal sharing principle applies. However, just because an asset was acquired outside the marriage does not mean that it is forever omitted from the sharing principle. Where an asset has been used during the marriage, for example as a matrimonial home, or relied upon, for example as a fund to repair the home, then because it has become central to the matrimonial endeavour, it is more likely to be regarded as 'matrimonial property' and thus it is more likely to be shared equally. In short, a long marriage is likely to obscure the provenance of an asset and more of what the parties have at separation is likely to be shared.

When does the acquest period end?

Surprisingly, one might think, this has not really been pinned down. For bonuses, one judge expressed the view that there had to be a full 12 months of separation for a person

to be able to say that the endeavour that generated the bonus was nothing to do with the marriage partnership. Passive growth on an asset is very likely to be shared. However, assets which have been generated from a genuinely new post-separation endeavour may fall outside what the court would regard as property to be shared.

Broad-based thinking

However, don't expect to see these concepts applied with precision in all the cases. Often one sees a 'these are the considerations' and 'this is my conclusion' approach in judgments, with no very clear causal link between the two. The court has a wide discretion to balance the different factors of a specific case in reaching an outcome.

CASE STUDY: sharing property and assets

Mark was concerned about what would happen to his business when he separated after five years of marriage to his barrister wife, Jade. The court concluded that even though the marital home was in Mark's sole name, the fact that he had bought it for them both shortly before the marriage meant that Jade should share in its equity equally. There was also an order equalising the pensions and other savings built up during the marriage. Mark's stationery business, though valuable, was proved to have been fully established prior to the marriage and had not increased in any significant way during the marriage. Consequently, the court permitted Mark to keep the business intact without having to share it with Jade or pay any increased capital sum for that retention.

NEEDS

Where one side can't meet their needs from the resources provided by sharing and the other has a surplus, then they usually pursue a 'needs-based claim' to receive maintenance or some of the assets in the other spouse's matrimonial share, to enable them to do so.

There is no particular magic in what the court is doing under this heading (or in what the lawyers and mediators are doing when they seek to find solutions outside of the court process). It is similar to the strategic management married couples might have brought to their lives planning a future together. On the one hand, they have resources such as:

- capital;
- income;

- what can be borrowed; and
- future resources such as pensions, perhaps business assets that may be sold or inheritances to the extent that it is sensible to bank upon them.

And there will be at least some of the following needs:

- accommodation;
- other capital needs such as provision of a car or a fund to meet your children's university costs;
- day-to-day living expenses; and
- a secure retirement.

In your separated future, there will be the same types of resource and the same categories of need, save that now there will be two separate homes, two separate households to run and two separate retirements.

This may point you towards squeezing each of the above eight categories, seeking to...

For the resources:

- manage your capital more efficiently;
- each earn more, or start to earn; and/or
- borrow more, which can be a hard ask in an era of tightening lending criteria.

For the needs, for example:

- meet your accommodation needs more efficiently or affordably; and/or
- become more efficient in the funding and management of day-to-day spending in a way that you may not have had to do until now.

And along the way, there is the imperative of using up as few of these hard-won resources as possible on the costs of the process.

What the court is seeking is:

- a sustainable arrangement;
- that creates proportionality between the two parties;

- that is consistent, in so far as possible, with on the one hand the standard of living during the marriage and on the other, the period that it has lasted (thus a high standard of living in a short marriage would probably not create long-term entitlements for the applicant spouse); and
- that is alive to the realities of life. (For example, few of us expect to be able to maintain into retirement exactly the same standard of living we enjoy while working.)

The adjustment the court will make to the parties' finances may well be in the form of maintenance, ie to provide support so that the dependent spouse can move towards self-sufficiency. If so, then the court will additionally be looking to consider how quickly the provision can be ended. A new consciousness has been given to the idea that termination should be as soon as can be done without generating hardship – though some hardship, provided that it is not 'undue', is apparently acceptable. The

CASE STUDY: needs and resources

Joe and Sam have been married for ten years and live in a £1m house with a £400,000 mortgage. Joe has recently inherited a similar amount, around £400,000.

Joe commutes to the city. His success over the years has seen his income rise to £100,000 net. In consequence when there were office difficulties where Sam worked three years ago, it was agreed that she should stop work and she has not gone back.

The sharing principle might suggest the following outcome:

		Joe	Sam
House	£1,000,000		
Mortgage	-£400,000	£600,000	£300,000
Inheritance		£400,000	£0
Totals		£700,000	£300,000

However, Sam would be able to mount a strong case that leaving her without maintenance and in effect having to spend down her £300,000 share whilst she gets

court will look to assess whether this type of support can be provided by a one-off lump sum.

Needs are generally less predictable to assess than the sharing principle. Different views could be taken of the type of housing or the budgetary spend that is reasonable.

COMPENSATION

In the *Miller-McFarlane* case in 2005, there was a great deal of attention given to the third of the pillars, 'compensation', because Julia McFarlane was considered a paradigm case – indeed *the* paradigm case, it turns out, in a very small group indeed:

- If the spouses agreed that one would give up a strong career (say to have children);

herself back on her feet would be unfair. The resolution of this conundrum is likely to focus upon:

- *the opportunities Sam has for getting back into work;*
- *the period it is reasonable to allow for this to take place;*
- *whether she is able to adjust without undue hardship to the ending of maintenance; and*
- *what budget for her re-housing is reasonable.*

The upshot is that Joe is likely to have to pay Sam maintenance for a period of time and is likely to have to release to Sam some share of his greater resources.

If the reason that Sam left work was because Joe and Sam had started a family, and even if the marriage was of a much shorter duration, then:

- *the needs of the child would be prioritised;*
- *Sam's housing needs would likely be greater; and*
- *whilst the child is very young, the court is not going to expect Sam to make an immediate return to work, though the court's attitude to this does vary round the country.*

- and if, when they separate, needs can be met from the resources already generated;
- but if one spouse only has a rocketing career and the other spouse (here the mother) can't recover her career;
- then unfairness might exist if the mother was only awarded her needs whilst the father continues to build capital from his high income.

Compensation was the concept created to fill that gap. It would see, usually, higher levels of maintenance being paid whilst the higher-earning spouse continued to earn well.

