FLiP Family Law in Partnership

Divorce: a route map

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Introduction

The firm that is now Family Law in Partnership came into being in 1995, with the goal of finding better ways for clients to manage the difficult process of separation.

Over the last few years, we have become increasingly interested in drawing together our combined 650 years (give or take) of experience in the family law system (as litigators, arbitrators, mediators, collaborative lawyers and therapists) and trying to distil them into a form of guidance that would answer clients who otherwise might perhaps say, late in the day, *"I wish that I had known at the beginning… I probably wouldn't be here in this mess now."* This booklet is the upshot.

Our experience has been that many people come at the process of separation slightly overconfident that they will be able to navigate their way through it and out the other side with ease, sorting out a sensible deal, before exiting over the horizon to their happier hereafter. After all, they have such competence in the "real world" of their day jobs, which is surely a far more complex system.

Either that or they are too busy to give what lies ahead the sort of attention that in time they come to realise it needs… Because for many, it is only sometime later as they feel that they are being dragged down into the treacle of seemingly endless, to-and-fro paperwork that they start to say *"you know, this is like I started out on a trek totally unprepared as to what was going to be thrown at me and without anything like the mental-preparations and equipment that I came to see I should have had with me"*.

This booklet isn't comprehensive. It would be unfathomably large if it were. And it doesn't have "the easy answer". We don't think that there are any of those available – we would love it if there were (and would definitely tell you if we knew it).

Our experience has been that many people come at the process of separation slightly overconfident that they will be able to navigate their way through it and out the other side with ease

But what we can give you is a decent run at the basics – we think that, by getting you familiar with at least some of the main risks and challenges, that more of the early conversations we will be having will make more sense more quickly, and hopefully you will be some distance ahead as regards a consciousness of what matters. That in turn should enable you to progress more quickly and with more strategic intelligence over the early and following stages, and achieve the real target in all of this:

- the good-enough outcome
- in the as-good-as-it-can-be process

Some of the information in the pages that follow will be "too-much too-early". Skim over what is not useful and come back to it when it may be of more help as it becomes of more direct relevance to the decisions that you are having to make then…

Other information may just touch the surface where you need more detail and specific assistance (which is what your lawyers are there to provide). Avoid treating any of this as advice – the family law arena (like most other areas of our complex lives) is too nuanced and case-specific to be wrapped up within the confines of even a rather long booklet.

There will be other pressing questions that you feel are not covered. We have tried to be selective about what is going to be of most help to most people, whilst recognising that everyone has busy lives and limited time to spend.

… We can catch up with the rest as things progress.

Where relationships are better, at least half of the battle around setting up successful parenting structures is already won

We have sought to arrange this booklet in line with what experience tells us clients are likely to consider the pressing priorities…

Finances

- An early anxiety will be around the financial elements. We give the orientation around the courts' principles in pages 10 to 44, starting **here**.

Process

- In fact, finances are usually solved by agreement rather than a judge. So it is the process, people and pacing that often have more to do with the outcome than pure legal theory. And it is the professionals who are appointed by your spouse for their support who will matter (or their decision to make no such appointment).

- For most, this is the area where you will want to give most focus once you have decided that you need to go forward, recognising the separation and resolving the issues that arise. If you are able to get the right people within the right process, and do it at the right time, then the right outcome is more likely to follow. Our thoughts on this are set out on pages 45 to 81, starting **here**.

Relationship

- More generally, the underlying determinant of a positive and successful process is the quality of the relationship between the parties. The more things have broken down, the less the trust and the harder it is to have constructive conversations. It is an easy slip into the court process with all its intrusion, delay and cost. Trust, respect and positivity are of course high asks when a relationship has broken down and everyone is scared about what the future may prove to hold.

- So keep in mind that calming or remedying of the situation is usually both possible and advisable. And an important part of the mix is likely to be your engaging with professionals who may help you to start to deal with or understand what is going on for everyone in the family system (and your ex doing so too) so as to make better choices among those you face. We provide our overview of this aspect on pages 111 to 115, starting **here**.

Children

- Where there are children, this ultimately will be the area where getting it right will pay enormous dividends… our children did not ask for this change to their lives – how the

transition process is managed for them will have profound impacts upon their future and indeed who they become, either in a positive or perhaps in a very negative way.

- Our suggestions around "kids" connects very much to the approach to relationships… where relationships are better, then at least half of the battle around setting up successful parenting structures is already won. But even in those situations, there are things to learn and models and approaches that have worked well for other families to be looked at for what can be usefully adopted (or for what should be avoided).

- Where relationships are more difficult then early attention to the parenting structures may be all the more important – these should not be left to risk becoming entwined with the financial negotiations if avoidable. Some preliminary thoughts on this area start **here** on page 95.

Divorce

- "Divorce" usually describes for clients the whole process and is highly emotionally charged… but for the professionals, it usually refers to the bit of admin and shuffling paperwork. Yes, on cross-jurisdictional cases this will be a crucial battlezone where speed is all; but for most it is generally a paper process:

  - to be contained and managed in a low-charged way (emotionally and financially); and

  - something that is needed to bring the marriage to a close (hopefully in a respectful and constructive way)

  - which permits final financial orders to be made and pension sharing (where appropriate) to be implemented.

