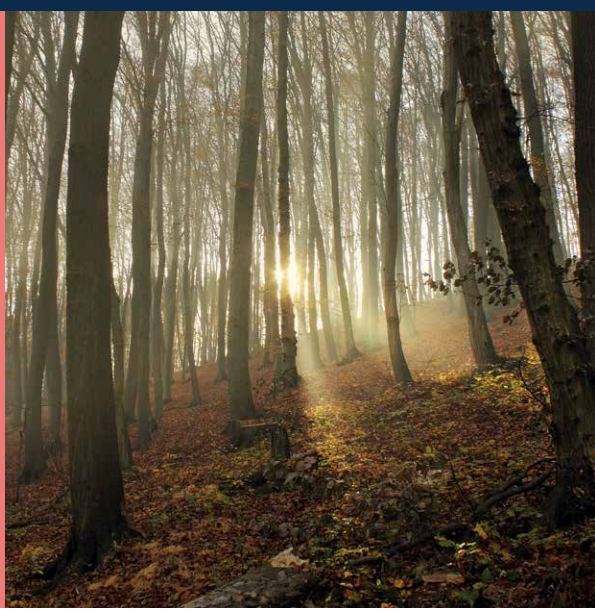
FLiP Family Law in Partnership

A guide to law and procedure

Making financial claims for children between former partners



flip.co.uk E: hello@flip.co.uk T: +44 (0)20 7420 5000

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Starting out

This is not a booklet for people who are married to each other and are now separating. It is strictly for those who have lived together and are now separating – and it is aimed at those who have the sort of complex and intertwined lives that often emerge from a committed relationship where they have had children together (born or adopted).

The law that exists to regulate disputes between unmarried couples is often bitty and complicated and those coming to it for the first time can feel that there is no over-arching common sense to it. The strategy required to manage the situation well can involve nuances that may not seem obvious at first. But ultimately, the goal will remain to get to the most positive outcome at the end of an "as good as it can be" process.

We are not seeking to map out every potentially relevant point – the booklet would be oppressively long if we did: you will look at those sorts of detailed issues in due course with your lawyer (whether that is us or another firm).

Our aim is to provide a reasonable overview of the territory, an overview that would take us more than an hour in our first meeting. By reading it first, the points that you should be hearing in your first solicitor's meeting will seem more familiar when you come to them. It should thus give you more time to address the important angles that we are not covering in this book when they crop up… and that should mean that you are able to decide more quickly how to go forward to the solutions that are needed.

Ultimately, the goal will remain to get to the most positive outcome at the end of an "as good as it can be" process

1 INTRODUCTION & OVERVIEW

Orientation

Working your way through your separation will be challenging at times. Some of the systems you face are complex and may make little sense. Those who have passed this way before talk about an Alice in Wonderland reality, where what seems to be real in the court system is at odds with everyday life. But the main point is that they have passed this way, have got through it and are now doing ok. There may be times ahead when the situation will feel hard… but with good guidance, support and a recognition of what is realistic you will be able to make sense of the present and build towards a positive future.

We are going to bang on about a few things (because they are so important and so central to the wise management of this situation in which you find yourself) so let's get these elements out front and centre:

1. Some of this is complex. Whilst the child support formula (if it applies) is relatively clear, predicting what is to be done with a lot of the financial picture depends on experience. With apologies for sounding self-serving, **get advice on the likely outcomes early on and keep them in mind** so that you know realistically the likely zone of settlement. This ensures that you don't fall into the trap of missing good deals whilst trying to pursue something which is better and which might seem fair but which ultimately is simply not realistic to pursue if the other party isn't in agreement with it.

With good guidance, support and a recognition of what is realistic you will be able to make sense of the present and build towards a positive future

2. Keep the legal costs contained: **do all that you can to keep the costs low**: this is an area where, time and again, parties spend as much on the lawyers as they do on the settlement – be careful: you can't turn the clock back at the end of the day when you find that you have joined that unhappy band…

3. … but you are also going to have to fund your case along the way and this means that any resources that you have now are going to be super-important. **Protect the resources that you have and get started soon**. Too many people allow any free savings that they have to be spent. Avoid that if possible. You are likely to need these resources for legal advice, for transition costs and for keeping yourself going whilst all of this is sorted out. Think long-term and plan carefully: if you don't have a scheme to get through to the end of the process then your negotiating strength is going to be diminished.

   The best way of containing costs is by **maintaining an efficient and business-like relationship with your lawyers** and expecting them to do the same with the other lawyers involved. But even more important is… **trying to keep things constructive with your ex too**.

   If you can go further and be kind and positive then so much the better: where each of you and your ex feel that the other has "got their back" (even if there are disagreements), then faster, cheaper, better solutions are more likely to follow for all aspects and without doubt your children will benefit. It often only takes one of you to set that tone for the other to be likely to follow.

4. In almost all situations, this is going to call for you to **get support for you**. Ideally you will have trained therapeutic support, helping you to process all that has happened, the process you are going through and the challenges that lie ahead. Such support can help you to grasp where your ex is coming from and make sense of how you got here, and also help you to grasp what your children are going through, what they need from you and how you can best support them. When all of that is in place, you will manage far more efficiently and effectively the legal process that otherwise risks sapping your energy as you progress towards less-wise (because less-informed) outcomes.

5. If you can do all of this then the biggest winners are your child or children. When they can sense that their parents are doing ok, are in control and have a plan for going forward, then they will relax and get on with the business of being a child, whatever that means for them in the stage of life they are at. Where "the arrangements" have become "a case" and are spiralling downwards into struggling through the courts, with ruinous levels of cost affecting your futures, then all of these stresses that you will be managing will be borne by them too. **Keep your children centrally in mind**.

To enable you to better make sense of all that you face more quickly, we have tried to describe the elements in colour-coded fashion, addressing the interlocking parts of:

1. **the relationship**
2. **emergencies**
3. **children**
4. **finances**
5. **process**
6. **separation, and**
7. **other** – the catch-all for myriad specifics that may need attention along the way

We came to realise over the many years of trying to explain these systems to clients and help them to manage their situations well, that we needed a way of:

- separating out these elements when we explain the system because there are some bits that need careful unpicking. Trying to tell clients the whole story in one go is likely to leave them gasping for breath. But with separate strands, we can really focus on the detail of an aspect; but it also enables us then…

- to pull back and hold the overview and the inter-connections between the different parts in mind.

Where you follow this process of 1) focusing on detail, as well as 2) holding the overview in mind, you are positioning yourself in a way that is most likely to enable you to understand the situation and from there make the best of it.

We referred to "interlocking". The connections between these elements are not always obvious. But for example:

- how well you can manage your separation and build a relationship of trust between you and your ex,

- impacts directly on what process you are likely to agree to use to resolve any differences that remain

- and some processes can offer you protection but at the same time are far more effective in permitting you to develop more constructive ideas and to do so at lower cost…

- that in turn raises the prospect of better material outcomes;
- it also creates the environment in which there can be a more positive co-parenting arrangement for your children going forward

Conversely, for some the relationship is profoundly difficult… it is not safe. This has implications for how you should aim to achieve the better exit from the relationship (element 6 above) and the sort of parenting relationship that you need to set up at the start so as to promote your wellbeing and that of your child.

Or we could start in the middle:

- focusing first upon the good arrangements for your kids…
- which may well generate better buy-in as regards the range of financial solutions in the frame, and
- this may improve relationships by reducing fears and anxieties…
- thus making constructive dialogue work better.

No one should step first towards the sort of high-cost, slow process offered by the court, which will be demanding of your time and energies too. Court is definitely a low-hanging safety net for those who are unable to work out better answers for their situation themselves, or where trying to do so is not safe.

Grasping how this system works and what is realistic, you will feel more in control, less under pressure, and generally better able to make sense of all you are facing. This means you will be able to get through the changes you face more quickly and also recover from this transition and move forward with your life.

Better financial arrangements will usually be reached by what you and your ex are able to agree between yourselves away from the court

Overview of the moving parts

Starting on the journey, we take a moment to look over some of the main elements in the terrain before we then examine them in greater detail.

Finances

The financial component is likely to take the longest to solve. We have suggested above that there is often value to be found in avoiding a slavish adherence to the legal system. Better agreements may be reached by what you and your ex are able to agree yourselves. However, the sort of agreement you reach is bound to be at least influenced by what is each party's understanding of the law, so it will be helpful that we start there.

For those who have never married, there is no over-arching set of principles or fairness. Working out solutions between you is often mostly to do with piecing together three separate legal regimes:

- property claims
- child maintenance
- any further child-financial claims

Property claims are sometimes called "TOLATA claims" by lawyers, referring to the Act of Parliament ("The Trusts of Land and Appointment of Trustees Act 1996") that gives the courts powers and also guidance as to how those powers should be exercised. So in the frame could be:

- a property owned in your names together (or perhaps owned in your partner's name only but where you are able to make claims upon it because of implied or actual promises you were given that you should share in it)
- in the same way, it might relate to savings or a bank account, furniture or cars, and so on

Claims are not based on the fact that it would be reasonable or fair that you share in the value of an asset, or even that you need it. You have to be able to point to a particular sort of evidence of a particular sort of understanding or promise.

Child maintenance comes in a range of flavours and there are detailed rules as to which system will apply to different situations.

For most people, maintenance is fixed by the Child Maintenance Service. It identifies which parent is due to pay maintenance to the other by identifying (broadly) who is the main carer. It then looks at the last HMRC evidence of income of the other parent, called "the non-resident parent" or "paying parent" by the CMS, and makes a maintenance award according to a formula. For example, where there are two children who will spend one night per week with the paying parent, then the maintenance will work out as around 17.14% of that person's net income.

table continues on the next page…

But where that paying parent's gross income is up above £3,000 per week, then the CMS applies its calculations to that first £3,000 (which works out as maintenance of £17,472 a year in our example) and then the court can decide whether an award should be made on top of that. The guidance to the judges is that they should often apply (in the example) effectively a "levy" of around 17.14% to the excess above that threshold too – but the court has a wider discretion to do what is fair than the CMS, and different judges have taken different approaches. The budget for the recurring child's needs is going to be central in this decision.

If the child or the paying parent live out of the UK, then generally the CMS can't get involved at all – and it is the court that makes the decision (but it will often apply the formulaic approach anyway).

The court can usually make maintenance orders to meet educational costs on top and the costs referable to certain sorts of conditions that the child may have (the statute – written in different times – says where the child is "blind, deaf or dumb or is substantially and permanently handicapped by illness, injury, mental disorder or congenital deformity").

At the end of A-levels, the regime provided by the CMS ends and all children must then look to the court for any support that they may want for the university years.

This then leaves the child-financial claims that are called "Schedule one" claims, referring to Schedule 1 to the Children Act 1989. The court is given limited powers:

- to require a parent to assist the other with, or provide the other with, housing for the child whilst the child is dependent (the current cut off save in special circumstances is the end of the child's first degree). At this point the entire investment (in this case the house) must be returned to the provider
- to require a parent to pay a lump sum… the cases see this being done, for example, to equip a property, to provide a car or to provide particular equipment or services (for example orthodontics) the child needs
- where maintenance is ordered by the court (for example to "top up" the child support, for education, disability or for international families or for the child at university) this is made as an order under Schedule 1 also.

These three aspects describe the claims that can be made against the child's other parent. You might also draw on other financial resources, for example your own earnings, savings or other resources, or child benefit and perhaps universal credit, to build the viable household for you and the child.

Many families have divided their family lives with each taking a particular role (for example one child-caring and another career building). At separation, this historic division comes under stress: the child-carer has the challenge of financing their future; the career-builder may have parenting challenges. The child-carer continues in that role of child-carer but may now have a reduced household income and a reduced scale of home. They will have to replan how to achieve the financial security of savings and pensions for later in life, without the benefits of their partner's career that they may have supported for many years.

Further, where the child is older (where the support for that career has been provided all the longer) the duration of help may – paradoxically – be less:

time before the child is independent, at which point the "Schedule 1" home is returned to the parent who provided it and the child-carer needs to find their financial way independently.

These are not easy transitions to manage. Just because it seems unfair does not mean that the courts will necessarily do something about it. You must focus on reaching agreement and if you cannot do so then focus on the legal claims you can make. You just need to be mindful that there is no fourth set of claims against your ex that comes into being simply because you need it. There is no such thing in the jurisdiction of England & Wales as a "common law spouse" (or a "de facto" as they are called in other countries). You need to guard against pursuing a claim that has no basis in law, which is likely to involve riotous spend and could convert a challenging situation into a worse one.

Schedule 1 and Child Maintenance Service claims are the same whether the relationship between the parents was long or short, and whether the parties lived together or not.