The cases are rare partly because the judges don't seem to like to make compensation awards. But more significant may be that we all tend to live up to the extent of our resources. Needs is an elastic concept that responds to higher lifestyles with higher awards, so it is only rarely that compensation will be needed to fill the gap that would otherwise be left in achieving fairness.

Mostyn J in SA v PA (Pre-marital agreement: Compensation) [2014]:

'I think that the principles concerning a compensation claim can properly be expressed as follows:

- i) It will only be in a very rare and exceptional case where the principles will be capable of being successfully invoked.*
- ii) Such a case will be one where the court can say without any speculation, ie with almost near certainty, that the claimant gave up a very high earning career which had it not been foregone would have led to earnings at least equivalent to that presently enjoyed by the respondent.*
- iii) Such a high earning career will have been practised by the claimant over an appreciable period during the marriage. Proof of this track-record is key.*
- iv) Once these findings have been made compensation will be reflected by fixing the periodical payments award... towards the top end of the discretionary bracket applicable for a needs assessment on the facts of the case. Compensation ought not to be reflected by a premium or additional element on top of a needs-based award.'*

Of course the consequence of this reluctance is that if the career-spouse's income is not shared for reasons of need then they keep the entirety of the post-marriage accruals, whilst the other spouse may have to fund spending from capital. This may seem unfair but is not a conclusion the law currently feels uncomfortable about reaching, it would seem.

CHILD SUPPORT

There is a relatively clear formula operated by the Child Maintenance Service (CMS).

It is very difficult to contract out of this formula, so most people identify the likely CMS figure first and construct an overall settlement that will not be undermined if a CMS application is made after the rest of the package has been fixed and implemented.

Put simply, sharing equally the care of children should mean no child support payments. Otherwise the parent providing care to a lesser extent pays to the other parent child support that approximates to:

- 15% of net income where there is one child, 20% where there are two children and 25% where there are three or more.
- This sum is reduced by one-seventh for one overnight stay on average per week, two-sevenths for two such stays, and so on.
- There will also be reductions where the paying parent has children living with them in their household (for example, children born after separation or step-children).

There is a vast array of detailed and slightly idiosyncratic rules to consider, so some care is needed to ensure that you are negotiating from robust figures. Note, for example, that:

- Education costs are considered separately. They are not treated as part payment of the child support obligation.

*Every family's finances are different and **separating spouses are likely to have different views** as regards how, in fairness, they should be addressed.*



- Children usually fall out of the formula and back into the court's regime when they complete secondary education, so the university years will need to be planned for separately.

Every family's finances are different and separating spouses are likely to have different views as regards how, in fairness, they should be addressed. For some that can mean a long and expensive grind through the courts. However, others are able to take advice early on and take a realistic approach that capitalises on the value of an early solution to each of them, leaving everyone better able to move on to the next chapter of their lives.

CHILD SUPPORT CASE STUDY: Joe and Sam again

To continue with the case of Joe and Sam, started on page 44, Joe's child support liability for little Josephine will be around £1,250 per month, ie £15,000 per annum. This sum will be reduced by the overnight stays and is reduced anyway by 15% as Joe is now living with a new partner who has a child of her own.

The figure is much lower than the total sum that Joe is paying in maintenance for Sam, so negotiations are concluded upon the basis that the global sum of maintenance he pays includes his liability for child support.

In this sort of situation we might see, going back to the compass points on page 38:

- **(South)** *That Sam had a basic entitlement to a share of what had been built up during the marriage.*
- **(North and East)** *She sought sums over and above this to meet her needs given the household required for the child, but that provision would encompass the aspiration to draw to an end the support being paid.*
- *A compensation claim was not engaged because the needs of Sam and Joe (given the standard of living during the marriage) more than swallowed up the overall resources.*
- **(West)** *A pre-nuptial agreement might impact upon the shares or needs, but only so far – and not in a way that would affect Sam's liability to provide properly for Josephine.*

5) DIVORCE AND SEPARATION

There are five 'facts' on which divorce can be based:

- 1) that the other person has committed **adultery**;
- 2) that they have behaved in such a way that you cannot reasonably be expected to live with them (**behaviour**);
- 3) that they deserted you and you have lived apart for two years (**desertion**);
- 4) that you have lived apart for two years and they consent (**two years and consent**); or
- 5) that you have lived apart for five years (**five years**).

In each situation the petitioner, the party who issues the petition, must explain to the court the specific events that justify their assertion that a divorce could and should be granted.

The petitioner has to pay a fee (currently £550) but in some circumstances is able to claim this fee, and a contribution towards any reasonable legal costs incurred in pursuing the divorce, from the other spouse – the respondent.

Annual statistics usually show a little over one hundred thousand divorces taking place each year with:

- 65% being granted to the wife – 54% of those being based on behaviour;
- of the divorces granted to the husband, 38% being based on behaviour and 31% on the basis of two years' separation and consent.

The above list is perhaps the wrong way to categorise divorces. More meaningfully, there are the following types:

Jurisdiction race cases

First are the international cases where circumstances conspire to create a choice of jurisdiction and one party is racing to court to ensure that the courts of England & Wales get to deal with the finances – and the other party is perhaps racing to avoid this, depending on the likely financial outcome (see page 19).

Pragmatic divorces

The pragmatic divorce is managed with co-operation between the spouses. They see it as a means to an end. They recognise the end of their relationship and wish this to be formally recognised too. They need the divorce to formalise (or provide) a financial agreement and to implement a pension share.

Re-marriage cases

The primary motivation is to press on with the divorce to permit one party to remarry.

Therapeutic divorces

There is a smaller group where the petition is issued as a form of vindication or payback, where one party wants to make a point about behaviour during the marriage.

Defended divorces

One party denies either that the marriage has broken down or the facts upon which the divorce is sought.