Some basic pointers are on pages 116 to 122, starting **here**.

With all of that outlined, we have…

- Some detailed comments on financial areas that cause **particular problems**.

- Some guidelines about how to get your lawyers working well for you, as discussed **here**. And…

- A checklist of the things that can get overlooked and which at least need an eye-lash **at the start**.

Good luck

1 HOW THE COURT APPROACHES THE DIVISION OF FINANCIAL RESOURCES

A APPROACH TO THE FINANCES

The need for a solution… but one approved by the court

There is nothing to stop people from sorting out their financial affairs and separating out as they choose where a relationship breaks down. But where you are married, you do need to get court sign-off if you want to avoid the risk of the deal being revisited, which can feel like an ambush if things have gone well for you. The court has powers to redistribute assets and unless those powers have been triggered, they remain in the background, perhaps to be activated opportunistically many years later. For most it will be sensible to have any resolution endorsed by the court.

(Some) respect for self-determination

It will be natural to have ideas about how the finances should be resolved. Where this is a comprehensive plan adopted by each of you after advice and disclosure, the court is likely to endorse it – unless it is very left-field. However, unlike in the commercial world, there is no obligation on the court to do so: the parties' agreement does not bind the courts, which have been given a responsibility by parliament to oversee arrangements.

The court needs the arrangements to be proposed to it in the correct form and with the correct paperwork. At least a summary of the numbers is always required (how else can the court discharge its duty to parliament?). If those numbers are inaccurate then there is a chance that any order can be later set aside. There will be more particular scrutiny of arrangements that are put forward where there has been an unrepresented party. Obviously, the further that the arrangements depart from "court-norms" the more likely the court is to intervene.

The help provided by a court analysis

So you will probably always need to know how the court would be likely to approach things (even if in the deal you depart from such norms to a greater or lesser extent, expecting such departures to get past the court on the nod, or on a "good-enough" basis). We say this because:

- whilst you may have ideas about a resolution, often this is not a comprehensive plan…

- you may well find that you can get so far in the discussions but not all the way and questions will remain over the final touches…

- those touches will require legal principles… and the legal principles may say, in effect: "I wouldn't have started from there".

In many other situations, the main planks of the overall agreement are best laid through completing an analysis of the court's approach. Even if there may be disagreement as to the precise terms, where there is acceptance of the broad zone of likely outcome, then there may well be an appetite to settle down to work out the structure that will work better for each side, from which can be hammered out a conclusion for sign off by the court.

The court's norms of separation & viability

The goal of the court will usually be to resolve the financial entitlements of the parties through financial separation. That separation does not have to be immediate. Some ongoing co-ownership may be needed whilst an asset can be realised, but broadly:

- Most assets will be allocated immediately (if they can be).

- Usually joint accounts will be closed (or converted into sole accounts).

- Where assets can't be realised now (perhaps there are share options of an uncertain value or perhaps the parties must remain co-invested in a property, an investment or, more rarely, a company for a period whilst a seller is located and the sale process advances) arrangements will usually be put in place directing disposal (perhaps at

The goal of the court will usually be to resolve the financial entitlements of the parties through financial separation

a delayed point) and providing a mechanism to divide the proceeds that result in a clear way.

- Only occasionally may it make sense for a joint account to be left intact, for example to meet miscellaneous spending relating to children or to hold their longer-term savings.

Given this, it will often make sense to start to separate out accounts and so on as the process goes along (it can be messy to leave it to the end – but sometimes this is unavoidable).

And this financial separation will have at its heart the expectation that each side will be able to "cope".

- In a "*sharing*" case (a concept we consider below), the resources are always significant and each side will have more than enough to meet needs.

- In a "*needs*" case, the court will allocate resources, in effect to balance up the financial challenges of separation, whilst ensuring so far as possible that the needs of any children are met during their minority.

But whatever the situation, the court will be trying to create the best possible outcome for each side so that they can each cope reasonably whatever the limitation of the resources.

In each, the parties will be expected to make adjustments to run viable households, rather than move forward with a plan that involves a household economy that is plunging into debt.

No re-visiting of capital

The outcome of this arrangement will almost always be:

- That all of the capital and the pensions will have been allocated (even if the point of receipt is only at a later stage)

- And these capital and pension entitlements are probably fixed for all time[1]

1 The main exemptions to this are:

1. **"Livesey" non-disclosure:** there is a duty to disclose right up to the point when the order is made: if one side has failed in their duty then the other may be able to re-open the case later.
2. **"Barder" change of circumstances:** there is a relatively narrow window during which a catastrophic change of circumstances may permit re-opening.
3. **Final clean break:** where there is ongoing maintenance, the court may make a further award of capital or pension as part and parcel of a later capitalisation of any spousal maintenance claims.

A summary of the court's approach

What are the principles that the court applies?

First a summary and then, below, we will seek to explain what the different units mean.

The court's approach will usually have engaged the following:

1. Support for any children during their minority (or if later, end of tertiary education) often referencing the formula of the Child Maintenance Service.