Process for finances

The three strands of financial claim may require two or perhaps three different processes operating alongside each other:

- there is the process at court to deal with any property ("TOLATA") claims and the Schedule 1 claims… in some situations, these may need to move in parallel in different courts, and

- there is the process to secure child support via the Child Maintenance Service

Ideally families may not go near these systems at all: where negotiations can advance to agreement away from the courts, that will often be preferred as being cheaper and quicker – but often more creative too. So there will usually be a dialogue phase before any proceedings are issued, during which there is a search for solutions. Often this will be with the help of **a mediator** or lawyers providing help **within the collaborative approach**, which is a specific and positive model focused on helping parties reach good agreements.

If there is impasse a court may be needed to impose a decision. But most people who are properly advised will do better to appoint instead **an arbitrator** to determine the outcome to the claims rather than leave the matter to the court. An arbitrator's determinations are in practice as binding as those of a judge. But the arbitrator has more time to reach careful solutions and the delays before that decision can be made will be much shorter.

The Child Maintenance Service can't order either party to pay the other's costs. The court can – and often will.

We look at these aspects further in **Part 2**.

Our resolute encouragement will be that you look for such good as you can and seek to build the co-operative parenting alliance

Parenting

Alongside the financial dialogue is the parenting agenda. There is a continuum of families. At one end there is the financial provider perhaps being indifferent to the child and seeking no relationship at all; at the other end there is the financially stronger parent who seeks an equal parenting role and may even step up to take the major day-to-day care function at some point in the child's life. There is a diversity at all points between.

Very many of these situations can play out with…

- the financially stronger party asserting their negotiation muscle over the finances, whilst
- the major carer seeks to balance the negotiation-gradient a little by their power over the child's time

And mostly this scenario would create losses at each end:

- the child is denied the relationship they need with each of their parents and the arrangements around such time as is spent is inevitably soured and troubled by the conflicted mentality
- meanwhile the ill-will leaches into the financial negotiations, leaving them to become a pretty binary struggle between taking as much as possible on the one hand and giving as little away as possible on the other

Our resolute encouragement will be that where safe, you look for such good as you can and seek to build the co-operative parenting alliance:

- doing so is doing best by the child

- is applauded by the court (which puts you in a stronger position in the discretionary system it operates), and

- is most likely to generate a more benign approach to the finances by the other party (which is, essentially, the best hope in a regime that may often feel as if it operates meanly)

Often this attitude will see agreements around parenting falling into place through direct discussion. Where matters are more challenging or disputed then mediation is the forum in which most agreements are built. Where agreements around parenting are not possible and, in particular, where there are issues of safety, then the court application exists to regularise the arrangements. Having said that, most who will hear the guidance would do better to use arbitration rather than court – and often in arbitration the two issues, finance and parenting, will run alongside each other efficiently in a way that would not be possible at court.

Between parent-authored solutions and court (or arbitrator)-imposed ones, there is a substantial gap, particularly because of the philosophy of the court and what it is capable of delivering. The underlying approaches of the court might be summarised:

- to promote the relationship with each parent provided that it is safe for all involved…

- against a backdrop that the child has an increasing say as they develop in age and maturity

However, for a minority of families, the court can be left flailing around giving specific directions for time or arrangements and then making further orders, trying to ensure compliance, which are ultimately ineffective in delivering what the child really needs – ie a positive, respectful and co-operative relationship between their parents focused on their child's wellbeing.

Costs orders are rare in parenting litigation unless there is misbehaviour in the way that the court process itself has been run. Thus, almost always, where legal representation is needed, it has to be funded from somewhere.

Relationship

These financial and parenting issues often need to be resolved in the most challenging of situations, where each person is dealing with their own feelings about the end of the relationship. In this context it can be hard to focus on finding solutions and working co-operatively.

What we encourage is the appointment of appropriate counselling support alongside the legal support so that the feelings around the end of the relationship can be tended to and thought about, in a process that is separate from the legal one. This is more likely to permit a constructive environment for the legal claims, permitting a more careful

discussion about options and preferences between parties/their lawyers, avoiding for more couples the wasteful, hurtful trip to court.

Proving negative behaviours in the past relationship generally has no impact on the outcome the court would impose at its end, as regards parenting or financial arrangements, unless for example they hit the thresholds:

- of being the sort of enforceable promises that provides someone with an interest in the promiser's property, or
- they point to serious questions of safety for the child or parent

But being able to maintain a positive relationship in the future can deliver real benefits in how the resolution of the legal claims is achieved:

- parties are more likely to strive for win-win solutions
- better parenting structures can develop, and from both of these…
- usually better financial outcomes can emerge

Safety and exit

There are some for whom this open search for constructive co-operative ways forward is not possible and for whom there could be danger in trying to do so: this is the population whose safety is already compromised in the relationship.

This category of carer will have particular challenges to meet:

- usually they are initiating the separation to bring to an end an abusive relationship – but the very act of doing so may precipitate even worse behaviours

There are some for whom an open search for constructive co-operative ways forward is not possible and for whom there could be danger in trying to do so

- having to focus on safety, compromises for example around finances may feel like a price worth paying just to secure an exit
- additional costs spent on lawyers are likely to be needed to activate the protection measures that are available
- resources may be scant already: the applicant may be more isolated and less well-resourced, and we do not underestimate the challenges that can be involved in finding a way forward

However, the legal systems that are in place are very much alive to these predicaments and there are skilled professionals ready to move forward swiftly to provide support where protection is needed.

Careful thought will be needed at the start as regards the strategies to be engaged. Some will see the point of separation as delivering safety. Others will need longer-term court-ordered arrangements in place backed by a whole raft of practical structures to encourage behavioural change on the part of the other party.

Parenthood and legal status

Before setting out on any claim, a first step will be to ensure that it is going to stand up if it ever needs to arrive in the courtroom. Moral rights and responsibilities exist in myriad ways and not all are recognised by the court. For many the position is clear, but some situations require a more careful examination of the rules.

Safety and orders for protection

There are a range of statutes that may be relied upon to address questions of abuse, safety and protection. Generally where protection is needed it is available: the court's powers are widely framed so that those who have been in an intimate relationship or who have lived together are able to apply for protection.

Of course care is needed to make the right application in the right way (and experience is needed to know whether there may be better ways forward) but that is what your lawyer is for.

Claims around decision-making relating to the child

Parental responsibility refers to "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".

The woman who carried the child to birth automatically has it.

The man who provided the gametes would generally have it too (births assisted by fertilisation clinics are considered separately below). That apart:

- formal registration of the father as a parent "on the birth certificate" would usually mean parental responsibility
- a parental responsibility agreement between the parents can give it, and
- the court can award it

Rules for child arrangement orders

Parents, those with parental responsibility, those named in an earlier order, and those with whom a child has lived for three years (or certain relatives after one year) are included amongst all of those who can make an application in relation to a child as regards how parental responsibility is to be exercised (which includes how time is to be shared). Courts will not make orders for those aged sixteen or over, save in exceptional circumstances.

Schedule 1

Only those who are the legal parents of a child can be targeted by claims. So it is possible to have parental responsibility for a child (for example having been given it by the parent or by court order, or through having lived with the child) and yet not be liable for the financial support of a child under Schedule 1 because the child…

- is not their biological child
- is not their child by the human fertilisation rules
- and was not adopted by them

The CMS

Broadly similar rules apply for the Child Maintenance Service (CMS)… a person could only be considered to make payments if they are the biological, adoptive parent or deemed to be the parent under Human Fertilisation and Embryology Act rules. However, the CMS has various routes enabling it to deem that a person is a liable parent and different situations may need prompt management.

Only exceptionally will the court make orders about the parenting of children who are sixteen or over

2 FINANCIAL QUESTIONS

As explained in our introduction, the law sees the outcome to the never-married family as a confluence between:

- property questions between the couple (in the main the lifetime "TOLATA" claims)[1]
- child support entitlements ("CSA awards from the CMS")[2]
- the Schedule 1 claim[3]

Against this background, parties are free to agree pretty much whatever sort of arrangement makes sense to them. However, when parties become stuck, they will reach for legal advice and so the influence of legal guidance may range from the marginal to centre stage, where it can become the overwhelming language. Here, even where ultimately an agreement is reached, it will have been worked out in terms based resolutely on the legal teams' legal-rights analyses.

We therefore look at each of the three elements in turn, starting with the property claims between the couple.

1. PROPERTY CLAIMS

How does the court decide who has what share of the proceeds of property?

There are two situations, which may be treated differently by the law: what happens if one partner has died; and what happens if there is a separation during their lifetimes and there is a dispute as to how the asset or its proceeds will be shared. Each reflects the fact that the courts operate in a legal system that has grown up over a long period when priorities and lifestyles were once very different, and where responsibilities and respect

1 The Trusts of Land and Appointment of Trustees Act 1996.

2 Referring to the Child Support Act 1991 and the Child Maintenance Service, which is the current administration managing the rights and responsibilities provided under that statute.

3 Schedule 1 to the Children Act 1989.

were conceived of differently. For many, the rules that apply to their situations will not feel like a modern form of legal culture nor a fair way to address these issues.

At death

Co-owned property can either go to the surviving co-owner automatically or it can be dealt with by the will of the person who has died (or intestacy rules might apply if there is no will). So if John and Jill have each written wills giving all their property to their children and John dies:

- either Jill receives John's share despite the fact that John's will said that it was to go to the children, or
- John's share is treated as separate and goes as he has directed in his will

The first outcome will follow if John and Jill hold the property as joint tenants (Jill is said to have the right of survivorship to receive the whole property) and it is only if John and Jill hold the property as tenants in common that John's share is released to be dealt with in line with his will. Points to note are:

- holding as joint tenants is probably more common
- where people die abroad, the foreign laws may apply
- many people will want to consider taking out life insurance

Where a cohabitant was being supported by the deceased prior to the death and their partner dies domiciled in England or Wales, they have the right to make an application for reasonable provision (if this was not provided) under the Inheritance (Provision for Family and Dependants) Act 1975.

Lifetime divisions

Where John and Jill who are unmarried live in an owned home together and then separate, the situation can be a lot more complex and difficult to predict. Applications are brought under the Trusts of Land and Appointment of Trustees Act 1996 (or TOLATA, as noted above).

The court may eventually decide:

- that there should be equal shares
- the shares should be proportionate to contributions

- there should be some other arrangement that reflects the fairness of the case (in the particular conception that the courts are required to apply of that word), or
- that there should be no sharing at all

If the house is only in Jill's name, then John may have an equal share or some lesser percentage, a lifetime interest or no share.

The court will make its mind up by looking for an express agreement and if there is none then trying to work out what approach is consistent with what the intentions of John and Jill appear to have been. To understand the courts' approaches, first some concepts and secondly some terminology must be grappled with.

"Nominal" and "real" ownership – the "legal" and "equitable"/"beneficial" interests
All property is owned in two ways. There is the formal title of who owns it and then there is the person who owns it in the sense of being able to use it. For example, Eric is the Treasurer of a Committee and operates a bank account in his name even though it is full of money which has come entirely from the membership and which has to be used for those members' purposes, rather than for Eric's needs. The bank account is nominally in the Treasurer's name but that does not mean that he owns what it contains.

The same goes for our homes. All properties are registered at the Central Land Registry. They are registered in one or more person's name – but it does not follow automatically that those people own them. We often do not give the complexity of these legal arrangements a second thought.

But the point is that the formalities surrounding an asset do not dictate who gets the money from it – that answer must be found somewhere else… or to give it court terminology the "legal estate" may be owned by someone "upon trust" as to the "beneficial or equitable ownership". To work out who has what share in the proceeds of sale (the equity) you don't just look at the legal title.

If the legal title does not provide the answer does the transfer document help?
It may do and is always the first port of call. The transfer document, usually a "TR1", is the paper that operated at completion (in the case of property) to vest the property in the new owner.

The first rule is that an "express trust" will bind. If the TR1 declares the shares then that is usually an end to the discussion – and this may well remain the case even if the parties did not particularly engage with what they were signing.

Secondly, there is a presumption that if the document confirms co-ownership, then if nothing more is said they own it equally; and if the document confirms sole ownership then it is presumed that no other person has rights or claims and they have the burden of proving that a different outcome was intended.

Generally, those who hold their property as a joint tenancy are going to be treated as though they have equal shares

What if there is no clarity in the transfer document?
The court may need to look at all the circumstances and decide what the parties probably decided – or would have done if they had thought about the problem. Generally, those who hold their property as a joint tenancy are going to be treated as though they have equal shares – so this problem mainly relates to those who said that they would have a tenancy in common or where the property is held in one person's name and the other one claims that they ought to have some interest.

The court is likely to take account of three sorts of behaviour:

1. *Where the person who owns the land has promised the other a share in it*

   For example, the owner, Jill might say "don't worry, John, I have always regarded this as our home for us to share together forever". The court will hold Jill to her promise **provided** John can show that

   - he took Jill at her word and…
   - acted in some way that has caused him a detriment… this might be that he gave up a council property to move in or that he gave away his home, or spent savings on the home or possibly on Jill or on living costs, because he assumed that his housing needs would be met by this promise

   The courts refer to this as "equitable or proprietary estoppel". Because Jill has made a promise, the court holds her to it and "estops" or prevents her from now asserting her strict legal rights, for example by turfing John out of the property registered in her name and giving him nothing.