Making your decision about the sort of divorce you want will take into account the following features:

- 1) It takes a bit over six months for the process to complete and a lot longer if the petition is defended.
- 2) The court cannot intervene to deal with financial claims without a divorce on which to pin those claims. Once the divorce has been issued then the financial process can be started. Only about 15 weeks after the divorce petition has been issued is the court empowered to make a final financial order. This is relevant if a financial settlement has been reached outside the court.
- 3) The divorce is conducted in private unless defended, when a range of detailed assertions and allegations will be picked to pieces in the witness box, usually with the press in attendance. Unsurprisingly, this is a very rare phenomenon.
- 4) When the divorce is concluded, the parties are no longer married and so, first, are free to re-marry and secondly, in the event of one party's death, the other will no longer be their widow or widower. There are, therefore, impacts as regards pensions. There may also be implications as regards taxes, for example capital gains tax or inheritance tax. Some couples are caused financial loss through failing to take tax advice when they divorce.
- 5) The basis for the divorce will very likely have no implications for the determination of parenting or financial issues.
- 6) Defending the divorce proceedings will rarely result in you remaining married in the long term, though it will delay the divorce by up to a year.
- 7) Resolution, the national family law organisation, has identified the basis of divorce as particularly dangerous territory. To minimise the risks of further souring relationships through a strongly worded petition, there is increasing pressure to conduct divorces co-operatively and potential disadvantages where this is not done. Some points to note here are:

- Third parties are not named in adultery petitions.
- Notice of the imminent issue of a divorce petition should be given to the other spouse save where this is impractical (for example, in a jurisdiction race case).
- The wording of behavioural petitions should usually be put forward in draft for agreement.
- Where you breach these rules, you are unlikely to persuade the court to order the other party to pay your costs, and it may well impact upon how the court's discretion is exercised in financial matters.

Because of all this, if there is no jurisdiction race then generally it makes sense to manage your case as co-operatively as possible.

Whilst there are signs of the policy makers at last responding to the long campaign for 'no-fault' divorce, which avoids the heightened emotions that are so often engaged unnecessarily as couples start to work out the issues arising from their separation, change in the law is, no doubt, still some distance away.

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MANAGING SEPARATION

Each family is different. Many will find a good way to manage the separation, which recognises the dawning change, manages the situation pragmatically and in particular respects the needs of any children.

Others will say that this is just never going to happen and indeed that this book's encouragement towards co-operative, dialogue-based solutions is simply wide of the mark, that 'these approaches just don't take into account what s/he is really like... s/he is incapable of co-operation... dialogue is about control and put-downs and the conversation isn't really ever focused on solutions at all, so much as a territory to extend further the hurt and control'.

Every ending relationship is likely to have at least a bit of this: if your spouse was reasonable, there would, in all likelihood, be no separation at all and thus no consequences to consider. However, there are some relationships that are shading into something darker where a more strategic approach is needed. This is not a level playing field as whilst one spouse may be searching to find a solution that anticipates the likely outcome, is fair and meets everyone's needs, the other one is really focused on something very different.

One professional leading in this area has called these individuals 'high-conflict personalities', a term that encompasses borderline, narcissist, anti-social and pathological personality types. An enormous amount is written about such individuals and if you are one of the unfortunate people married to one then you are unlikely to manage the safe exit for you and any children without considerable planning and support.

Such people will not easily give up on their strategies, which are often aimed at isolating and controlling their partners. There are complex reasons for this which may lead to these behaviours continuing despite the potentially ruinous cost of the court process that will result. And certainly the characteristics of court offer an unfortunately enticing 'playground' for those who have a greater need for psychological relief than resolution of the issues arising from the separation that is underway.

In some situations, dialogue may still be the way of achieving progress. Research has shown that this is the way in which you are more likely to engage the best of the other person with these tendencies. Even if this approach falls short of comprehensive results on all aspects, by narrowing the areas for which resolution is outstanding, the demands of the negotiation process will be very much reduced. However, the dialogue will need to be much more carefully thought through and targeted, and managed in a careful way.

For those in the most extreme of coercive and controlling relationships, separation may be very much the most challenging strand of the whole process. They may face unbearable pressures from someone who knows them well and who may be desperate to restore the relationship that was meeting their needs, in a way that they were not ready to see changed. The victims in such relationships may find that the various authorities

offer no silver-bullet solution and so careful planning, usually with an appropriately skilled and experienced professional, across the whole range of issues will be required to promote the best possible transition whilst ensuring their safety. There are obvious overlaps between this strand and:

- **emergencies**; and also
- **process** (the next strand), with potentially profound implications for whether there is to be an efficient process in securing a good enough conclusion to the other issues in the case.

CASE STUDY: Behavioural petitions

John and Yen have separated. John seeks a divorce, having started a new relationship, but Yen is reluctant to let him have his way. John's lawyers indicate to Yen's lawyers that he seeks her co-operation in the divorce, either to proceed against him or to accept his proceedings. There is no response from Yen.

John decides to write to Yen saying that he will issue a petition if he does not hear from her. He words it tactfully and says he will meet the costs himself and make no claim on Yen as follows:

The Petitioner has a demanding job which requires the Petitioner to work late on various occasions. On each occasion when the Petitioner notifies the Respondent of this commitment, she criticises him and so acts to make the Petitioner feel that he has let down the Respondent and the children. This radically increases the stresses caused to the Petitioner by his position and affects his ability to continue to secure earnings for the family.

The Respondent has been the cause of many arguments taking place on a weekly or more frequent basis since [date]. During these arguments the Respondent will be critical of the Petitioner, suggesting that he does not care for the Respondent or the children.

The Respondent does not show tenderness or affection toward the Petitioner and resists the Petitioner's demonstrations of affection.

At this point Yen agrees to petition on John's adultery provided he pays the costs.

6) PROCESS AND COSTS

Most clients crave 'the answer', ie clarity around what the court will do with any application and what are their rights in dealing with their partner. As earlier chapters make clear, there are few precise answers to such questions. This is why questions of process are crucial: the right answer is much more likely to be secured because the right resources and right people are assembled to address the problem. This chapter aims to give an introduction to the options that exist by looking at the issues from the perspectives of:

Tasks: what is it that you might need to manage in order to reach a conclusion.

Options: what is the range of process options that you might choose between, and what are the pros and cons of each?

Characteristics: what are the features of the situation that might make one process more appropriate than another?

The modern law in England & Wales became operational in 1973. For the following 10 to 20 years, most people would consult lawyers and make an application for the court to decide what financial arrangements were appropriate. It was a slow and often untargeted process. In the 1980s there was the rise of mediation, and the noughties saw the introduction of the collaborative process to the UK. In 2013 arbitration went live for financial remedies and in 2016 for children issues. With the rise of consumer power, increasing attention has been given to identifying 'alternatives to court' that might better suit particular situations. The diversity of options reflects the diversity of needs. So far as the different aspects of separation are concerned, one might summarise the situation as follows.