2. Respect for any pre-nuptial or post-nuptial agreement, entered into in accordance with established protocols.

3. The sharing (usually equally) of what the marriage has built up, but…

4. Where this will not meet the needs of each side then a re-allocation of capital or a re-distribution of pension resources or the provision of income (or both or all three) to the spouse less able to provide for themselves. Such re-allocation is particularly easy to justify where the applicant spouse's deficit arises from choices made (and dependency developed) during the marriage.

5. Future incomes are not shared – an applicant can only make a claim on future earnings for the reasons above: as child support or as spousal maintenance to meet needs.

Future incomes are not shared – an applicant can only make a claim on future earnings as child support or as spousal maintenance to meet needs

On the other hand, whilst the income arrangements (maintenance or "periodical payments") may be set, these are **not** set for all time. They may be later varied if this is dictated by a change – for example, incomes can go up or collapse and this might well mean that:

- Child maintenance arrangements need to alter
- Any spousal maintenance arrangements might need to change too

Court language and acceptance

As the court may not sensibly be avoided entirely, it becomes necessary to engage in the financial questions with the court's eyes and using the court's language (at least as a parallel discussion to settlement dialogue).

The court is driven by parliament's diktat as to what is taken into account and what powers it has to craft the solution, and these have been tumbled like beach pebbles into some highly polished and well-established principles, which we consider below.

For people from the real world, there is a real sense that some of these principles are not really fit for purpose and we can spend considerable time debating what should be the approach of the court. Deciding to avoid such debates is for many an important first step.

In fact, the court's approach sort of "works" in most cases; but more importantly the court is what it is… there are occasional shifts, most of them small – larger ones perhaps once a decade. Change is only up for grabs where there is a paradigm case. We don't shy away from them but for most clients it is good advice to avoid being a trail-blazer: it is expensive, slow, played out in the public eye and will be enormously taxing of your time. Whether you even manage to change a system that is solidly content with itself is much in doubt. Even if you are able to achieve change, the benefits are unlikely to justify all that you have had to contribute. Best advice is usually "create the right environment for solutions, get in and get out…"

In short, we generally do better to accept the system we have and press forward to make the best of it.

B PRELIMINARY & IMPORTANT

Jurisdiction

Families are increasingly international. You may find yourself able to pursue a divorce in jurisdictions other than this one ("England and Wales" or "E&W"). Where you can do so, then that foreign court may also seize control of the financial claims… and most of those jurisdictions will make lower provision. Even though the provision in England is less generous than it was a decade or so ago, the English courts are still likely to make generous provision.

This is because the English system is relatively unique in:

- dividing up everything that was built up during the marriage broadly equally;
- making the provision that the financially-dependent party should have to meet their needs; and
- leaving the applicant with whichever level of provision is higher.

Seizing this chance to start the case abroad (if you have it and it advantages you) may appear opportunistic. But it may change fundamentally the sort of level of outcome that would be imposed by a judge in E&W, and in turn that may change fundamentally the nature of the negotiations and make it far easier to secure the sort of fair outcome that you would prefer.

These are always technical and complex issues and they need specific and tailored advice from lawyers not only here but also in the other jurisdiction. Above all, they need swift action – and your time would be better spent making arrangements to secure that advice rather than reading this booklet.

Even though the provision in England is less generous than it was a decade or so ago, the English courts are still likely to make generous provision

The English courts give considerable focus to the future and whether the outcome creates a viable/sustainable set of arrangements

Nuptial agreements

The "pre-nup" (an agreement about finances before the marriage) and the "post-nup" (its sister-agreement contracted after and during the marriage) were pretty much unknown in the English courts right up to and through the 90s. They were treated as contrary to public policy. During the noughties the tide changed profoundly – the key principle is provided in the leading case as follows:

> "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

Inevitably attention has been given to the point at which such an agreement ceases to be fair. Given as we shall see that, in particular, the English courts give considerable focus to the future and whether the outcome creates a viable/sustainable set of arrangements (ie enabling each party to meet needs) these agreements cannot be treated as binding. In the law as it now stands, they are influential… possibly very influential on the outcome, right up to the point where the court decides that they go too far and the court intervenes to remedy unfairness and make proper provision for children and at least basic provision to meet needs..

Pre-nups will never be able to restrict provision being made to meet the needs of minor or dependent children. But they remain a potentially potent force that will affect significantly the court's approach to the finances that we set out in the rest of this section.

So as you read the pages below, please treat all of this as subject to these two overriding warnings: "perhaps subject to issues of **jurisdiction** or **an effective pre- or post-nuptial agreement**…"

C THE COURT'S APPROACH

Fairness

The court seeks a fair outcome. For the court, "fair" is largely the confluence between the sharing principle and the needs principle.[2]

Sharing

"Sharing" sees the division of what the marriage has built up…

a) The property that is shared in this way is called "matrimonial property". It includes:

- property accumulated by the endeavour of the marriage usually divided equally;
- property that has been integrated within the fabric of the marriage – so almost always, after an appreciable length of time, the family home will be treated as matrimonial property (even if it was paid for unequally or by one person and remains in their name) because it was central to the marriage;
- in the same way, property that was mingled with marital property is likely over time to become marital. These two categories may be divided equally or shared in some other proportion.

b) "Non-matrimonial" property is therefore likely to be restricted to assets, particularly those that have been kept separate, which were also:

- owned before the marriage (and not worked on or developed and built up during the marriage);
- inheritances or gifts received during the marriage; and, occasionally…
- wholly new enterprises started after the marriage and built up after it (for example where there has been a long delay before sorting out the finances).

c) There is no "sharing" of income after separation.