2. *Where there have been direct contributions towards a property*

   This approach reflects the commonsense view that if someone makes a significant contribution towards an asset then there is often a reason for that. If Rhoda puts

down only 75% of the purchase price of a property in her name, then why should Ron have any less than the 25% of the proceeds that he put in?

Less obvious are the court's views that:

- merely by putting your name on a mortgage you are often treated as making a contribution – hence, if Rhoda and Ron have a 100% mortgage in their joint names, Ron may be treated as contributing and therefore having a share in the profit on the home even though, as things turn out, it is Rhoda who makes all the repayments

- only contributions which relate directly to acquiring the property or increasing its value are likely to count – so all the money spent on food or merely repairs and decorations by one side are unlikely to count

Clearly though, the court is still guided by the intentions and if it can see that there was an intention to reflect future unspecified contributions in the shares then this will certainly come into account.

Fixing shares by reference to contributions is referred to by the courts as "a resulting trust" (the share of the contributor results back to him/her at disposal). It is less common for the family home.

3. *Finally there is the constructive trust*

This is the first time that the courts come close to the view that a party should have "his/her share" – often 50%, because it seems fair.

It is only if you have made a direct contribution of some sort at the outset that you can qualify to make this claim. Even then it may well be viewed restrictively. However, provided that you did this then the court may be prepared to look at the whole history of contributions – thinking about whether in reality this was a partnership in the home, where equal shares were intended even though there may not have been equal financial contributions. Here your bringing up children could elevate a claim on the proceeds (which may be small when considering only direct financial contributions to the property) into a larger share.

So provided that Chris made some initial contribution directly to the property, she may be able to claim a half share twenty years' later when she separates from Charles after raising his children (Chris' step-children) and generally running the home for them all.

Whilst this seems the least that the legal system can do to protect the financially vulnerable in society, it also creates difficulty; it is extremely hard to predict whether the court will regard the behaviours in the relationship as sufficient to point towards the award of a share in the property.

At root though, all that these three concepts do is reflect what might be regarded as a commonsense view that intentions matter:

- Jill seemed to intend that John should have a share in the property by her telling him repeatedly that the property was both of theirs
- Rhoda and Ron may be assumed to want to get back proportionate to what they put in
- as Charles continued to make his life with Chris, Charles may well be taken to intend that what was their home was truly equally their home, and the fact that Chris made a direct financial contribution to begin with shows that this was more than just a family relationship in Charles' home – their arrangements were intended to have traction over their finances too

Summary as to approach

Usually the court will approach these cases in the following sequence:

1. Is there a document setting out the terms? if not…
2. Is there an initial step by which the parties showed their intentions to share in the value of the property? This might be an initial contribution towards the purchase price or subsequently arranging for really significant works at the property which have increased the property's value or taking responsibility for the payment of the mortgage. Alternatively, merely words showing a clear intention that this is the joint family home may suffice.
3. Next is the question "what arrangement did the parties intend – what were the consequences of those commitments?" It might have been an agreement to share in the value that accrued subsequently… it might have been to have equal shares.

All that these concepts do is reflect what might be regarded as a commonsense view that intentions matter

4. Finally, "equitable accounting" – often parties have separated and the question then emerges as to how the costs since separation (and very occasionally pre-separation) and the benefits since separation should be shared between the parties, given the shares they had in the property. (For example, the party who has remained in occupation for an extended period might be expected to pay an "occupational rent"; the party who terminated contributions towards the mortgage might be expected to bring those payments up to date).

Clear and clean predictions are not easy to provide. The gathering of information can be hugely wide-ranging (and thus expensive) and a minor and perhaps forgotten email may have an overwhelming and unexpected impact on the court's conclusion as to shares in cases of dispute.

Many individuals wrestling with these situations will draw the conclusion that:

- the law-generated outcome is hard to predict
- will be expensive to acquire, and thus…
- coming together to find the good-enough solution which avoids potentially ruinous court-based litigation has much to recommend it

As we have previously explained, making that leap when things are so hard at the end of a relationship and where there may be really significant anxiety as regards future financial security, is a challenging step indeed.

2. THE CHILD MAINTENANCE SERVICE

Towards the end of the 1980s there was increasing disquiet about the wide variety of child maintenance awards being made in the UK – and also disquiet that the levels of support were often being set at unrealistically low levels. A national government organisation that would apply and enforce fixed rules across the jurisdiction, raising children out of poverty and ensuring consistent outcomes – a new fairness – was a compelling idea to Mrs Thatcher. It raced through Parliament with cross-party support in what the leader of the Lib-Dems, Charles Kennedy, would subsequently consider the greatest political error of his career.

Since then the scheme has been footballed to and fro, each administration trying to find a way to still or at least stall the criticism of its poor performance. As a result what we have really isn't the scheme that you would design from a blank page, so please don't expect something which screams principle, logic, simplicity, fairness… or sadly sometimes even efficacy.

What is the likely level of support?

You can carry out a top-line calculation or ranging shot here: **www.gov.uk/calculate-child-maintenance** (though we think that there are some problems with this system and we prefer our own maintenance calculator, which we can share with you).

Fundamentally, you should expect this:

- 15% (1 child), 20% (2 children) or 25% (3 or more) of a person's net income (the formula actually comes at it in a more complex way from gross income, but this is a decent approximation)
- these sums are then reduced where the paying parent has children in their new household (step-children or birth children) by the same percentages 15% (for one), 20% for two and 25% for three or more
- they are reduced again where the child stays overnight with the paying parent by sevenths depending on the likely yearly average (one seventh for 52 nights or more, 104 means two sevenths, 156 is three sevenths. If there are 174 nights then it reduces by half plus £7)

Where a person is supporting children across two families then there is a headcount and the appropriate percentage shared accordingly. Where the person makes pension contributions, usually you look at their income net of those payments.

Complex situations and the variation scheme

Complex earners engage a raft of subsidiary systems. The Child Maintenance Service was a scheme designed for the bulk of the population back in the nineties and noughties

The CMS would say that one child has around 15% of the liable parent's NET income, reduced if they have children in their household and reduced again if they are paying for other children or have overnight stays

– it works less well for those in the gig economy, the self-employed and those living in complex ways from capital and certain other situations.

The system has struggled consistently to generate good outcomes for these outlier situations and the CMS's appeal system has been clogged by these challenging sorts of cases. This has resulted in changes of the rules to seek to stem the tide, which often has meant lower awards for those with higher capacity to pay.

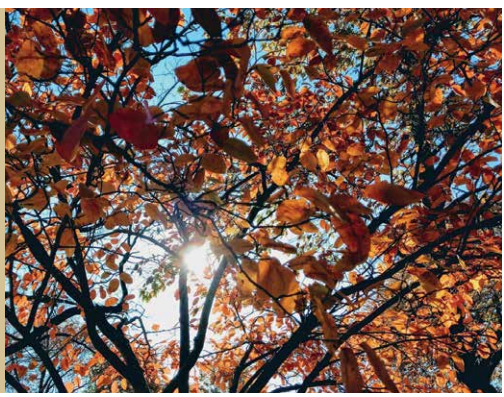
The paying party can ask for a reduction in the level of award commensurate with:

- payment of boarding school fees
- any significant (specified) contact costs they have
- costs they must meet associated with the illness or disability of a child in their new household
- payments towards debt or a mortgage from the relationship

On the other hand the recipient can ask for an increase where:

- the paying party has other income (in particular from investments)
- they have assets (other than their business or home) above £31,250, or
- they have control over their income and it is clear that they have reduced it (manipulated the situation), generally by diverting it to someone/somewhere else

The system has struggled consistently to generate good outcomes for outlier situations and the CMS's appeal system has been clogged by these challenging sorts of cases



None of these provide a free-for-all for the CMS then to impose an outcome that would be fair, looking at the whole situation. It is simply a case of more calculations – either adding to the income entering the formula or reducing it and then running the formula as before.

How is the provision secured?

Generally application is made via the website **www.gov.uk/child-maintenance-service/how-to-apply**

A fee of £20 is charged and the CMS makes contact with HMRC to gather the last-filed information about earned income, and then provides a letter indicating the likely level of the award. At this point it makes contact with the paying parent, who may:

- deny paternity
- give information about other children
- or give evidence of pension contributions

The first will stop the process in its tracks until paternity is resolved, usually by DNA testing. The other responses will obviously have an impact upon the level of the award.

A final assessment is then issued, which might be within eight weeks, say, of the application.

The maintenance "clock" is ticking from the time when the CMS first makes contact with the paying party (called the "NRP" or "non-resident parent", while the claimant is the "PWC" or "parent with care") but it may take time to establish the final level of award – whenever this is done it will relate back to this start date.

Each year, in the period leading up to the anniversary, information will be regathered and the assessment process re-run.

But this process doesn't apply to everyone

The jurisdiction rules are intricate. Broadly, the CMS will not take your case if:

- **geography:** the paying parent isn't based in the UK (unless they are abroad but employed by a UK-based company or on UK government service)

- **age and stage:** the child isn't entitled within the child benefit rules (for most people this means the child needs to be pre-A-levels: jurisdiction ends on the 31st August afterwards)

- **parentage:** the person you are applying against is not the natural or adoptive parent of the child (the rules we touched on in the previous chapter)

- **separation:** the claimant is still living in the same home as the parent they are applying against

- **order:** there is already an order in place: if the court has made an order within the last 12 months, then applications can only be made once the anniversary has passed (and the CMS then take over the case and this discharges the order)

- **shared care:** if care of the child is managed broadly equally between you (and there are a whole range of factors in the frame, so predicting what the CMS will do here is not easy: generally if you have child benefit then the claim will be accepted, leaving the other parent to challenge the claim by raising an appeal, which can be a three-year journey)

Where the CMS has no jurisdiction and cannot get involved, then it is usually back to the court – so in all of the above situations, you can (indeed would have to) make an application to the court, rather than the CMS to finalise general maintenance provision if you could not agree. So this would see all of the following situations going to the court:

- most international cases
- cases dealing with support for the university years
- where the parents are still in the home together
- if they share care equally[4]

Other claims beyond the CMS

At court, the judge will have powers to make orders for maintenance (these will be orders made under the powers given it by Schedule 1 to the Children Act, which we come to next). However, the court is prohibited from making orders where the CMS could make orders. So this opens up the possibility of asking the court for its help where:

- the CMS has no power to make orders at all (ie in the categories listed in the previous section for equal care, international and university cases)

- the parties agree that it can do so in place of the CMS (but care is needed here as these orders can be swept to one side by an application to the CMS once the order has been in place for 12 months)

- the providing parent has income higher than £156,000 gross per annum (because the CMS only deals with that first slice of income of £3k per week)

4 We leave out from this list cases where the parent being pursued isn't the "natural" or adoptive parent of the child (because here no claims can be pursued at court either unless the parents were married) or where there is an order already (that is probably not going to be relevant to this early stage).

The Child Maintenance Service has been patched and repatched, creating a system of labyrinthine complexity

- the orders are to deal with educational costs
- they are to address the costs of disability

Note that the courts have tended to adopt the approach that the CMS decides whether or not it has jurisdiction – ie the court can't simply jump in and take the case because it seems obvious to the court that the conditions permitting its involvement exist. It has to wait till the CMS has determined that it, the CMS, does not have jurisdiction.

How to make the best of the situation

The administrative scheme was intended to be accessible to people without advice. We referred at the start of this section to how it had become a political football, and over the last three decades it has been patched and re-patched by new statutes and regulations, indeed whole new formulae, creating a system of labyrinthine complexity. Meanwhile, responsibility has changed hands repeatedly, often with cost-cutting in mind, with the result that even those operating the system may not know and apply all its rules, and delivery can be patchy.

Handled strategically, well and early, you should be able to get the best from the CMS system. Slip-ups, complexity or just bad luck may see you wandering through parts of the system that may halt your progress for literally years. Sometimes it is possible to avoid the system entirely. Sometimes how it is used will be straightforward. For a minority there will need to be focused support over a period that may involve a long delay before there is eventually a hearing in front of a tribunal to get things straightened out.

You may well want or need additional information. We worked on a three-part briefing to the profession which you can find **here** for a more detailed review. But it may be of more help that we focus on your specific concerns and provide direct and targeted advice.

Handled strategically, well and early, you should be able to get the best from the administrative scheme

3. SCHEDULE ONE CLAIMS

You reach this point having identified any property claims against the other parent (see "TOLATA" above) and secured provision for the child(ren) via the Child Maintenance Service (or identified that the CMS does not apply to you). The third strand is one that seeks to address the needs of the child, where there is a shortfall between what you have and the resources you need to provide a safe and sustainable home for the child.