Emergency needs

Where protection is required, this will usually require an immediate application to the court. This step will often polarise the situation between the parties and may mean that the court process becomes the predominant way to resolve all the other issues.

Children

Here the norm is that matters are concluded away from the court: court applications may be needed for perhaps one family in 20. For the majority:

- Parenting structures are not normally confirmed by court order.
- The court will refuse to make orders save where this is in the child's interests, and if there is agreement then often this is unnecessary.
- The changing nature of a child's needs will often make a static court order unhelpful.

- Where there are unresolved issues between the parents around the arrangements, this usually points to the need to shift attitudes or improve communication. The court process is more likely to see the parties' relationship deteriorate further in the partisan to-and-fro. Further, the court is not able to address the underlying malaise but can only make orders to deal with the symptoms, by specifying the parenting structures that will be adopted.

So these problems are more likely to be better addressed in mediation – indeed, court proceedings can't usually begin unless the applicant has a mediator's certificate to confirm that they have attended a meeting to learn about mediation. Choosing a mediator with care will be very important to get to the right answer. Other out-of-court processes may also help, such as family therapy.

Finance

A court application made today might be heard 12 to 18 months after proceedings are issued and may involve substantial cost. Where agreement seems a possibility, there is a mutual interest in coming to terms quickly and efficiently and at less cost. The agreement is usually then formalised by being converted into the form of a court order and made by consent without attendance at court.

Divorce

The final decree can only be granted by a court. This administrative process is always managed entirely at court.

STAGES?

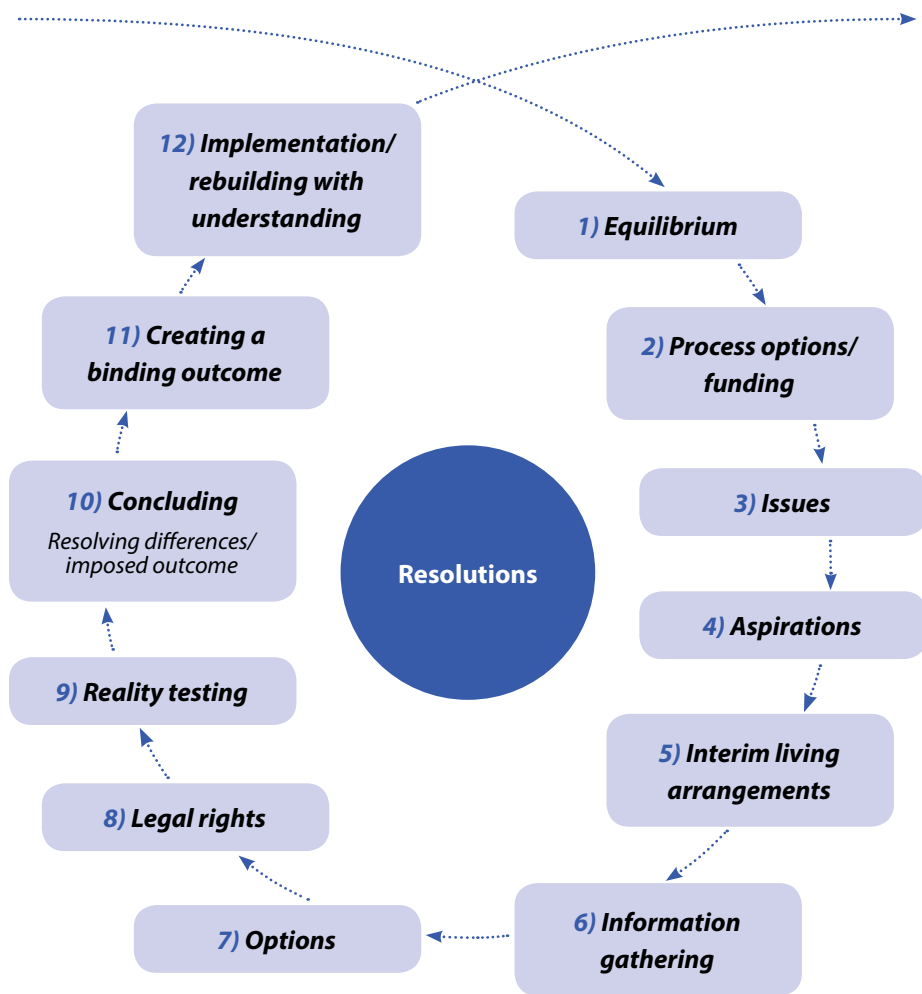
One way of coming at the question of process choice is to recognise that there will often be up to 12 different aspects involved (see diagram on page 56). Each type of process (mediation or litigation etc) may be a better choice for one aspect and less good for

Court proceedings can't usually begin unless the applicant has a mediator's certificate to confirm that they have attended a meeting to learn about mediation.

Choosing a mediator with care will be very important to get to the right answer.



THE STAGES OF ALL PROCESSES



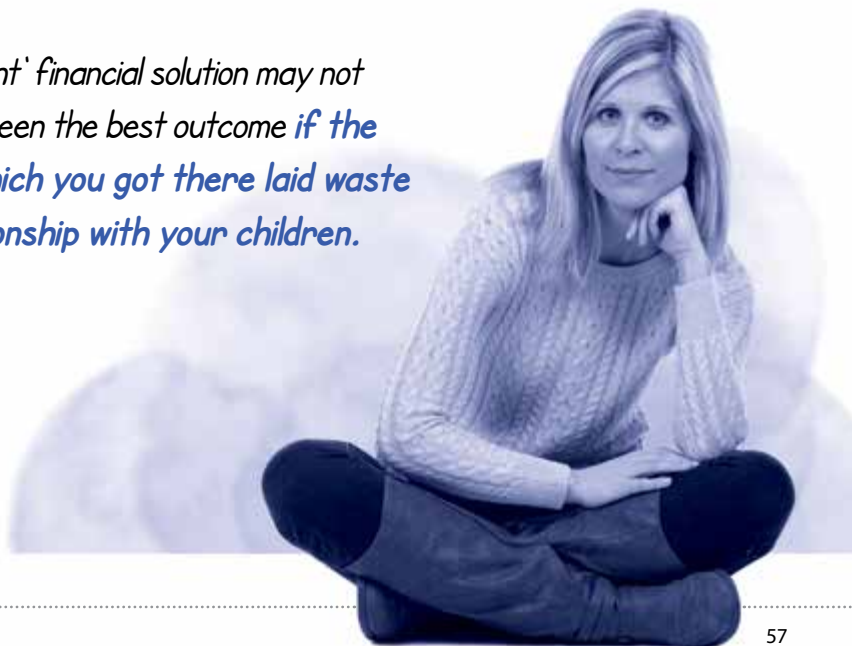
another, and good choices will often be about identifying the process that will best address the combination of pinch-points that you have.