This relatively simple set of principles has an exception which is the short childless marriage where each party has been earning and has kept their finances separate (save, say, for

2 There is a third "pillar", that of compensation, which crops up so rarely as to be safely set to one side at this stage.

co-funding a joint property). Here the court may well leave each side with what they have kept separate and simply focus on an allocation of the joint-funded property only.

This was regarded as a revolutionary idea in the case that brought it to public attention, *Sharp v Sharp* [2017] EWCA Civ 408, and the scope of the exception is still being worked out – but these cases are likely to be as rare as compensation cases and the broad norm remains as described in a–c above.

Needs

But the sharing analysis will give way to a re-allocation of property on the basis of need. This will apply where one side will be unable to meet from their share of marital capital and future earnings their reasonable needs for:

- a home
- living costs
- the basis for the funding of a reasonably secure retirement…

… and the other has a surplus.

"Needs", then, might see the financially stronger party:

- releasing some of their marital share of capital to their former spouse; and/or
- paying maintenance to them; and/or
- transferring to them additional shares of pension (ie beyond the one half "sharing entitlement" that was built up during the marriage).

But, obviously, it is a balancing exercise – the court process doesn't create money and any award must have in mind the impact of the award on each party. The aim is to create a sustainable and viable structure for each side.

"Needs" describes a level of provision: it is an elastic concept that is likely to reference the standard of living during the marriage, how long that standard was enjoyed and the impacts on the award on each side – ie what is financially achievable after all liabilities, including legal costs, have been met. "Needs" has within it the goal of its ending: the central aspiration for a needs-based re-allocation is "financial independence where achievable", so it may carry an expectation that, over time, a recipient will achieve economies as part of the drive towards independence.

Where changes are reasonably anticipated (such as a return to work) the order may well anticipate the new scenario

So, in analysing the numbers, there will be some reference to the standard of living during the marriage. But this is not a fixed minimum – parties may well be expected to economise from there either because they have to (there is only so much money to go around), OR so as to migrate towards the point at which there can be a final financial uncoupling: the independence and termination of ongoing support referred to above.

The court will also have centrally in mind duration. A short marriage cannot easily justify support (= maintenance) being paid for a long period to meet a high standard of living. Or to come at it from the other direction, a short marriage will not create a compelling standard of living argument. Similarly, where support is likely to be needed for a long time, it might be provided at a "thinner" (ie lower) level, so that the level of provision does not become unfair. Where changes are reasonably anticipated (such as a return to work) the order may well anticipate the new scenario. The order then has defined "steps" or changes at various time intervals. It leaves each side to work towards those fixed step-changes, making applications for a variation (increase or decrease) only if the steps become non-viable, ie depending on how circumstances unroll after the order. A party asking for a change would then need to show how the expectation of the order failed to come good.

The court will also seek "independence where achievable". The court's scheme will often apply pressures on the applicant/recipient to reduce spends and to increase/access resources (for example by building earnings where reasonable and consistent with the needs of minor children). Ultimately, spousal maintenance can only be an award of periodical payments to the financially weaker party until their remarriage. It may also be changed if there is a change of circumstances that will require a review, or there is some other arrangement (such as an inheritance, a pension share or a further lump sum paid) to fill any residual gap between needs and resources that exists at the time. These events may permit the clean break (which is the termination of all financial connections save for the support that may be claimed for children) to come into place.

These are not fixed rules though… there is an overarching mandate of doing what is fair. And yes, this will make outcomes in unusual circumstances particularly hard to predict:

"fairness, like beauty, lies in the eye of the beholder" (*White v White* [2000] UKHL 54). For example, if at the point of separation one side finds their income soaring way beyond what was ever available during the marriage, their insistence that provision for the other spouse is capped at the level of spending during the marriage and should come down from there may fall on deaf ears.

And nothing much else!

This summary is perhaps helpful for what it does not contain:

- Instinctively with friends we come at the question of what might be a fair settlement from a clear sense of moral outrage: the story of waste, hurt, abuse or indolence is a compelling one. Or it may just be the argument of contribution: that so many of the assets have come from one side…
- But almost none of these moral reactions are likely to have any impact on the outcome unless they can be formulated into a presentation of sharing or needs, because that is what, ultimately, the case will come down to.
- Any other element pushed centre-stage in a presentation to the court runs the risk of alienating the court and undermining the credibility of the position being put forward. Our strongest presentations will always be resolutely rooted in arguments of needs and sharing.