Surprisingly, this is not mainstream work. Statistics differ. The charity Relate suggests that there may be 60,000 couples a year who separate where there are dependent children, and the MoJ say that there are only around 750 Schedule 1 cases brought. If those numbers are both right then the claims are made for only a minute slice: 1.25% of the relevant population. Factor in the potential for cases brought by those who have never lived together and the position is more extreme still.

This may reflect that for many families there are simply no resources to be argued about: once child support is paid, that is as good as things can be made. For some it will reflect the challenges in funding and bringing a successful claim and a resistance to the risk of litigation. But in part it is lack of awareness: people don't pursue claims just because they never knew that they could and are left struggling to provide the child with a standard of living that would be significantly eased with a contribution from the other parent.

One of our aims in writing this booklet has been to help raise awareness of the possibility so that more children are able to access the resources of both parents. It is bad enough being deprived of the support of two adults as a child manages the difficult job of growing up; doing it with scant resources when more could realistically be provided would be very hard indeed.

Targets in the Schedule 1 case are the following:

Funding for professional costs

The court recognises that where a potential applicant is prevented from bringing a claim because the situation is difficult and they don't have the resources to do so then help may be needed. Legal aid can assist some (see information here **www.gov.uk/legal-aid**) but that is a pretty narrow doorway. For many the only realistic source of help is to have funding provided by the respondent to the other party/parent.

What tends to happen is that the applicant finds a way to fund the preliminary stages; and then the first step in the legal process is to pursue claims for a) the costs that have been spent; and b) the costs that are expected.

There is a range of requirements to meet (probably sixteen of them in total) but with experienced support, you will find out whether you tick those boxes and if so will be able to make the claim for help with legal costs that will enable you to make the financial claim for overall provision. Often against that backdrop, the other party will volunteer provision. (Why spend all the money fighting a case if you are likely to lose?)

This stage is crucial… your case cannot run if you cannot fund it: most lawyers who are experienced in this work know that the only way that it can be paid for is "as you go and along the way" – there is no certainty of free funds at the end of the day, so no lawyer can sensibly roll up the costs to be met from the proceeds of the litigation. **The work should not be carried out if there is no fund to pay for it.**

The funding can cover more than just the Schedule 1 case: we have seen the recipients of these claims ordered to pay to permit representation over parenting issues and child support issues. (There is no reported case yet on whether you can have funding for TOLATA work).

Secure the provision and the whole power balance in the discussions may shift: an ex who may have been pretty intransigent may suddenly become much more willing to reach agreement because they know that they are funding each side of the conversation between two lawyers and so have a real interest in bringing that dialogue to a conclusion. However, note that you will only be given a contribution towards your costs – rather than have them paid in full. How this shortfall will be managed will require discussion.

Housing

1. Approach

The modern law really launched in 2003 with a case called *Re P*. The Court of Appeal declared that a sensible way of approaching the problem was this:

> *The starting point for the judge should be to decide, at least generically, the home that the respondent must provide for the child. The value, the size, and the location of the home all bear upon the reasonable capital cost of furnishing and equipping it as well as upon future income needs, directly in the case of outgoings but also indirectly in the case of external expenditure such as travel, education and perhaps even holidays... Once that decision has been taken the amount of the lump sum should be easier to judge. For the choice of home introduces some useful boundaries.*

Memorable guidance was given as to the scale of the home in another case a couple of years later.

> *I am... anxious that my award should, to an extent which I regard as reasonable in all the circumstances of the case, mitigate the disparity which inevitably will remain between the father's spending power and that of the household where [the child] will grow up. I can do that by adopting a level of award which should enable the mother to provide [the child] with a fabric of home life not too brutally remote from that which the father's hard work enables him to sustain.*

table continues on the next page…

2. Scale

This is not a precise metric, but in the frame as reference points are going to be any home where:

- the parties may have lived as a family
- the respondent will be living in the future, as well as…
- … what is now affordable. (In medium-scale resource cases, separation is likely to require economies as the resources previously available to fund the costs of providing one home now need to be stretched across two).

Where (as happens relatively regularly), perhaps as a result of this litigation, the paying parent separates from a previous partner or spouse as well, then there will be other needs to balance into the mix too: those of their former partner and any children of that relationship.

3. A home on loan

Whilst the applicant should be equipped with their independent home in which to provide for the child, the law is clear: once dependency ends, the home must be returned to the provider.

It should follow that lack of precision as to home-scale and cost is not particularly problematic. Surely given that the respondent is going to get the money back anyway, this doesn't need to be a long disagreement. Unfortunately disagreements often emerge, too often because relationships are bad and given the lack of precise guidance that anyone can give as to the "right" outcome.

4. One shot

We also know that the claim can be raised on one occasion only. You can ask for permission to sell and relocate (for example, moves for your work might be needed or to access a new school), but returning to court for cash top-ups as housing needs grow is not permitted – so long-sightedness is important. (The child's secondary education may be far in the future but that second bathroom for when your sweet 3-year-old becomes a challenging 15-year-old may be a life-saver for you.)

Equipping

Next on the menu, and following the *Re P* guidance, will be thoughts around the cost of equipping this home to a reasonable standard, if you do not currently have funds to do this. Obviously where you have furnishing and white goods already there is no need for provision: the Schedule 1 jurisdiction is resolutely gap-filling: only providing what would otherwise be missing from the child's life and your ability to provide for their needs.

Car

In most situations, a car will be needed by the applicant to meet the child's needs (perhaps less so for city-dwellers with mid or lower-range finances). Where needed, a reasonable car is ordered, often again taking the relationship standard of living as a reference point for the quality and frequency of replacement or the standard the paying party gives themselves.

table continues on the next page…

Other immediate capital needs

Alongside there may be immediate capital spends for the child – past or present, these have stretched far and wide. Obvious contenders would be:

- recent, post-separation, birth-related costs and baby equipment, or
- for older children orthodontic treatment, a computer or perhaps a musical instrument.
- but other things have been ordered too, for example, a kayak and a holiday.

Other lump sums

Other elements could be in the frame…

- there is a hotly disputed question over whether claims for debt can be pursued
- less contentious would be costs that have had to be incurred in foreign proceedings
- also, therapeutic costs relating to the re-building of the parenting relationship for contact have been ordered too

The next range of claims relate to income and so will depend on the position with the CMS; only if the CMS permits these claims can they be brought at all

General maintenance

Exceptional wealth can generate orders as high as £235k or £277k p/a – but most are much lower. Of course, they cannot be made at all unless:

- the parties agree that the court should make an award (in which case it may be knocked out by an application to the CMS once the court order has been running a year), or
- currently the CMS has hit its maximum award (ie the paying parent is treated as earning over £156k p/a gross)

Awards at £60-70k have been common where provision is pursued against the wealthy. One compelling view has been taken that you simply take the cap off the CMS formula and keep on applying the percentages for higher earners until you get to gross income of £650k (which would provide an award of £60k for one child and £80k for two, if there were no overnight stays). More recently still there has been a return to focusing on deciding what would be a reasonable budget.

Other judges have decided that the applicant's earning capacity is very much in the frame and, as children age, a return to the workplace for the claiming parent may be expected such that maintenance reduces over time.

Central to the award is likely to be a realistically pitched budget, focusing on:

- child specific costs
- housing costs (council tax, water rates and other bills)
- household costs (food – tech – cleaning)
- holidays and costs such as at Christmas or other religious festivals
- car and transport

table continues on the next page…

It is also permitted to bring into this frame some provision for the applicant carer's own costs (often referred to as "the carer's allowance" and now more usually a "HECSA" Household Expenditure Child Support Award).

It is very hard to pull together all the various judicial comments to provide a dependable route-map towards the likely position of any eventual judge's award. It is often a question of experience as to what will "run" and what is realistic. The broadly based approaches taken by many judges might be indicated by the following statements of principle by some of our most experienced judges:

> *In making an independent assessment in the exercise of my own discretion, I have regard to the likely cost of running the home that the trustees will buy for the mother and [the child, L]. I have regard to the fact that the mother is to be L's primary carer …. [she should have] sufficient maintenance as will enable her to discharge her responsibilities as [the child's] carer, reflect her position and [the father's] position, both socially and financially, and allow her and [the child] to live comfortably, but not luxuriously, in the accommodation... Enough to remove legitimate financial anxiety and put [her] in charge of a budget on which she can reasonably be expected to manage without getting into further debt or returning to seek more money from [the father].*
>
> *There will... be numerous grey areas, where the need asserted is of no direct benefit to the child, but is (or is arguably) of legitimate indirect benefit in helping reasonably to sustain the mother's physical/emotional welfare. This will be most pronounced when the father is very wealthy and able without difficulty to provide for living costs of no clearly identifiable direct benefit to the child, but which would indirectly promote the mother's care of the child by allowing her such a lifestyle as not to feel "out of place" in the society of the parents of the child's friends… It is these fine (and largely insoluble) distinctions of fact and degree within the grey areas of indirect benefit to the child which particularly justify... a broad budgetary approach by the court in bigger money cases. Such an approach aims so far as possible to avoid subjectively driven, time-consuming and cost-ineffective arguments, so often fairly sterile in the result. … For the same reasons, the parties should themselves likewise be prepared to adopt a broad-brush approach to questions of sums claimed and sums actually spent. Some give-and-take is plainly required in this sensitive area, if conflict is to be avoided. But where there are grounds for belief that a mother is taking or is likely to "take advantage" by spending Schedule 1 payments on things of clearly no benefit whatever to the child, there needs to be some longstop for the father.*

Some judges (unhelpfully we think) are comfortable requiring the recipient of maintenance to provide accounts showing how the sums have been spent.

table continues on the next page…

In late 2022, one of our leading judges summarised the principles as follows:

1. When determining a child maintenance application, the welfare of the child must be a constant influence.
2. A child maintenance award can extend beyond the direct expenses of the children. It can additionally meet the expenses of the claiming parent's household, to the extent that they cannot cover, or contribute to, those expenses from their own means. Such an award might be referred to as a Household Expenditure Child Support Award ("a HECSA"). The essential principle is that it is permissible to support the child by supporting the claiming parent.
3. But a HECSA cannot meet those expenses of the claiming parent which are directly personal to them and have no reference to their role as carer of the child. An example is a subscription to a nightclub. However, the award can meet the expenses of the claiming parent which are personal to them provided that they are connected to their role as a carer. Examples are the provision of a car or designer clothing.
4. The reasonable level of the claiming parent's household expenses should be judged by reference not only to the present standard of living of the respondent but also, if applicable, to the standard of living enjoyed by the family prior to the breakdown of the relationship. The object of a HECSA is not to replicate either such standard, but to ensure that the child's circumstances "bears some sort of relationship" to them. The standard of living in the parties' home prior to the breakdown of the relationship is "as good a baseline" as any other.
5. The HECSA must be set at such a level that the claiming parent is not burdened by unnecessary financial anxiety.
6. When assessing the claiming parent's budget, the court should paint with a broad brush and not get bogged down in detailed analysis. Rather, the court should achieve a fair and realistic outcome by the application of broad common-sense to the overall circumstances of the particular case.

We accept that these six principles do not give clarity as to what sort of award you should anticipate your judge making or whether a particular item of spending will be accepted or not. However, it is the best guidance we have and it is why all those dealing with these claims must avoid getting too bogged down, must paint with a broad brush and must think carefully and creatively about what compromises can be agreed so as to reach an agreement.

The following year, the same judge gave guidance that there was a formula that could be applied which built to some extent upon the formula of the CMS even for those paying parents earning above the CMS cap. We will see how this formula beds in with the industry – but you may well hear the term "*James v Seymour* assessment/table" being used and this is what it refers to.

Rent

It would be possible to ask for payment of rent as part of the general maintenance costs and one judge has recently decided as a lump sum instead, which is a real release for those within the CMS limits. Generally, however, housing is provided by way of purchase – so rental costs are likely to be short term.

table continues on the next page…

Education costs

The piece that the CMS does not try to deal with is educational costs: these were carved out of the prohibition to the court as regards its making income orders (so the court can still make orders about them, even if the general maintenance is being dealt with by the CMS and the payer's income is below £156k per annum).

We think (but it hasn't yet been tested in the higher courts) that this is not just about private school fees – the carve out seems to be broad enough to cover tutors and – we suspect – any other costs relating to education in a general sense (so we think that school trips abroad and perhaps private musical tuition might all be ordered by a court under this heading).

Costs relating to disability

This would actually be part of the "general maintenance" budget, referred to above – but it is addressed specifically by the law, so we mention it here. Where a child has particular needs then the court is able to consider these pretty broadly and order support to address them. So *even where the CMS prevents the court from making a general order, the court can nonetheless make orders "relating specifically to meeting the expenses attributable to the child's disability".*

A costs award?

The final element in the financial mix is the costs award. It can have a significant impact on the level of provision and it is why it is so important for you to manage your case well.

In both Schedule 1 and TOLATA claims, the court has a duty to decide whether one party should pay towards the legal costs incurred by the other in bringing their case. This could mean that you receive a contribution towards your costs OR that you are required to contribute towards your ex's costs. There are some key points to bear in mind:

First, the decision is only made at the end of the day, when the award has been made (so you don't get to find out whether you are going to receive a contribution rather than pay one and then decide whether to bring your case).