- 1) **Equilibrium:** At the outset is the challenge of finding your feet and getting into a strong enough place to make the long-term decisions that are being thrust upon you (as discussed in the chapter on **You and the Relationship**).
- 2) **Process selection:** Once you are in that stronger position, almost the first question you will need to face is a decision about the process by which you are going to address the various issues that confront you. This will include addressing the separate but very much related problem – it may in fact determine your process selection – of how the costs of that process are going to be met.

The decisions made here are also very much informed by the next two. However, court is the default and it is only if you and your partner agree to step off that conveyor belt that you can adopt an alternative.

- 3) **Issues:** What issues are you aiming to see resolved?
- 4) **Aspirations:** What are your hopes in all of this? What do you intend to come out of it? Being clear about the outcome requires us to focus on two aspects. First there is the substance: 'Is this process offering me the best chance of the parenting arrangement or the financial outcome that I seek?' Secondly, there is the issue of experience: 'When I have the outcome what do I want the experience to have been like?' For example, getting the 'right' financial solution may not prove to have been the best outcome if the process by which you got there laid waste to your relationship with your children.

*Getting the 'right' financial solution may not prove to have been the best outcome **if the process by which you got there laid waste to your relationship with your children.***



- 5) Interim arrangements:** The seven stages below (6-12) will see the issues you face brought to a conclusion, but this process will take time and sometimes there are things that have to be sorted for you even to be able to engage on those stages. So at stage five, you might be focusing on issues of pressing debt, managing outgoings, protecting assets or setting up interim arrangements for parenting your children.
- 6) Information gathering:** Now the process can begin in earnest. If you know what you want to address then you ought to be able to identify what information must be gathered to be able to make decisions or have them made by the court.
- 7) Options:** Then, if you have the raw data relating to these issues, you can identify all the different ways in which matters might be arranged – you are able to develop hypotheses for how things might be arranged in the future. Negotiations will focus upon identifying the best (or least bad) of these... litigation will involve persuading the court of your proposition.
- 8) Legal rights:** Into the mix should also come an understanding of legal rights. If you do not know whether you have entitlements and what those entitlements are then you cannot make robust decisions for the best. You need to know what you are giving up.
- 9) Reality testing:** The different options should be rigorously assessed – will they work in detail and as regards every particular? There are times when you will need to loop back to early parts of the process, for example to gather more information or to review and expand your range of options, but at this stage the shape of the solution should be beginning to emerge from out of the mist.
- 10) Closure:** On the back of the information you have gathered, the options you have developed and tested and an understanding of legal rights that are contained within your choice of process (see box on pages 60-61), matters come to a conclusion.

For most it will be cheaper to reach by agreement, but if your reasonable proposals are not accepted then a court or arbitral determination will be needed. This factor is crucial. If, realistically, agreement is never going to be reached, then this will limit your process choices to the court or arbitration. These are the only two processes that are capable of imposing an outcome. Arbitration can only be adopted with the agreement of the other party.

- 11) Formalisation:** The agreement may need to be converted into a formalised arrangement. This would be usual in financial issues when an agreed court order will be prepared and approved by the court even when the settlement has been reached outside of court. With children issues, the formality of a court order is only likely where there has been a court-based dispute or where enforcement steps may be needed.

12) Implementation: Finally, there is the stage of implementing the arrangement.

In financial matters this might involve the transfer of assets or the sharing of a pension. With parenting issues there may be the steps and stages of bedding in the arrangement. Hopefully, this stage will see the building of necessary skills, perhaps in parenting or in financial management. For some people this stage may also contain the seeds of preparing to review the situation.

APPLYING THE STAGES TO FINANCIAL ISSUES

One can use the model on page 56 to think about the full range of steps that might be needed in relation to financial issues.

This summary table may be helpful, with the numbers in the right hand column referring to the list above.

Identifying	What assets are in the mix?	6
Protecting	Protecting them until an allocation can be made	5
Valuing	What are they worth?	6
Allocating shares	What share does each party receive?	10/11
Expressing	How are those shares to be made up?	10/11
Realising	The process of completing the allocation	12
Enforcement	Where allocation is proving difficult, can the agreement be enforced?	12
Rebuilding	How do you make use of the allocated resources to achieve a secure future?	12
Variation	In some cases you will need to consider the risk/opportunity of varying, especially maintenance orders	12

RANGE OF PROCESSES

The diagram on pages 60-61 indicates the main process choices (ignoring hybrids and sub-divisions). It might be thought of as a corridor of rooms down which you might progress.

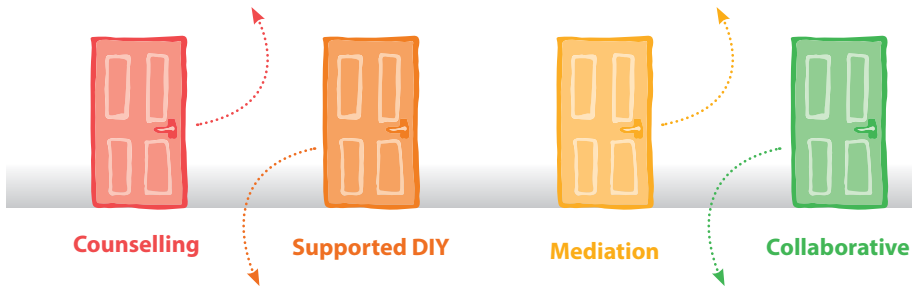
RANGE OF PROCESS OPTIONS

Counselling

- 1) What do I want?
 - 2) Can this relationship deliver it?
- If not, building respect for the other person, to the end point that:
- 3) we can reach agreements; and
 - 4) we can co-parent.