Cases on the cusp

There is a wide swathe of cases that are neither entirely sharing nor entirely needs… one side (the one with the resources) might well be arguing that the sharing principle provides a fair outcome that will encompass needs… the other might be presenting a case based on higher levels of housing provision and, on the one hand, the reasonableness of high income needs and, on the other, low likely earnings, such that there is a needs gap that is not met by a simple marital share of the assets.

These cases will usually spawn analyses that have elements of the sharing approach and of the needs-based approach.

D MAINTENANCE/PERIODICAL PAYMENTS

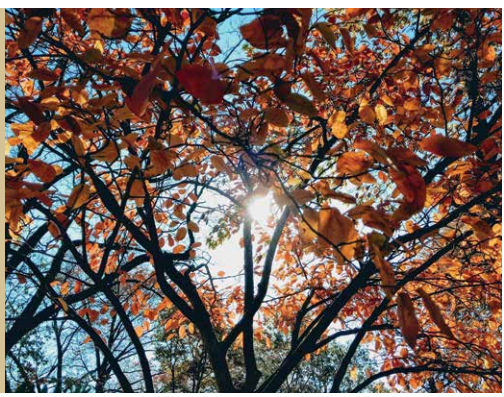
"Periodical payments", "maintenance" (or more rarely the Americanism "alimony"), call it what you will, there are important further rules relating to the maintenance arrangements which will influence how the package is ultimately crafted.

First, there are profound differences between spousal and child maintenance arrangements, which can be seen in the following table identifying some of the main restrictions and rules:

Spousal	Child
Spousal payments are an option – there may be spousal payments for life, for a period or none at all. A termination of them may be absolute or extendable.	Generally the parties have no right to give up or settle up on the question of child-support – it can always be pursued. The child themselves may be able to seek provision when older (eg for university support) too.
The claim or arrangement terminates only: • by remarriage or • by court order.	The arrangement only ends with the end of the child's dependency. Currently that is seen as the end of tertiary education (to end of first degree). Further provision (even lifelong provision) may be pursued where there is disability creating long-term dependence. Such claims are rare and the law is unclear.
There is the policy aspiration of termination, or '*independence where this is achievable*'.	The policy aspiration is for reasonable provision to meet the child's needs, commensurate with the availability of the payer's resources.
	There are two different types of regime: • up to the end of secondary • subsequent to school: university provision

table continues on the next page…

There are important further rules relating to the maintenance arrangements which will influence how the package is ultimately crafted



Spousal	Child	
	Up to end secondary	**Tertiary education**
Obligation only created by: • agreement (usually recorded in a deed); or • court order (made by agreement or by the court following a contested hearing).	May be fixed administratively by the Child Maintenance Service ("CMS") in (broadly) domestic UK cases. The parties **can** agree provision and can agree to cement this in a court order. But the parties cannot permanently exclude the CMS by the court order even if they want to do so. We must see the court order as a binding structure lasting only for one year and then until one side wishes to step back to the CMS.	There is a tendency to consider provision in the following segments: **Paid to the child** 1. sums for the discharge of university fees (because otherwise the child must take out a loan); 2. accommodation and living costs during term time; and 3. support (eg during vacations) **Paid to the parent where the child "resides"** 4. A contribution towards living expenses or "roofing allowance".
There is no formula for determining the level of the award.	The CMS operates a fixed formula for incomes up to £156k gross p/a. (Albeit with a somewhat discretionary/ unpredictable overlay – ie there are traps for the unwary). Fixing the figure for higher incomes may adopt some of the principles of the formula.	Again, no formula.
The detailed arrangements are set out in the court order.	The CMS will issue an assessment, which is enforceable OR the parties are encouraged to reach their own arrangements, relying on the threat of CMS involvement if that arrangement breaks down.	The detail of the obligation for tertiary education support is generally contained in a court order.
Enforcement is through the court.	Where the CMS is involved administrative enforcement is through the CMS. Enforcement of the court order is through the court.	Enforcement through the court as for the spousal order.

table continues on the next page…

Spousal	Child
If the spouse has a proper claim for provision, then the court has an option of making a "global" order – ie a level of provision that meets spousal maintenance and the needs of any child in one overall (usually monthly) payment. Clearly this will need re-examination… • if the recipient spouse remarries (because at that point there can be no spousal payments and so the global sum must change); or • as the children reach university age (because at that point the child maintenance element in the global sum is likely to change).	
Very often, indexation (usually now CPI rather than RPI) is used to combat the erosive effects of inflation on an order that may continue for some years. But where the CMS provides the award, "inflation-proofing" is provided by annual review of the order.	

Whilst the table highlights differences, there are also elements that are pretty similar between spousal and child periodical payments:

- periodical payments are usually paid monthly
- they are often paid by standing order (the court has powers to order this)
- the courts never order (in our experience) the recipient to account for what they have done with the maintenance)
- they are changeable – ie where circumstances alter (most usually where the capacity of the paying party to provide reduces) then the provision may need to reduce too

Where circumstances alter (most usually where the capacity of the paying party to provide reduces) then the provision may need to reduce too

The goal of maintenance is independence where achievable

Basic tenets

Maintenance for children is generally always paid for the period of their dependency. It is money that falls into the other spouse's household for them to administer and obviously will often reduce what otherwise could be needed as spousal maintenance to balance the books. The court will never require that books or an audit of the allocation of this money are produced.