The court's decision in each regime will usually turn on whether you have managed your case reasonably. This will include

- whether you have made reasonable claims and pitched your case reasonably
- whether you have made reasonable efforts to settle the case, and in particular…
- whether you have "won", in the sense of having received more than you were offered. This of course is fine at the start of the case when you have been offered nothing – but as things advance, you may receive what appears to be a not very generous offer – but it is still within the zone of what the court might do at the end of the day. Deciding whether or not to proceed at this point can be very challenging

Finding a way into work – or higher-earning work – however challenging, may often be the safest route to financial security

This system overlaps in a slightly ungainly way with funding for professional costs provision that we discussed in the table on page 29. It is possible to be given funding for your legal costs at the start… but for the court at the end to then conclude that you should contribute towards the other party's costs because you have not run a reasonable case. Here the court will have to decide where your contribution to your ex's costs will come from, as well as how you repay your original costs funding. In 2014 the Court of Appeal said this:

> *"The mother must act responsibly in the stewardship of the monies that are paid for [the child's] benefit. She is not entitled to assume that a court will countenance her unmerited applications by declining to order costs against her or ordering further lump sums to be paid by the father to make good the shortfall."*

This will sound scary. However, if you run a realistic case in a reasonable way and manage your costs well, you should not expect to come unstuck.

4. YOUR OWN RESOURCES

The fourth element in the financial matrix is the resources you are able to access yourself, for example:

Child benefit

- As we go to print, £21.80 per week for the first child and £14.45 per week for subsequent children.
- You do not qualify if you earn over £60,000.
- The award is tapered away by £1 per £100 you earn a year above £50,000.

table continues on the next page…

Other benefits

The system has myriad complexities, but for many this heading will involve a claim for Universal Credit, which is unavailable if you have savings of over £16,000. Health conditions or disability in the family unit will involve enhanced payments. The payments are means tested.

There is quite a good calculator here:

www.turn2us.org.uk/Benefit-guides/Universal-Credit

At FLiP we tend to pull in specialist advice where needed.

Own earnings

Finding a way into work – or higher-earning work – however challenging, may often be the safest route to financial security. We have in mind in particular that the child support and Schedule 1 provision is limited to the period of dependency of the child and it will be important to build a robust plan that will provide for you in the longer-term.

Family support

Beyond this there may be the rallying around of family support, particularly in the short term.

But please note that these resources are likely to be in the frame when the court carries out its Schedule 1 analysis. It will:

- start with a consideration of the household needs
- then assess what resources you can provide yourself and thus…
- arrive at a sense of the shortfall
- then it will consider whether the other parent can meet this need and should be ordered to do so

Changes in such resources, for example cohabitation or remarriage, may lead to a reassessment of the provision being made under Schedule 1.

3 PARENTING ISSUES

Different needs for different stages

Where separation takes place and the children of the family are older, a broad range of challenges and considerations are thrown up.

This chapter is more for the situation where children are dependent, say up to university age. In fact courts will not deal with parenting issues for older children unless there are exceptional circumstances. But for all children, at root, whether they will come through this change in good shape or not (and they can come through it very well indeed) is likely to depend upon their parents and the attitude that they adopt in the separation process and its aftermath.

Separation will usually feel like it changes everything in relation to our children – but whilst change is unavoidable, it need not be for the worse. In the same home, our parenting can be a bit ad-hoc as we try to manage the other demands on our time. The moments actually spent with our children can, in retrospect, sometimes seem rather less focused than perhaps was ideal, and how we spent that time may be restricted or influenced by the other parent in a way that may have not always felt for the best. So there is an opportunity as we move forward to create a better situation not only for ourselves but also for our children: by being able to be more the person that we want to be, we are also able, in time, to create a better future for our relationship with our children.

And yes, there are also opportunities for things to go catastrophically wrong too, for example:

- where the difficulties just leave children stuck in a bad place somewhere in the middle, missing out on rafts of opportunities, struggling to make sense of a seismic change in their life

- or simply facing a childhood characterised by sailing a difficult course between two island-homes that are in conflict with each other and missing out on friends whilst this all takes place

Getting it right should not be as hard as it is, given the benefits for everyone of doing it well. It is just that with trust and communications in a poor place and emotions running high (as will so often be the case) there seem to be so many points at which the better way that would help everyone can founder. The aim of this section is to provide some suggestions about what might be needed to give yourself the best chance of keeping on course so far as can be done, especially over the early period.

Boiled down into the barest essentials:

1.	**Ensure safety at all times for you and your child**; subject to this:
2.	**Avoid this becoming a competition:** one of your goals will be to enable the other parent to be the best they can be. Usually, doing all that you can to promote your children having a positive view of the other parent can only bring benefits to your children.
3.	**Do the best you can and don't bank on the court:** the court is really only a safety net for situations of real danger to a child or parent – most other issues are going to need to be worked out between you, probably with mediator help if required. And however sub-optimal the agreed solutions may appear to be at the time, they are likely to be better than the process of pursuing a solution from a judge at court.
4.	**Pace it and be patient:** things may be horrid today, but giving back to your ex in kind may well stoke the conflict, with your kids as the losers. Yes, there may be some issues where there are no easy third ways but generally try to pull back rather than end at loggerheads. Consider making use of **www.ourfamilywizard.co.uk** if communication is hard.
5.	**Keep the child informed:** but only at an appropriate level (and as agreed between the parents, if possible) and only as regards the things that they need to know about.
6.	**The child has a voice:** and that should be heard and given appropriate weight – but the parents make decisions. The guideline is "voice not choice".
7.	**Try to create a clear structure but operate it flexibly:** a clear structure will enable everyone to know where they stand – but we know that families are complex and things happen. Operating that structure flexibly too will give the child the best in a constantly evolving world.
8.	**Fix your principles:** agreement to a set of principles is likely to make it easier to develop consistent day-to-day arrangements and to do so with greater ease.
9.	**And always think ahead:** … consider how the other parent will view your actions… create a culture of doing what is best for your child, being patient, and if possible talking things through to come up with what is best.

Escalating tensions towards the point of separation

Fear, particularly around something so irreplaceably dear to us, seldom brings out our best. We are likely to step out and prepare to protect the position… but these are the very actions that are likely to bring out the worst in our co-parent.

However well we think that we may know our former partner, we may struggle to predict what reactions separation may generate. Escalating tensions are dangerous: the more things escalate, the less predictable reactions will be.

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Briefly, the culture of the legal system is that of promoting co-parenting where safe. So, provided there can be no argument about safety, the legal culture will always be to back both parents' involvement with their child.

More on the overview

There is no legal culture of 50/50 time – there is only a recognition that, where safe, children need a proper relationship with each parent and that dictates that they are having meaningful time with them.

In our experience, co-parenting works. Often career or historic arrangements will have put one parent in the role of main carer. The happenstance of separation may cement that arrangement into a form of starting point. However, both adults involved in a child's life mean greater resources available, respite for each and children have the benefits of experiencing different household upbringings.

The point of separation

Separation is best planned; it will be the child's first experience of separated co-parenting and, carried off well, provides easy wins to reassure the children that all will be ok.

After separation

The parent who is managing a difficult situation well for the sake of their relationship with the children during the initial period whilst things settle down is likely to operate a culture based on:

- listening, suggesting & holding back
- giving recognition and appreciation for the role undertaken by their co-parent, rather than minimising and belittling
- being patient

Where there is a chance to do it better

Parents who have managed their separation well and are managing their children's upbringing well will usually have positively addressed the following:

1.	**Themselves** We can only parent our children well if we are in a good place to do so. We need to attend to ourselves and get the support we need, in particular to manage the trauma of the end of the relationship.
2.	**Safety** The non-negotiable for every child is ensuring their safety from emotional and physical harm and everything else is subject to this over-arching requirement.

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3. **The parents' relationship**
   Where our interactions with the other parent are driven by our own needs and based in the history of the relationship, we are going to struggle to achieve the sort of working arrangement that will enable the 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, you still need to steer the steady course that is focused on the child's needs rather than allow the child to witness tit-for-tat exchanges.

4. **Ground rules**
   As the separation takes place, and over the subsequent early period, 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 will include how you are going to raise and negotiate issues relating to your children, respectful listening and so on.

5. **Informing the child**
   Good management of the discussion where the child is told of the impending separation is important. Ideally together, tell the children of the changes to come and reassure them – not just once – but also deal with their questions during the after-shock period. Be honest and find a reassuring way of talking through the things that you don't yet know. We look at this stage below.

6. **Staging the separation**
   How the separation is staged will be the child's first experience of how separated parenting is going to be. Doing it well, with proper information, good timing, joint management and positivism can deliver particular benefits. Don't worry, though, if things don't go well on the first occasion. It is usually better than the child's worst fears and there are usually second chances to build from what you have learned.

7. **Goals and principles**
   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. Working out these "self-evident truths" that will underpin how the parenting will work promotes better communication, faster decisions and consistent approaches for the future.

   For many families, this will include:

   - the imperative of promoting the best relationship possible with each parent and with the wider family on each side
   - 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 yourself in the child's shoes and understanding their position, which will include recognising the difficulty for the child of seeing conflict between the parents
   - being relentlessly positive about the other parent

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8. **Good arrangements**
   This is the way that parenting will work going forward, in line with those principles. They will also provide the means for assessing different options for working out the child's arrangements between the two homes and how important times (holidays, Christmas and birthdays) are to be structured. It is all too easy to sink into exchanges over who was to blame for the end of the relationship and have the arrangements fed by that sense, rather than what must remain your metric: namely what will work best for the child.

9. **Family story**
   We define ourselves by the stories that we tell. Children do too – perhaps even more so. Shaping and explaining the separation in an authentic way that also enables the children to make sense of it will help them, and it may enable more of the context around the family of relatives and friends to remain intact rather than their being alienated and polarised into different camps on one parent's side or the other.

   But families can't wait – children will want an explanation that can help them make sense of what is happening to their world and will struggle without it… so a good enough account needs to be managed quickly, even if it is refined later. Third-party help is often particularly important here.

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 and then have to manage the fall-out.

11. **Implications**
    The focus on children can inform the approach taken to other parts of the separation process: how it is timed, how it is to be managed and indeed the outcome. For example, when an ongoing regular involvement is intended through the week, that will inform choices around (continuity at) school, (geographically-close) homes and (child-friendly) careers.

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It is ok to say that you don't yet know… that life may feel a bit messy for a while but that you, as parents, will be doing the best you can

There is a considerable literature around the approaches that might be taken by parents who are separating, focusing on making the situation work well for their children. And much will depend on the situation, in particular the ages of the children, but also their nature generally. We look in more detail at one stage that will come up early on – the informing one.

Task five: informing

1. **Plan – both together**

   - Ideally both parents will talk to the children together. That will mean planning and agreeing what is going to be said.
   - Usually, keeping it smaller & simpler is better than straying into difficult territory… small and simple may be all that the children will be able to hear at the first stage.
   - Each parent will want to reflect ahead of time on whether they will be able to manage their feelings during the conversation.