Mediation

A neutral professional assists dialogue – usually in face-to-face meetings – any advice needed is provided by separate lawyers.



Supported DIY

Discussions advance directly with the professionals in the background offering help as required.

Collaborative

Each client has their own lawyer, but all sign up to constructive, principled negotiations. Progress is usually through face-to-face discussions, focused on creative solutions to the clients' aspirations, with other professionals involved as circumstances dictate.

Issues then to address likely to be:

Ongoing relationship issues

Emergencies

- Personal protection
- Jurisdiction
- Interim financial needs
- Protection of children
- Protection of money

Children

- Informing
- Arrangements
- Implications
- Staging
- Story
- Principles
- Issues and changes

Lawyer-led negotiation

Usually as part of the litigation process, round-table negotiations might take place, focused on reaching agreement so as to avoid costs, delays and demands of the litigated hearing.

Litigation

Usually the last resort – a process that imposes outcomes in line with the broad guidelines provided by the general law at the end of a process that will often, in financial cases, take 15 months and involve three separate court attendances.



Lawyer-led negotiation



Arbitration



Litigation

Arbitration

The younger, sharper private brother to litigation. Still imposes outcomes in line with legal principles – but the process is tailored for speed, efficiency and costs control by the professionals.

Financial resolutions

- Home
- Maintenance and overall needs
- Overall capital resources
- Pensions

Divorce

- Managing the good separation

Particular other items

- Immigration
- Trusts

Along the way, rebuilding with insight.

Counselling

The first option you will consider is counselling as a way of gathering your thoughts around your own priorities and gaining insight as to the likely reactions and approach of your spouse.

Supported DIY

The next choice is 'DIY': trying to reach agreement directly. If it is a realistic choice, there is much to be said for it – solutions that work for each of you may be found quickly and at low cost. But where it comes unstuck, what is more likely is that negotiating ground may have been given away and positions may have been allowed to harden, when they might have been capitalised upon in a different, formal process so as to achieve greater progress.

Mediation

This is the next door along. The mediator enables the parties to exchange views but can't give advice on the law. In mediation concerning parenting issues the voice of the child can be heard by mediators trained to see children within the process. The children are seen privately without the parents and their views, where allowed by the child, are fed back to the parents. Usually lawyers are not involved in the mediation itself but may provide each spouse with advice, support and guidance as appropriate alongside the process.

Collaborative practice

This is a step on from mediation in that the legal advice now enters the room. Instead of one, non-aligned mediator, the parties each have their lawyers present and all four enter into a contract that seeks to build trustworthy negotiation behaviours and so promote solutions. Importantly, the parties sign up to an agreement not to go to court without the expensive and lengthy business of changing both sets of lawyers. This commits the lawyers and the couple to finding solutions round the table and is the action which helps the process to work.

Arbitration

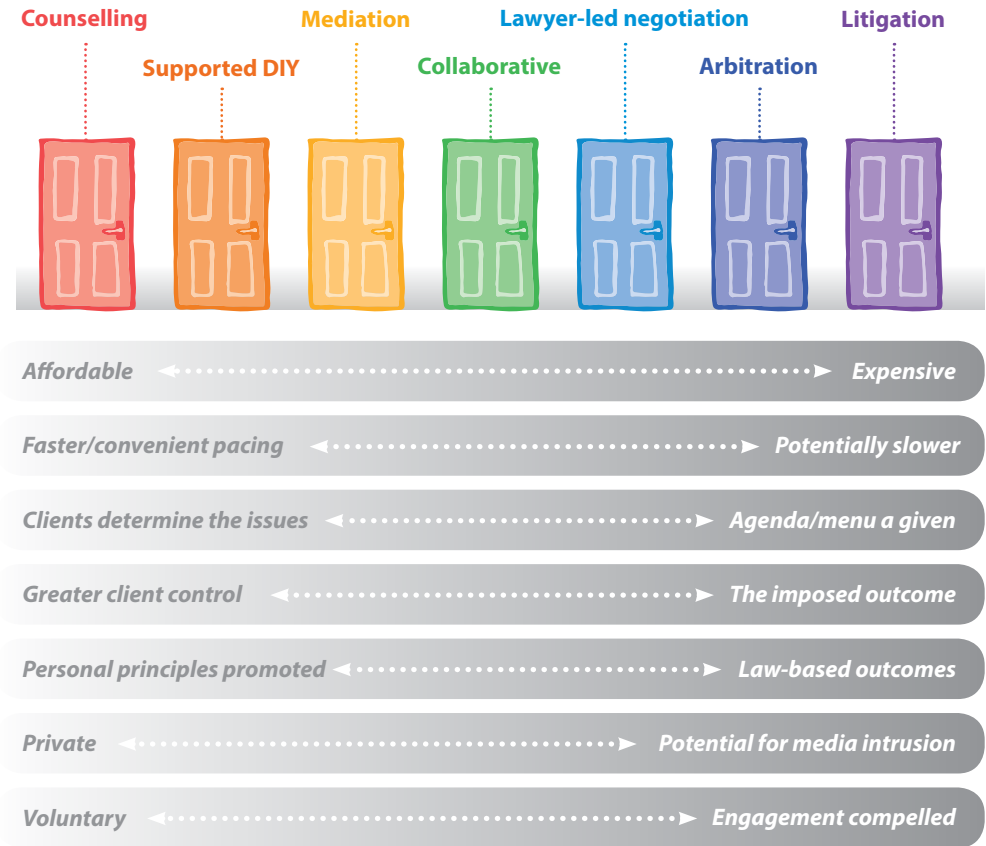
The alternative to court adjudication is arbitration. Here the parties contract out of court, agreeing to adopt the final determination of a legal expert appointed (and paid for) to provide the adjudication instead. The arbitrator applies the law just as the judge would. This means that usually lawyers will be involved to prepare and present the case. If the alternative is court then the cost of the arbitrator will often be dwarfed by the savings the parties can achieve by using this more efficient process.

Litigated outcome

Towards the bottom of the corridor is the litigated outcome, but only a small minority of cases actually require a judge's final adjudication. The court process itself still encourages the finding of solutions and many cases will settle during litigation, either at one of the pre-final hearing stages or through lawyers' interventions and negotiations in the light of the court's involvement.