Maintenance for spouses is – broadly – only paid to meet needs, often to remedy a financial imbalance that arose from decisions during the marriage (eg one spouse stepped out of their career for the children).

The approach to maintenance has changed profoundly since the noughties, and the higher levels of award being made regularly then are really not reference points that help us decide how to approach cases that we see now.

Needs is – admittedly – an elastic concept so will be paid at a much higher level at the end of a long marriage, where there is a substantial income and where there has been – and the earner will continue to enjoy – an affluent lifestyle; but… the goal has now been clearly articulated of independence, where achievable. Thus where the marital assets are very large, the marital share may well mean that maintenance is not paid at all: all needs, housing and future income needs can be met out of the non-earning spouse's share of capital. Otherwise there will be encouragement that that spouse return to the job market to help to reduce or even eliminate the maintenance that might otherwise be required to meet their needs.

There may well be an expectation that over time that spouse's spending will reduce so as to make independence a stronger possibility.

The claimant's remarriage must end the maintenance claim and cohabitation may do so (or at least suspend it for the duration of the new relationship).

But, ultimately, a [further] lump sum or a pension share may be needed to create the fund from which future income needs will be met, so as to permit a clean break and termination of the final financial link.

Considerations

The court will have the following hurdles in mind before it makes or varies a spousal maintenance order:

Can the applicant show that they have reasonable needs that will be unmet without provision?	
Amount	
Do those needs relate to the decisions of the marriage? If not, provision may be only at a lower level.	
For what period is the maintenance likely to continue? The longer the period the lower may be the provision.	
Was the marriage only of a short duration such that longer-term provision is inappropriate?	
Review & termination	
Is it possible to terminate maintenance claims and the dependent spouse be able to cope without hardship that is undue?	
Is there evidence to show that a party will be able to adjust to the end of maintenance? If so, provision should only be for the period during which adjustment will take place.	
If there is no clarity as to the period by when adjustment to independence will be possible, then an extendable order is more likely to be appropriate (ie one that will end unless an application for adjustment is made before the end of the term).	
Might steps (ie steps down) in the order be an appropriate way of moving the recipient towards such termination?	
A spouse is not an insurer against all hazards – financial mismanagement by the recipient may be a reason for denying provision to meet needs in extreme cases.	

Types of spousal order

So there are the following five options in relation to spousal maintenance (and a few hybrids and sub-species) and the parties will agree (or the court will decide) which one applies.

Unfortunately, terminology is used a bit sloppily but probably the best descriptors are as follows:

1. **A joint lives order:** the open-ended arrangement – it lasts until either the person doing the paying or the person doing the receiving dies.[3]

2. **Immediate clean break**: the maintenance claims terminate with the stamping of the order.

3. **Term order with bar:** here, whatever the situation, the arrangement ends at this point. It is also known as "the delayed clean break".

4. **A term order:** an order that will end on a certain date or event unless the recipient makes an application for a good reason for it to extend longer before then. If they make that application, then:

   a) they may lose and have 2;

   b) or have some form of further order of type 3 or 5 (or conceivably, but unlikely given the policy, 1).

5. **A stepped order:** provision that reduces to a lower or nominal figure at a later date or set of dates or event(s), which could be a joint lives, term order or term order with bar.

More on Inheritance (Provision for Family and Dependants) Act 1975 claims and insurance

Note that where maintenance is paid (spousal or child), the applicant may well pursue an insurance arrangement too. In particular, this will be life cover to provide payments in the event of the payer's death. Obviously this would need to be built into arguments around affordability. Advice from a financial planner (or "IFA") will be needed – but often what is recommended as a cheaper but effective option is a family income benefit policy which provides a stream of income that can be matched to the term of the order. This arrangement can best be tailored to the deficit that is created in the event of the payer's demise terminating the payments.

Where such arrangements are not in place and the payer dies domiciled in England & Wales then an application for a lump sum would usually be made against their estate instead.

3 The recipient could still make application for financial provision out of the estate of the first-to-die spouse under the Inheritance (Provision for Family and Dependants) Act 1975.

E MORE ON CHILD SUPPORT

Child maintenance will be paid for dependent children whether the case is a "sharing" or "needs" case, and the principles setting out the basis on which payments are made can probably be described, as "clear in parts".

Maintenance is generally paid to the parent with whom the children make their main home until the children conclude their secondary education. At this point, as the child leaves for university, there is often a split order as discussed below.

General maintenance to the end of secondary education

There is a measure of clarity where the Child Maintenance Service would apply, because the whole "statutory system" is based on an attempt to eliminate discretion and provide a clear set of rules for every circumstance, rather than permit a judgement on balance and in the light of all the circumstances. Thus there will be a level of clarity (but perhaps a level of unfairness) where the CMS only has jurisdiction. There may also be a labyrinth of hard to understand rules that may weigh down upon the particular set of circumstances and a lot of research or advice may well be needed.