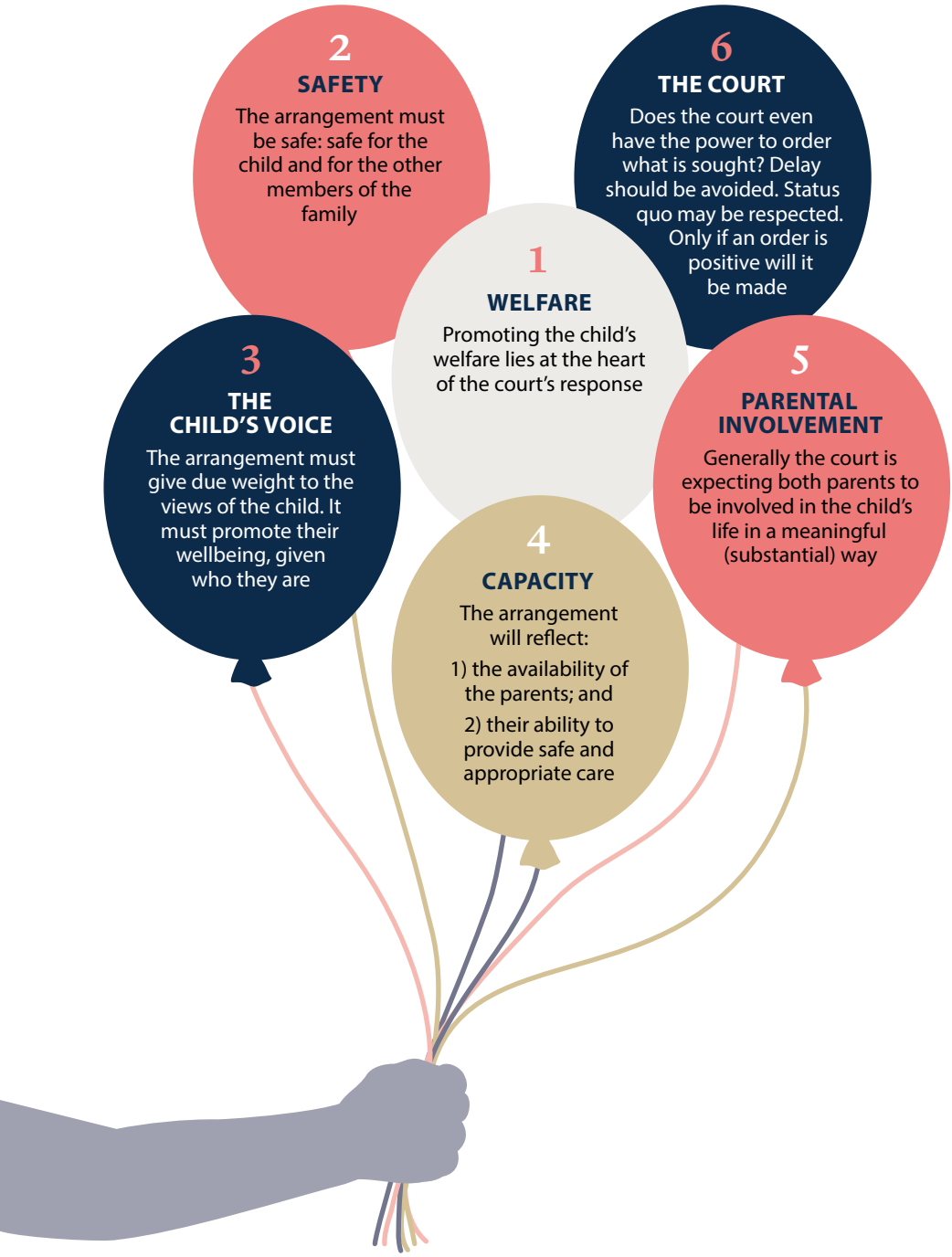
2. **Fault… no! Honesty… yes**

   - We think that our children may want to know the back story about why this is happening – they absolutely do not and it is a topic better kept well away from. not just at this initial stage but more generally and longer-term too.
   - They may well need to know that you have tried to keep things going but that it has not been possible and you are truly sad about that – they will not need to know about infidelity or the negative views you now have of your ex.
   - They should be reassured that the separation is not about them – that it is not their responsibility.
   - And what you tell them has to be honest: now more than ever they need to know that they can trust what you tell them.

3. **Changes**

   - Children will usually want to know a whole raft of practical things… things that may not yet be decided.

Parenting arrangements: the essentials



- It is ok to say that you don't yet know… that life may feel a bit messy for a while but that you, as parents, will be doing the best you can to provide for the best possible solutions, and that you will keep them informed along the way.

4. **Care, love and support**

   - Ideally this is the main message that the children will come away with: that their parents' love for them is absolute and unwavering, that they will each always be there to support them and each care for them no matter what.

5. **Follow up**

   - The shock of the news (even where expected) may generate a flow of questions from some children and mute horror in others. Tell them that asking questions to each or both of you later on is fine. Children are likely to circle back to ask questions (or even the same question) time and again.

6. **Sticking to it**

   - Needless to say, sticking to what you have promised/committed to is crucial. This is going to inform what you say at this time – don't make promises whilst things are uncertain. Your children need to know that they can depend on what you say, even if some of it is not what they want to hear.

7. **Make it real**

   - Sometimes separation will follow soon after – for others separation is not possible for many months. Children can be confused if the conversation happens and then nothing changes – at least separate bedrooms will be usual – often separating out into different homes will help, in particular where it can be managed well. Don't try to minimise what is going on. This will be seismic for your children and pretending that it isn't won't help. They will need space to be sad and their reactions will be confused for some time. If you are worried, get help. Agree with your co-parent to keep the schools informed. Think about telling wider family members too so that they can provide support.

There is a lot of great help available online and locally. Look into what will help you and follow it through.

The legal dimension

Having said that it is better to steer clear of the court in most situations, it may nonetheless be helpful to have in mind what clarity the court can offer. First, an overview which may help to give a sense of how the courts come at these issues:

The law operates as a safety net for parents who can't agree structures that will best meet the needs of their children.

The key strands in that safety net are the following:

1. **Jurisdiction: which legal system decides?**

   Where children and their parents are based in ("habitually resident in") England and Wales then it is usually English legal principles 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 makes the decisions.

2. **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. Only in extreme circumstances, and when there is no alternative, will an authority intervene, ultimately by taking the children into its care.

   Schools also are often vigilant and generally well-resourced to provide support (getting them on board by agreement between the parents is generally a sensible early step).

   However, 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, often a criminal offence is committed

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

3. **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 decision making unless this is inappropriate (for example, if there is an emergency).

   Parental responsibility ("PR") 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."

   This is not just about "rights"; there is an emphasis on "responsibilities". The obligation to financially maintain a child exists whether or not there is PR; having it means additional,

positive, non-financial responsibilities and rights in respect of the child. Those rights and responsibilities are not lost where someone else also has PR for the same child.

The mother automatically has PR. The father (for which also read other legal parent) has it automatically if he is married to the mother when the child is born. A father can also obtain PR by the parents jointly naming him on the birth certificate, by entering a PR agreement with the mother or getting a PR order from the court. What is the importance of this for the father?

- the father of the child acquires rights, for example to take an equal part in questions of the child's religious upbringing and schooling; a father would have to be consulted should the mother wish to remove the child from the jurisdiction or change their name
- the father would have the right to look after the child if the mother died, even if she had tried to appoint someone else as the guardian, for example in her will (unless the mother has a certain sort of court order – in which case she retains this power; of course this would not stop other applicants such as the father from seeking orders in relation to the child's residence)
- the father with PR can appoint someone to be the child's guardian following his death and the death of the mother
- the father would be party to any adoption proceedings concerning the child
- the most important advantages are that the child, together with their teachers, doctors etc, are aware that the parents are equal before the law; and from the child's point of view they are aware that their father has had the commitment to them to acquire PR

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*"

4. 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 (s1(5)).[5]

5. Welfare of the child

If it comes to intervention, then the court must impose the outcome that is in the best interests of the child, by promoting the child's welfare. This is the sole criterion for identifying how the court should decide between options.

6. The welfare checklist

When the court is trying to work out what is best for each child, there is a list of the things that it must consider (s1(3)):

a) **Delay** (the assumption being that delay is prejudicial to a child's welfare)

b) **The child:**

- their wishes & feelings (in the light of their age and understanding)
- physical, emotional & educational needs
- age, sex and background
- any harm they have suffered and the harm they are at risk of suffering
- the effects of any change on the child

c) **The parents:** how capable are each of the parents in meeting the child's needs?

d) **The powers** that the court has.

e) 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**"* (s1(2A)).

Note:

- this does not dictate equal time

5 References to section numbers are references to the Children Act 1989 (as amended by the Children and Families Act 2014).

- but it does mean that involvement directly or indirectly is likely to be treated as advancing the child's welfare (s1(2B)), provided that
- the involvement *"does not put the child at risk of suffering harm"* (s1(6)), and
- the assumption is that involvement is safe unless there is evidence to the contrary (s1(7))

7. Growing independence and increasing say

The welfare checklist refers to the wishes and feelings of the child in the light of the child's age and understanding. What follows is that, as children become older, their voice should be given increasing weight in the assessment process.

8. The powers the court has to manage its interventions

The welfare checklist at point 6 above, demonstrates the range of powers that the court has by which to pursue the goal it seeks for the child. These 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 current.

Now the court must address the child's needs through one of the orders set out below. These are somewhat clunky (but were designed to reduce conflicts by avoiding labels for the children which proved in the past to generate disagreement):

Child Arrangements Order
This 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)
- "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

Prohibited Steps Order
Such an order would contain or restrict how a parent is permitted to exercise their parental responsibility (for example, preventing them from taking the child to a particular place or removing them from a school).

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

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

To repeat: Why the law may not be the best answer

Some families need the protection and clarity of the law. Having a court order will also automatically invoke certain other arrangements.[6] But that does not mean that, in the majority of cases, the court should be the default option. Parents may prefer to work things out by agreement because those self-determined solutions are:

- faster and cheaper
- determined by the parents, who know the child and their needs better than a judge ever could
- less hard-edged (and so better able to fit around the messy unpredictability of family life)
- better able to change in the future (which is more likely to fit well with the rolling and evolving nature of children and family relationships)
- reached without going through a court, where the court process will so often generate criticism and allegation, polarise feelings and make co-operative parenting so much harder to achieve for the future

6 For example, where a court order is made then there is a prohibition on changing a child's surname (s13(1)) and a prohibition on the child being taken abroad without the consent of every person with parental responsibility – save that the person in whose favour an order is made is permitted to take the child abroad for periods of less than a month (s13(2)). These prohibitions may exist anyway in consequence of shared parental responsibility.

We are not a poor parent when we feel that we could be doing a better job – we are often a parent doing our best in difficult circumstances and it may be that we need further help

Further, the court process is fallible – the court may not identify the outcome that would suit a child best: parents may end up with an arrangement imposed on them which neither of them ever would have chosen and certainly that neither of them – nor perhaps the child – want.

Where there is impasse though, and ultimately the court is needed, some of these problems can be managed better by appointing an arbitrator to make the decision that otherwise the court would make … but most children would prefer to know that their parents are able to work things out. Reaching for a court/arbitrator to help decide so often results in needing to keep reaching out as the changes in the child's life emerge: better and WAY cheaper to be able to make these decisions between you.

The law may be needed to help decide big issues one way or the other (relocation abroad say, or schools) or to address issues of safety, but is unlikely to be what will help co-parents navigate their children through the odyssey of their upbringing. That is a challenge even in one household. It may be more demanding when there are two, but is likely to be particularly testing where the parents have difficulties working together, for example when the separation has been tough.

The key questions at the start are, therefore, likely to be:

1. whether, with proper support, the parents are likely to be able to reach agreement, and…

2. if not, whether the court – or an arbitrator – is likely to make the sort of order that will make things better

"Better still" will often be a question of whether parents get help and are then able to reach agreement to achieve a consistent approach. Where this is done, children can have a positive childhood.

Parenting well through separation and its aftermath is not instinctive. We are not a poor parent when we feel that we could be doing a better job – we are often a parent doing our best in difficult circumstances and it may be that we need further help and ideas to create significant improvements.

4 FINDING THE RIGHT PROCESS

Process and pacing probably have more to do with good outcomes than any other elements we touch on in this booklet: engage the right process at the right time and, if you are able to do it with the right mindset, the right outcome is most likely to follow.

At FLiP, we are likely to spend significant time in our discussions with you working on this part of the conundrum: what next steps are mostly likely to take you towards most of what you seek?

What underpins this is that a formal process through the court or the Child Maintenance Service is usually hard work, slow or expensive and often all three. That would not be so bad if the outcomes that ultimately emerge were things of beauty, justice, calm and imagination, which worked incredibly well. Of course they are generally none of the above. The solutions imposed are exactly the things that were available at the outset… just that later on there are fewer financial resources and probably less goodwill to make them work well. So parties can find that there is seldom even vindication in the formal process, just a slow grind to a fairly low level conclusion.

But that is still what may be needed in some situations and if it is clear that this is the route you must go then it is far better to get started on the formal process early: there is one thing worse than the formal process and that is a lot of delay and expense before the formal process even gets started.