DIFFERENT STRENGTHS

As mentioned above, these different processes have different strengths. Seven examples are given below. Whether these factors are important or not will depend on the circumstances.



MAKING A CHOICE

If you are able to identify the best process then the right outcome is much more likely to follow. You might address this task by first identifying your goals, for example:







































































I seek the best possible transition for me and my family, that is:

- 1) an efficient;
- 2) private;
- 3) manageable; and
- 4) cost-effective process;
- 5) leading to a conclusion;
- 6) that is workable/pragmatic.

And that has:

- 7) explored options and informed me as to my rights;
- 8) promoted my authorship;
- 9) addressed my priorities; and
- 10) promoted the needs of my family and, in particular, the children.

Against this background, you then might be able to grade the capacity of the different process choices to deliver against these criteria:

	Counselling	Supported DIY	Mediation	Collaborative	Lawyer-led negotiation	Arbitration	Litigation
Efficient							
Private							
Manageable (non-intrusive)							
Cost-effective							
Conclusion							
Pragmatic solutions							
Exploring possible solutions							
Control/input							
Your needs							
Your family's needs							

MISCELLANEOUS

There will always be some specific issues that need dealt with in any separation that relate to your own particular circumstances – they may be religious, business-oriented, or to do with privacy and press interest. It is important to isolate these issues for what they are and not let them get tangled into the other strands you are carefully keeping separate. Your solicitor may well be able to help ensure that these issues do not become sticking points that prevent resolution of other elements.

OUT OF THE FOG

DRAWING THE STRANDS TOGETHER AND NEXT STEPS

Managing well the particular aspects of:

- 1) the relationship
- 2) emergencies
- 3) children
- 4) finances
- 5) divorce and separation
- 6) process choice and costs
- 7) circumstances specific to your relationship

... will see most of us out of the fog we described at the start of this book. Looking back on it all, there are some key pieces. Get them right and you are much more likely to progress well.

1) Get advice

First, hopefully, you can see that the recommendation to get advice is not a self-serving endeavour to have more individuals out there looking for lawyers to appoint. Knowing what the traps might be, knowing the answers (or knowing that there are none) and tapping into the professional's resources and contacts really is stuff of value, without which you are likely to be guessing or, perhaps worse, formulating a position mainly as a response to what is being proposed to you.

2) Get help in the negotiations

For the same reason, you should be careful about deciding to negotiate your own deal. When you have really thought about parenting arrangements or financial issues, there is usually just one answer that screams out to you. You are likely to crave the calm waters of agreement, and so leap to proposing this sensible end point... with no plan B. If this best of solutions is thrown back in your face, it is very hard to think through 'the long game' when you have never played it before.

At the very least, you should manage the presentation of your proposal and make it in the way that is most likely to leave as much of it intact as possible. Give yourself some 'wiggle room', and don't start with your best outcome. If you do, there is a danger that your spouse will simply use your proposal as a starting point for getting

more than you are willing to accept. Often people are more likely to hear and respond positively to a set of proposals that have emerged through mediation or that has been worked out in dialogue between lawyers.

3) Find the right professional

The advice above points towards expenditure on instructing professionals to help you. Most of us don't carry out minor medical procedures on ourselves. Most of us don't even do much under the bonnet of our cars. Why then would we want to go it alone during separation, when what is at stake might be our children, all that we have accumulated financially, and all that we will earn? The seriousness of the decisions that have to be made probably justifies the outlay on legal fees.

Get recommendations from friends, or friends of friends, who have been through it before. But just because they had a good experience may not mean that their lawyer will be right for you. Do your homework and try to get clear in your head what you are seeking from your professional and then assess whether this is a lawyer with whom you click, who is likely to deliver what you want, and who you feel has heard and understood you. This should not be a race around town simply to find the lawyer with the lowest hourly rate. A lawyer with a higher rate may well be the person who scythes through the situation at a fraction of the cost and time. Higher rates often tag greater experience and, if you have the right person, perhaps better conclusions at lower cost.

And don't be put off if your spouse's lawyer recommends a lawyer to you. They are likely to suggest more than one person anyway. You lose nothing by calling and speaking to the suggested lawyers to see if they tick the boxes mentioned in the previous paragraph. If the two lawyers like and respect each other they are likely to work much more effectively for the benefit of the family. There is less posturing, point scoring and unnecessary correspondence. All of which will save both you and your spouse time and money.

4) Manage your professional help well

Appointing a lawyer will be less financially daunting if you ensure that you keep the arrangement under control so that you are getting good value for money.

Get therapeutic help: such help and guidance will help you focus with your lawyer on what will prove to have lasting value. Lawyers are not therapists – don't treat them as if they are: get someone who is trained to offer you this help, which is usually available at a fraction of the lawyer's hourly rate.

Ask the best questions: be careful about firing off emails to your lawyer about things that worry you. You will get responses of course, but also the bills that reflect the time cost of those responses. Consider leaving your email overnight to assess whether it states clearly what you need to know and aim to gather together a series of questions at once.

Don't sweat the small stuff: use your lawyer to focus upon what will have lasting value. If what you are talking about is going to be no more than an anecdote in three years' time, then think about whether you really want to be spending money on addressing it now.

Beware the addiction of correspondence: to-and-fro letters between lawyers will increase costs a great deal. Make an assessment early on about whether these exchanges are constructing the road to conclusion or simply digging deeper the ditches in which you are positioning yourselves. Correspondence isn't usually even seen by the court at the end of the day, so the time spent fashioning killer points may well be wasted. Sometimes it is better to ask your lawyer to pick up the phone to your spouse's lawyer to cut through to the important issues.

Press on and get the job done: Over time it will be difficult for you to avoid beginning to be sucked into the quicksand of tit-for-tat litigation, as the arguments and counter-arguments become increasingly subtle (and usually less helpful). Most people realise later that they would have done better to just think things through well and then get the thing finished so as to move on from this low point and towards their future.

Get recommendations from friends, or friends of friends, who have been through it before. But just because they had a good experience may not mean that their lawyer will be right for you.