The CMS will have jurisdiction where (broadly):

- the children base themselves primarily with one parent (called under the child support regime "*the parent with care*" or "*PWC*"); and
- the other (termed "*the non-resident parent*" or "*NRP*") has income of under £156k p/a gross

Here the PWC is entitled to support and can turn to the CMS for an award. There are calculators online, eg at **www.gov.uk/calculate-child-maintenance** (or perhaps better, available from us, because then you can see in the spreadsheet what the formula is doing)… but broadly:

- maintenance is at around 15%, 20%, 25% (for 1, 2 or 3 children)…
- of a person's **net** income after pension contributions[4]
- reducing by 1/7th, 2/7^{ths} 3/7^{ths} etc where the children spend, averaged through the year, 1, 2, 3 nights p/w with the NRP

4 The formula is confusing because it now runs off gross income numbers, but the target of the complex gross income formula is more simply explained by these percentages of net income.

Be aware that most people can end their court-ordered child maintenance by applying to the CMS after a year

It is common for the court to adopt an approximation of the same approach when it is deciding child support awards.

Where the case is a "needs" case, clearly this support is part of the resource that enters the applicant's household to go towards the day-to-day living costs and which will thus reduce the scale of any spousal maintenance that might otherwise have been claimed.

Even if a court order for child maintenance is made by the court (generally this would have been done by agreement):

- either party has the right (that can't easily be given up) to step outside to the CMS once the court order has been running a year
- after the application, the court order (so far as it relates to general child maintenance) is terminated to be replaced by whatever is the CMS award
- so it is important that you are vigilant about the likely impacts of such a step (and it is why it usually makes sense to negotiate with the child support formula centrally in mind)

The CMS operates a scheme of annual reviews, each year referencing the latest HMRC information available for the NRP; it is hoped that as costs rise for the children, so the earnings of the NRP rise and thus the CMS award increases, retaining a measure of balance against the impacts of inflation.

For parents who do not turn to the CMS, it is usual for the child maintenance to be increased by indexation (usually CPI) to counteract the effects of inflation and reduce the need to have the provision re-examined.

The less clear bit is around some of the bolt-ons of the scheme and on what the court should do when the CMS formula is not directly applicable, for example:

- What is to be done with higher than £156k p/a gross incomes?
- Where care of a child is largely equal, the CMS will usually decline to become involved and this opens the way to the question being resolved at court with a largely blank page as to how it should do so.
- The variations scheme,[5] that may see really significant increases in the child support determined by the CMS falling due on the basis of investment income; or the NRP having assets beyond those being lived in (treated as "earning" an income of 8% p/a, which notional income then enters the formula in the same way); or the NRP having control over things like pension contributions or can draw from a private company (when the CMS will decide in worryingly unpredictable ways what "reasonable" might be and will proceed accordingly).

Where possible it will often be helpful in the negotiations to try to create a scheme that will provide insulation against the CMS regime that otherwise risks imposing on the parties a wearing and expensive litigation after-party following the court case.

School fees and extra-curricular activities

These are also part of the less clear regime.

Where parents agree to prioritise school fees then the court will usually build its solution around what is left. Obviously continuity of schooling may be really important for a child who will be experiencing considerable change in all the other parts of their lives, but for many families, as one household becomes two and particularly if significant legal fees have been incurred then something "has to give" and school fees are often the first out of the balloon basket in the search for a sustainable set of financial arrangements, to avoid crashing to the ground. Often this will be done in preference to further housing downsizing or unrealistic/insufficient living-costs budgets. Perceived affordability is therefore key.

Provision may be ordered to be paid from income (on top of general maintenance) or in some circumstances, may be met out of ring-fenced capital. There is obviously a major difference between these two approaches where there is only one significant income:

5 This is unhelpful terminology, we appreciate. At court a "variation" relates to a revisiting of certain court orders – usually only applicable to maintenance orders because of changed circumstances (and very occasionally lump sums paid by instalment). Step into the parallel world of child support and here "variations" refers to departing from the fixed formula that otherwise generates the outcome.

- in the latter, where payment is from capital, both parties are, in effect, paying the school fees

- in the former, one side is meeting them from their income

Where school fees are to be paid, they introduce a raft of other decisions and there is no standard scheme, but it is helpful to have a checklist of the main items, for example:

	Paid **in addition** to maintenance	Paid **out of** the maintenance
Uniform		
Extras on the school bill *Is a limit to be imposed on the scale of the extras without further agreement?*		
School organised tours		
Equipment in connection with extra-curricular activities		
Additional tuition		

This need for clarity also applies to out-of-school activities for the children, to include holiday expenses and clubs:

- whether the cost is met from the maintenance already being paid, or

- whether they are funded entirely, or as to say 50% by each parent on top

These are often really tedious and detailed discussions, with no obvious one template to adopt. The sad reality is it is pretty difficult to manage myriad future unknown opportunities from the fixed point at the end of a matrimonial negotiation:

- it may not be known what changes will come along in the future

- so often the issue will crop up at the end of a long negotiation as regards the main issues and so the discussion may not be had at all or may be reached in a rushed way, creating an unworkable system and a long-term irritant for the parents trying to work with it

A better solution will be to engage on the issues early and bank whatever structure can be worked out whilst the rest of the package is identified.