For most the early aim will be to build a constructive dialogue focused on resolving the issues and pulling together an overarching agreement. This might be done:

A formal process through the court or the Child Maintenance Service is usually hard work, slow or expensive and often all three

- in direct discussion
- in mediation, or
- with the help of your partner's lawyers, in constructive negotiations

If agreement is not possible then a range of parallel processes may be set going. In an extreme situation, where court proceedings are required to address all the aspects involved, this might involve the following:

		Outcome
Personal protection	Where there are issues of personal safety, proceedings are issued to obtain injunctions from the court 1) prohibiting molestation and perhaps 2) ordering the other party from the home. A first application will be made on an emergency basis and may be done without warning. The police are involved. There is then a return date when the issues are argued through, evidence is taken and a decision made by a judge.	Injunctions focused on providing protection.
Child Maintenance Service	At the point of separation, an application is made to the CMS. Within 5-8 weeks, funds will usually start to be provided. Where finances are complex, usually the CMS will under-assess and: • a mandatory review must be applied for • some months later (when, as is usual, this is refused) an appeal can be issued Payments at the original level are likely to carry on (if this is not done, enforcement proceedings may be raised). There will be a wait before the CMS case papers are prepared. You then have the right to provide your evidence – as may the other party. A review hearing is likely. And at some later point (probably after an adjournment or two) a tribunal will make a decision on your application, correcting the award all the way back. There is then the process of starting to gather in the arrears. The process may well take a couple of years or more. Gathering in any arrears will take further time.	An award of child support, reviewed each year with the possibility of enforcement mechanisms.

table continues on the next page…

		Outcome
Parenting arrangements	If there is a dispute as to the arrangements for care of a child, or decisions to be made about a child, then an application can be made to court. You are required to complete a fairly detailed form and where domestic abuse is alleged provide full details as to your concerns. Often you must attend an intake meeting with a mediator (called a MIAM) to be able to issue your application. A gatekeeping process will assess the level of judge to deal with your case. CAFCASS, a government agency, will carry out a high-level assessment as to safeguarding. A first hearing & dispute resolution appointment (or "FHDRA") will be listed within a couple of months, where the court will seek to help you reach an agreement. If this is not possible then directions will be given for the management of the case, for example: • (where there are contested issues of abuse) the listing of a separate hearing to make findings • the preparation of a formal report on the children's wellbeing and their wishes and feelings • the exchange of statements There will also be an endeavour to work out safe interim arrangements. The future conduct of the case will depend upon the directions but may involve two further hearings before a third hearing when the judge hears evidence and submissions and makes orders.	A series of rules as regards, for example, living arrangements, sharing the child's time and making decisions.
Property claims	If there is a dispute as to the beneficial ownership of a property, or if a joint tenant seeks to force a sale of a property, an application can be made under TOLATA. At this point it may be necessary for your lawyer to seek a restriction on the legal title to prevent the property being dealt with. These types of claims are governed by a different set of rules in the civil courts compared to the rules adopted by the family courts. There is a general pre-action protocol that requires a letter before action to be sent to the proposed defendant before issuing a claim. The letter should contain concise details of the claim, the basis on which the claim is made, a summary of the facts, what you want from the defendant, and if money, how the amount is calculated. Key documents should also be disclosed. Most TOLATA cases require the "Part 7" procedure which provides for more disclosure, evidence and pleadings to deal	Definition as regards realisation of any assets and division of the proceeds.

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		Outcome
Property claims *(continued)*	with complex disputes of fact. However, where there is not a substantial issue of fact, or you are seeking an order for sale, the "Part 8" procedure can be used. Under Part 7 you file particulars of claim and a defence is filed. A gatekeeper will most likely allocate your case to the multi-track and a case management conference ("CMC") will be listed. Disclosure and a costs budget will be ordered in advance of the CMC. Further disclosure, statements and, if necessary, expert evidence ordered at CMC. A pre-trial review hearing will likely be listed in advance of the trial. The trial is likely to be public. The judge hears evidence and imposes an outcome. The general rule is that the loser pays the winner's costs, but this depends on the "Part 36" offers made.	
Schedule 1 claims	A MIAM meeting would, again, usually be needed before issuing proceedings. Starting proceedings would fix a first appointment, the case management hearing, probably 16-26 weeks later. Prior to then disclosure would be provided. If you needed help with funding from the respondent, you would try to fix this as quickly as possible – ideally before the first appointment or at least soon after. There is then the further documentation, valuation and answering questions phase, before: The financial dispute resolution hearing (or "FDR") probably 4-6 months after the first appointment at which the court will try to help the parties reach agreement. if successful the order is written up and matters are concluded. If not, statements and updating disclosure and so on follows, leading up to a final hearing perhaps 6-9 months after the FDR hearing. Here, the court will hear evidence and impose an outcome. Split hearings may be necessary if the court runs out of time to deal with the case. Appeals to a higher-level court are possible, if one side thinks the judge has erred. The press may be given access to the hearings. Costs orders may be made as discussed in **Part 2**. Schedule 1 cases are notorious for the long-tail of litigation over implementation arrangements. So even a final hearing may not bring the situation promptly to a conclusion.	The loan of funds for housing, outright payment of sums for equipping and other one-off needs, and possibly maintenance (eg to top up the CMS award, for schooling or disability costs).

It is difficult to estimate the costs of an operation such as that described on the previous pages (where all elements are running all the way through the courts) – but probably £150-250,000 on each side. Complications (or appeals, as would be on the cards in cases such as this) would push the overall outlay higher still. It would, thankfully, be unusual to litigate on all fronts in this way. Where it happens, it would suggest inability to agree on almost anything and that would point to very hard-fought litigation indeed (the fewer points on which litigation proceeds the cheaper it is).

It would be difficult to see this course as a good one. A spend of even £200,000 between the parties would show few corresponding benefits in the quality of the outcome. The risk is that one party might find themselves picking up the bulk of the costs, which would radically undermine the value of any perceived wins in the outcome.

Supported dialogue could manage all of the above…

1. in a fraction of the time

2. at lower cost

3. with much lower intrusion (the workload on the client of preparing for these hearings has been likened to a full-time job) and anxiety in the parents' lives

What is more…

4. the parents' voices are likely to be much louder in the mix… the solution that you craft is more likely to make best use of the available resources because you will have them focused on what matters to each of you – rather than according to some template dusted off in the court system

5. your ability to find a way through all of this builds capacity to find solutions together. You are less likely to need to return to court, for example around parenting issues or any variation of the financial arrangements, because you have found ways of taking control and managing these challenges and opportunities yourselves

The reasons why this doesn't always happen include these:

- people's lives are often intertwined by relationships and there is considerable complexity to untwist – the legal rules are not always clear or in alignment with what may feel right: so there may be no clear route forward

- this highest need for co-operation, consideration, respect & creativity often comes at a time when the capacity for it has hit a low point, with the end of the relationship and fears about the future

- sometimes it is as simple as the lack of good guidance from the professionals towards the systems and support that people need to reach these outcomes: people in dispute may find their way into litigation because they are not aware of an alternative and are not shown how to make such alternatives as exist work well

You may already be asking for the answer: about how best to manage the situation, what process alternative is best? There is no one answer. Family lawyers will often have their particular preferences as to process or they may have a range of instinctive criteria leading them to promote one process over another. So there is not one size that best fits all situations. Further, the course adopted is the result of dialogue between (where each side is represented) the lawyers on each side and picking a route forward is likely to have a lot to do with whether the lawyers are each enthusiastic about it, and their views of whether it will be beneficial.

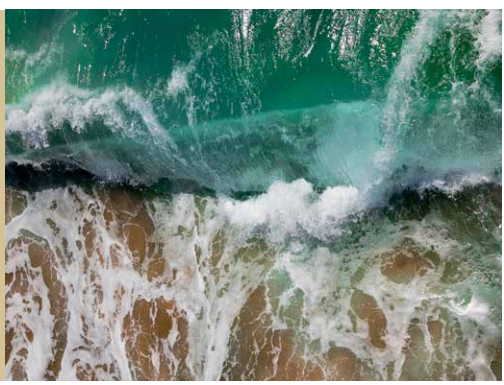
Because of this, it is probably only helpful to give a broad overview of what each process alternative involves and the differences between them, as these are likely to be considered in detail as matters progress and as the different preferences of the parties and their advisers become clearer.

There is one thing that all these processes have in common, which is that they only happen because the parties agree for them to take place: there is no picnic without first an agreement to sit down and have one. Otherwise there is either hiatus, reconciliation or the long walk to court:

Court doesn't depend upon an agreement to engage – either side can issue an application and the court hearing dates will come and require engagement, preparation and attendance: there is no choice… But non-court dispute resolution (NCDR) will only happen if there are agreements:

- to do it
- when to do it, and
- the form it will take

People in dispute may find their way into litigation because they are not aware of an alternative



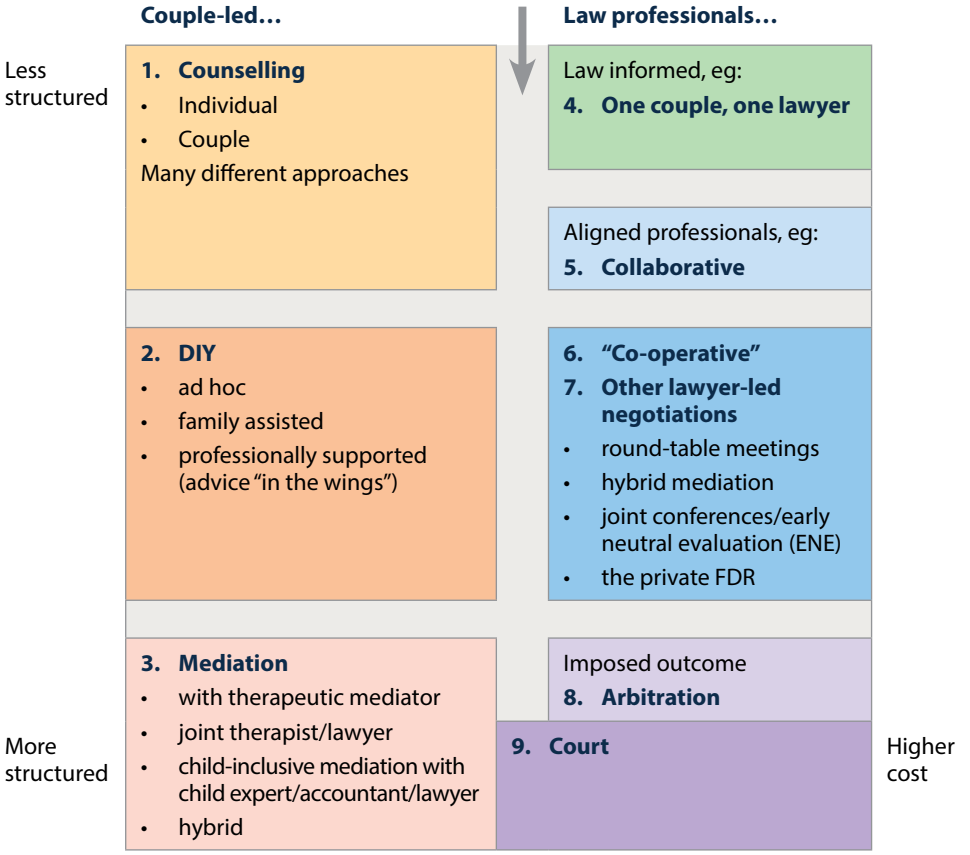
The most used alternatives are shown in the grid below:

<table>
<tr><th></th><th>No adviser/occasional advice</th><th>Directly involved adviser</th></tr>
<tr><td rowspan="2">No facilitator</td><td rowspan="2">The “DIY” solution, with or without lawyer support in the wings.</td><td>Collaborative practice</td></tr>
<tr><td>Lawyer-led negotiation
This might be negotiations by letter or a one-off or a series of meetings, or ‘co-operative’ which is a term used for less structured/ boundaried collaborative process.</td></tr>
<tr><td>Neutral facilitator</td><td>Family mediation</td><td>Occasionally we see family mediation with the lawyers brought in – usually during the later stages.</td></tr>
<tr><td>Facilitator and law guide</td><td>Directive mediation
Occasionally you might have a neutral facilitator with legal expertise brought in</td><td></td></tr>
<tr><td>Facilitator and tester</td><td colspan="2">Hybrid/Crunchpoint mediation
(usually with lawyers – possible without them)</td></tr>
<tr><td>Help with the law</td><td colspan="2">Neutral Evaluation/Private FDR</td></tr>
<tr><td>Imposing an outcome</td><td colspan="2">Arbitration</td></tr>
</table>

These processes might come in combinations or in a sequence. For example, neutral evaluation is pretty pointless unless it happens in the context of what is then done with the guidance on the likely outcome, so this might be couched in mediation; or, more usually, it is provided in the context of lawyer-led negotiation.

Med-2-arb would see a process commencing in neutral facilitative mediation, but with the unresolved issues then being referred to arbitration if an overall agreement can’t be reached.

An alternative way of looking at the process might be the extent to which it is controlled by the couple or managed by lawyers. This might be thought of as a series of rooms along the following corridor, which also provides our index for the brief sketch that we turn to next as to what is usually going on in each of them:



So here…

- In the top left is a process with a counsellor helping the couple address relationship issues. The parties might meet one counsellor together to work on the relationship, or make sense of its ending, and seek to create a good enough relationship going forward for the sake of co-parenting the children, for example. Alternatively (and the more usual course where the end of the relationship is accepted) one or both might be having individual help with a separate counsellor. The focus is on the ending of the relationship rather than the nuts and bolts of the pragmatic issues, which is the "stuff" of the legal agenda.

- In the orange room is the DIY arrangement as the parties seek to find their own agreement; perhaps they are taking their own legal advice to help them make decisions.

- Next is the rose room of mediation where there is an independent and non-aligned professional facilitating the discussions and perhaps providing recommendations and giving broad-based information (but no advice).

- Across the corridor at the top sees the couple seeking guidance on an outcome from one lawyer.

- Next in blue sees a variety of options usually involving each party having their interests protected by their own-appointed legal professional.

- Next are shades of purple where the parties will ultimately have a solution imposed on them, either by an arbitrator (8) or by a judge (9).