Get the key points clear: this is the obverse of the previous point but is just as important. Ensure that you are clear about the key elements, for example:

- What is the court's approach likely to be?
- Applying those principles to you, what sort of order will be made, when and at what cost?
- If this isn't known, then what are the variables and what is being done to pin them down?
- What are the strategies to reach agreement or prepare to secure the best possible outcome if agreement can't be reached?

Move on if it is not working: no lawyer can rightly pretend to be the best adviser for everyone. If, despite your best endeavours, the relationship with your lawyer is just not working well then raise the issues that are of concern with them. If you still don't get what you need then look around for someone else. Bear in mind however that the 'perfect' lawyer probably does not exist. They are human too. So make sure before you change lawyers too often that the problem really is with the lawyer and not with your own, perhaps unrealistic, expectations. Clients who change lawyers too often find it nigh on impossible to find the 'right' lawyer and can also find it difficult to find a new lawyer to take their case.

Use your lawyer to focus upon what will have lasting value.

If what you are talking about is going to be no more than an anecdote in three years' time, then think about whether you really want to be spending money on addressing it now.



5) Disclose

Yes, this is tedious, but there is a need for 'due diligence'. In financial matters there is a clear order in which things happen: Disclose – Dialogue – Deal... and if that doesn't fix it then Default, ie a court or arbitration process that imposes an outcome.

Lawyers aren't primed to move forward until the disclosure is complete, so do it early on, ideally in an agreed form and within an agreed structure. Ensure that it is comprehensive and clear and with sufficient supporting documentation to ensure that it is easily understood by your spouse and their lawyer. You risk a great deal if the court concludes that you have been evasive in your disclosure, and things can come to light many years later – do you want to live with the threat of that as you build your new future?

6) Prepare early and ensure that you can see it through

Too many people wait till their backs are right against the wall before taking what might feel like the ultimate step of consulting a professional. By that time, all sorts of opportunities are likely to have been missed and possibly expensive mistakes made. Getting advice early on, even if you then sit back for a bit and think it all through, will pay dividends.

Always have a plan B (and if possible C, D and E too). If your spouse doesn't agree with your approach, what then? Crucial will be that you have the resources to see your case through to a court adjudication if that is what is needed (and assuming that it is in line with what you are advised). Only at this point do you become a potent negotiating force – and as a result reaching an early and fair agreement becomes more likely. Don't be the person who is held in negotiation until you seem to have no alternative but to give in on terms that are unacceptable to you and unfair.

7) Kindness and insight

If you can adopt the guidance in this book, then you will have done a pretty good job, far better than many. But if there is one further strand to reach for, it would be about managing this process with kindness. That is a giant ask for many people but small gestures will often, eventually, lead to the other person being reciprocally positive. It does not mean that you should make concessions over substance – you should be firm and clear about what the situation demands. However, you can make your case in a way that is empathetic to what your spouse is going through too, and seek to make the solution work for them, whilst also requiring it to work for you.

For many there comes that moment of realisation that this is not some sort of miserable blind fight but a process. When the process is working well, it is simply about creating a different future with minimum damage on all sides. That moment can be a break in the clouds that sees professional fees reduce, better solutions starting to emerge, a better co-parenting relationship commencing and the start of reintegration back into the circle of family and friends in a way that bodes well for a brighter future. That brighter future should remain the goal for all of us faced with managing the tangle of separation and divorce. **There is light, if not gold, at the end of the rainbow.**



JAMES PIRRIE

"James is a trail blazer in dispute resolution and thinking outside the box. He really understands family dynamics... He is ahead of the times with his initiative... a renowned litigator... at the forefront of dispute resolution." The Legal 500 UK

James Pirrie has practised family law exclusively for over 25 years and is a director at Family Law in Partnership. The leading legal directories have ranked James a pre-eminent family lawyer for many years, with *The Legal 500 UK* also naming him as a leading mediator. James was given Resolution's John Cornwell Award in 2014 which recognises lawyers who have gone above and beyond the norm in their work to support separating families.

James specialises in complex financial issues and cost-effective approaches to divorce and separation. He is acknowledged for his constructive approach to family law and is distinguished throughout the country for his leadership in alternative dispute resolution and strategic litigation. He was instrumental to introducing Collaborative Law to Europe and was the first non-American director of the International Academy of Collaborative Professionals. James's initiatives also led to the introduction of the 'Parenting after Parting' programme which seeks to bring the children involved in a divorce or separation centre-stage.

James is a Law Society-accredited mediator and is qualified in the commercial model of mediation and direct child consultation. He writes and lectures widely on conflict resolution & negotiation, child support, financial provision for children, enforcement, experts, emergency procedures and financial remedies.

James has dedicated his practice to helping family law clients make the choices that will be seen as the wisest and best, whether it is three months, three years or thirty years down the road.

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ELIZABETH FLETCHER

"Elizabeth's advice and guidance were absolutely invaluable to me during a very difficult time. Her calm, sensitive and professional approach throughout the whole process was incredibly reassuring, and made me feel that she had my best interests at heart at all times." Client

Elizabeth is a director at Family Law in Partnership and has specialised in family law for over 10 years. Her skills lie in all aspects of family breakdown, but she has a specific interest in managing arrangements for children both in and out of the court arena, as well as resolving financial disputes arising from the breakdown of a marriage or relationship.

Elizabeth's clients include international professionals and business owners & executives, as well as stay-at-home parents. As the mother of a young child herself, she understands all the practical aspects that need to be addressed by parents dealing with a separation and the different anxieties which parents may have in managing those issues.

Elizabeth is committed to resolving issues constructively both in and out of court. She is a trained mediator and collaborative lawyer.

Elizabeth was shortlisted for Family Law Associate of the Year in the Jordan Family Law Awards 2014.

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A boutique family law firm based in the heart of Covent Garden, Family Law in Partnership advises on the full range of family law issues including:

- pre- and post-nuptial agreements;
- divorce and separation (including financial issues);
- never-married family separations (including cohabitant claims and financial support for children);
- surrogacy and other children issues (including parenting disputes and applications to relocate abroad);
- same-sex marriage and civil partnerships; and
- domestic violence and physical protection.

At Family Law in Partnership we work in partnership with our clients and with our other trusted advisers to provide bespoke family focused solutions. Our goal is to minimise damage and help our clients and their families to move forward with their lives. For further information visit our website www.flip.co.uk or speak to one of our specialist family lawyers by calling **020 7420 5000**.

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