Drawing the strands together across this continuum:

	DIY	Mediation	Early neutral evaluation (ENE)	Collaborative	Lawyer-led negotiation	Arbitration	Court
Cost	Minimal	Cheapest of the professional processes	£2-5k, but unlikely to provide a solution on its own	£5-£30k	£10-20k	Depends on case, say £20-40k	Depends on case, say £80k upwards
Speed	Completely dependent on the parties – from minutes to years	Usually 2-5 months	Similar to mediation	1 week upwards	Two months to a year or more	2-5 months	12-18 months
Professional help	None	One (who is neutral); lawyers can be appointed to assist, usually outside the process	One (who is neutral); lawyers can be appointed to assist, usually ***within*** the process – but there are variants	Two partisan lawyers but operating co-operatively by contract	One or more partisan lawyers each	Usually one or more partisan lawyers each; the arbitrator/judge is independent. Acting in person is possible but challenging	
Opt-in	By agreement						By application following a MIAM
Advice	Advice can be taken outside the discussion process		Advice can be taken outside the discussion process – but the intention would be to obtain and rely upon the law-guidance from the neutral professional, to provide a reference point for dialogue and solution Usually "in the room"		Perhaps "in the room"	Privately/separately	

table continues on the next page…

	DIY	Mediation	Early neutral evaluation (ENE)	Collaborative	Lawyer-led negotiation	Arbitration	Court
Law content of outcome	Usually none	Part of the context but not in the lead The purpose of ENE is to give predictions of what the court would do, albeit when information is often imperfect Agreements are struck usually with awareness of the court's likely approach, but ideally it is the parties' aspirations, not the court's approaches that prevail			Usually over-whelming	Total	
Agreement	Of little relevance to any finalised arrangement – but can be a starting point	Where achieved, usually then approved by lawyers and submitted to court		Submitted to court		Binding but usually court-approved anyway	The court makes its order
Conclusion	By agreement					An outcome is imposed	

5 THE RELATIONSHIP

It may seem strange to see a booklet about the end of a relationship finish with a chapter about the relationship. And we appreciate that what we set out here can seem like a very challenging ask indeed.

But hopefully you have started to sense how:

- the capacity of parents to work together has a direct impact on a child's wellbeing
- a parent's involvement (your ex's involvement) in your child's life is likely to have a direct impact on their willingness to provide properly for the child's home and costs of upbringing. Provision is more likely to be made in full and on time because there is a real sense of the impacts on the child of shortfall, including the indirect stress on the child of stress on you
- this more constructive mindset is more likely to enable the away-from-court negotiations on all aspects that arise from the separation to be concluded more successfully

Or to put it another way…

- the financial outcome, rather than being a legal analysis, is so often more a product of simply the process by which things are resolved…
- and rather than having a free choice as to the process option to be adopted, this is often dictated by the state of the relationship, levels of trust and pacing…
- where trust is low and the relationship threadbare, litigation is so much more likely to be the default with its high spend, low speed, polarisation and cruder outcomes
- similarly, when it comes to the parenting relationship, without any doubt, the capacity of the parents to maintain a positive relationship or at least one that is dignified, respectful and business-like is the single largest contributor to the wellbeing and happiness of their children during and after separation

Reasons for dealing with it

Strange it is then that most people, at the end of their relationship, have such reluctance to engage in the relationship agenda. For those people:

- it may seem flighty and peripheral, when actually it is central to all that is going on
- it may seem abstract, but it is actually highly practical
- to engage with a relationship professional can seem an expensive extravagance, but will usually enable solutions to be reached to practical questions more quickly and affordably, and promote better decisions that will stand the test of time
- it may seem too personal, but the intrusion of court into our personal lives where things go wrong is far greater

In short, children may benefit significantly. There may be much to save by hunkering down into the business of *"How did we get here? What is the other person thinking? How best do we go forward?"*. Once those questions are addressed, it can be quicker and easier to then be able to make practical plans to solve the situation.

FLiP was set up in 1995 on a central assumption that whilst there is a bewildering array of practical nuts-and-bolts issues to address on one side of the coin, outcomes often ultimately reflect the flipside: what is going on in the connection between the separating former partners. By offering our clients the opportunity to grapple with this and manage this dimension well:

- more intelligent solutions are more likely to be achieved
- more quickly
- and at lower cost
- within a process that will be fantastically less abrasive, and

There may be much to save by hunkering down into the business of *"How did we get here? What is the other person thinking? How best do we go forward?"*

where a far calmer future beckons without the storm residue that will so often be kicked up by, for example, a blind engagement with litigation.

What is on offer

Someone trained in relationships and focused on practicalities, such as our in-house counsellors Jo Harrison and Andrew Pearce are on hand to help you:

- they will provide integrated help and support
- they will seek to build understanding around the habit/dynamics of the relationship, providing answers to the *"why does [s]he do that?"* questions, and often an analysis as to how the cycle of cause and response, in which you are a central part, can be changed
- they can help focus on direction and offer suggestions around the practicalities of co-parenting, particularly where things are difficult
- they can think about appropriate referrals to specialists where this may be of help

The need for unique assistance

Each relationship is unique and so there is no single track that we can map for you to manage the situation for the best. Each ending of a relationship is likely to need a direct conversation with someone with relevant experience and training. Feedback from clients suggests two one-hour sessions is usually the minimum required for practical help. All we can do here is provide a couple of pointers around the basics.

Our in-house counsellors will seek to build understanding around the habit/dynamics of the relationship

Extreme reactions

First, the end of an intimate relationship is overwhelmingly challenging. Relationships are about integration and little wonder therefore that almost every aspect of our lives is affected, generating and raising issues of panic, fear, uncertainty, self-questioning, self-esteem… The list is endless and puts this event right up at the top of the stress scale alongside death of a life partner, as is discussed **here**.

Changing reactions

Secondly, participants in the crisis of separation often change… you might see a former partner:

- react with blind fury to the rejection or breach of trust that precipitates the breakdown
- then become stunned and non-functioning
- later there may be a "cornered tiger" syndrome as the reality of change is raised
- later again, there may be what appears to be total disengagement… yes, a desperation to see things finalised and life start again, but a complete absence of control over the process by which solutions might be achieved
- the solicitor from whom your partner may have received such enthusiastic support over the early days may now be ineffective to have your former partner engage productively or at all. It may be only at the point of the FDR (in the financial procedures, for example) that your partner will engage with their barrister or hear what the judge is saying and be able to identify what approach sensibly they should be adopting to see things concluded

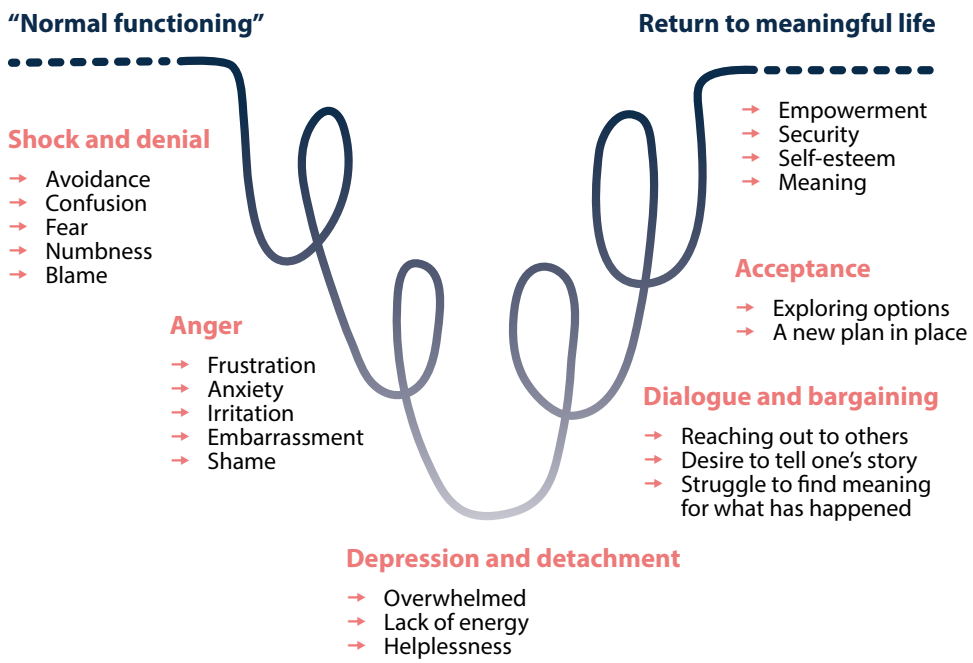
Each of these reactions may be unlike anything that you have ever encountered during the relationship, OR you might see patterns from earlier stress points.

Very often what you may be seeking to do is to help your former partner move forward to the point where they are able to be productive – and engage their highest performing self to see a good way forward.

Help from the bereavement curve

Thirdly, when we suggested above that there was no single track through this process, that is not entirely so as there is some research that helps. Many clients recognise what they – and their partner – have been through in the bereavement curve.

This was observed by John Bowlby and made famous by Elizabeth Kubler Ross. It is often presented as follows:



The help in this version of the diagram is the clarity it gives as regards the likelihood of looping back to earlier stages and so on, depending on triggers and the situation. If this curve is engaged for your former partner and/or for you, then little surprise that early conversations are so hard, because you are unlikely to be at the same point of the curve at the same time, at least until much later on. Where you are having, from this challenging space, to manage children either doing the same or at least reacting to the tense atmosphere and uncertainty, these are hard times indeed. But knowing this provides reassurance of likely progress towards something different.

Where to look

Many people say that they have good friends and family support and so look no further. It is of course hugely important to have friends and family at this time, but there is a value to having support from a more independent third party who may be able to offer different and experienced perspectives rooted in specialist training in what research, neuropsychology and a whole lot besides has to teach us. This is sensitive and crucial work.

Family and friends can operate as an echo chamber for your thoughts rather than challenging you to look wider and deeper, as is so often needed. Sometimes, the loyal support of family and friends can be an obstacle to progress, however well-meaning.

There is a wealth of information on the web, for example: **www.helpguide.org/articles/grief/dealing-with-a-breakup-or-divorce.htm**

Many people have this professional insight and support already in place and an established relationship with a good professional is likely to come into its own at this point. Nonetheless, we would usually advocate a further stage which is the appointment of someone who knows the practical and legal side of the separation process too and has taken this journey many times with a wide range of people. They can provide their insights to assist the progress that your legal team are seeking for you. If your support can provide this then great. Otherwise, the support at FLiP can work alongside FLiP lawyers, or your own if you have appointed and are working with someone else.

We would usually advocate the appointment of someone who knows the practical and legal side of the separation process and has taken this journey many times with a wide range of people

6 WHAT NOW?

You may have accessed this booklet prior to instructing a lawyer or may have been given it to read after a first meeting.

You will have gathered from that meeting or from this booklet the value of the well-managed and cost-effective case, and the value of input from a counselling perspective. This, in particular, can help you better understand the dynamics of what may be going on between you and your ex, but also how best to support your children through this transition.

What is likely to be of most value to you now from your lawyer (if you are not there already) is:

- a clear estimate of your likely entitlements
- if (as is likely) your lawyer can't yet give you this, then talk through what are the variables and what needs to happen to get clarity around this crucial part
- alongside, start to think through the process and strategy: how you are going to get from where you are now to the outcome that would be acceptable…
- this is going to include working out how to fund the steps and stages along the way

The team at FLiP has long prioritised the giving of advice and assistance to the never-married family. We co-authored the first edition of a much-loved guide in 2007, which is now being republished in its third edition and also leading on the challenging questions of child support. Alongside, we have promoted the child-centred management of cases and sought to prioritise the promotion of best outcomes for children by agreement where possible (and through court application where not). We have broad experience not only at court in the management of these cases, but also across the continuum of alternatives from mediation, through collaborative, lawyer-led negotiations and to arbitration. We act for applicants and respondents, gathering from our diverse work the experience to better promote the interests of each person who turns to us for help.

If you would like any further information on the matters covered in this booklet, please contact any member of our team of family lawyers at E: **hello@flip.co.uk** or T: 020 7420 5000

DISCLAIMER

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

IMAGE CREDITS
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FLiP Family Law in Partnership

Family Law in Partnership came into existence in 1995 to equip those who sought better outcomes for themselves and their families with the help they needed. It was established to provide cost-effective support joining up the insights required over the legal and the relationship aspects. It therefore offers counselling, insight and support on the one hand and legal advice, guidance and action on the other. It is experienced in away-from-court processes (mediation, collaborative etc) which provide the chance of the cost-effective outcome but also expert in the procedure and the law applied by the courts for when litigation will provide the better solution.

This booklet is part of FLiP's ethos of honouring its commitment to being cost-effective but also seeking to bolster individuals' self-determination by distilling from its long-experience the basics with which everyone should be equipped to approach this challenge, make their choices and work well with their lawyers towards the best possible future.

FLiP takes a unique approach to family law, guiding you with exceptional legal expertise, integrity, and specialist emotional and practical support