Maintenance is almost always considered by the court by reference to a budget – and a budget of anticipated future spending is a requirement of the usual disclosure stage. It will be helpful to get straight at an early point whose budget these spends are a part of.

As another illustration of the potholes in the child support system, the costs of future contact may, by application, be brought into the reckoning. And where boarding school fees are being paid, 35% of this amount can be taken to reduce the income entering the child support formula, which will, in turn, have some – albeit small – impact on the eventual child support award… but which may of course resonate in a request for increased spousal support in the appropriate case.

University years support

The CMS does not apply to children after school during the university years. For many children, the CMS scheme terminates, on the 31st August after A-levels. (This can of course leave a person paying for one child at university under the court scheme and for a younger sibling through the CMS.)

1) University fees

Whether the court will direct that maintenance is paid rather than university fees loans being taken out if the parents don't agree, is unpredictable.

2) General support and accommodation

Generally an appropriate level of support is paid directly to the child, topping up any ear-marked university fees fund and taking into account any state funding.

3) "Roofing allowance"

If the child has a main base with one parent rather than the other, then usually there will be support paid to the parent providing it (at perhaps one third of the level provided during the secondary education years), so as to cover additional costs during the university years, especially for the additional costs during vacations.

4) Approach to university when the children are younger

Many parties will find themselves trying to finalise a set of financial arrangements when there are years to go before their children will attend university. We think that there may be real advantage in trying to lay down the principles of provision, by agreement, when this first order is made, rather than risk a disproportionately expensive dispute when tertiary education finally arrives. This might include agreeing in principle:

- support for the child (in particular for university term living costs) being paid to them directly
- accommodation costs often (for security's sake) being paid to the provider of the "reasonable" accommodation directly
- a "roofing allowance" being paid to the parent who provides the main home (in particular, for example, where the child has based themselves primarily with the "home-maker" who remains financially dependent)

- the ticklish question of whether there should be help with university fees or not (rather than a loan being taken out)

Support for the boomerang years or in special circumstances

Many children are now forced back home after university in a way that simply was not the case when their parents graduated. Often one parent will find themselves with a significant burden of support for children for an extended period whilst the children find their feet (or not) and complete professional training (or not) and, all being well, eventually find their way to property owning (or at least property renting) independence. What support will the court direct is made for the parent otherwise shouldering alone the burden of these years?

In short, "none additional, save as might be agreed". The current state of the law is that support for those children after university is not part of the court's concern: that providing further help is simply a "lifestyle choice" for each party and it is up to each of them and the child as to what provision is made. The court is unlikely to be prepared to be involved (in the absence of a dependence-creating disability) where parents can't come to an agreement.

That is obviously a significant vulnerability if the children are always going to gravitate towards one parent – and that parent has provision only just sufficient for their own bare needs.

It is only where there are special circumstances that extended support might be available for the child or for the parent who provides for such a child. Case law guides us that it is only disability creating long-term dependency that currently ticks this box (and there is little guidance from the court as to what measure of dependency crosses the threshold and dictates that provision is made).

The current state of the law is that support for children after university is not part of the court's concern

F A LOGICAL ANALYSIS

The common complaint about so much family law guidance is "This seems to be a list of ingredients but no method to create the solution". By identifying a sensible order in which the considerations are addressed, some distance may be travelled along the road to working out the likely "landing zone" of provision. In it we will incorporate the twinfold approach adopted by most judges of identification and allocation:

- First: what is there?
- Second: who gets what?

However, realistically the stages are more numerous, as follows:

1) Identifying	What assets are in the mix?
2) Protecting	Should they be protected until an allocation can be made?
3) Valuing	What are they worth?
4) Allocating shares	What share of the asset types does each side receive?
5) Expressing	How are those shares to be made up?
6) Realising	The process of completing the allocation.
7) Enforcement	Where allocation does not proceed, enforcement may be needed.
8) Rebuilding	How do you make use of the resources to build back up and achieve a secure future?
9) Variation	Later changes of circumstance may create the risk or opportunity of variation.

We also appreciate that there are some answers that family law specialists might say are pretty obvious – but this simply cannot be discerned by outsiders, even with the text of the rules or law to hand. That is where specific tailored advice will come in and it is why "going it alone" is likely to be a dangerous choice where there is any level of complexity or significant value. Now, to put that in more detail…

1.	**The stage of identifying the net resources** First will be meticulous disclosure (if you are sensible) to clarify all assets, debts, pensions or other resources.
2.	This will include identifying the future incomes on each side (earned, benefits etc) that will (or in the court's view could be) secured.
3.	**Allocation** Assets (particularly where the resources are substantial) will be regarded either as "matrimonial" (those that are generated by the endeavour of the marriage); or "non-matrimonial", which as we have seen earlier will include: • assets generated prior to the marriage (and kept separate during the marriage/not relied upon) • inheritances & gifts • occasionally (where there has been a substantial period of separation) post-separation accruals It will often make sense to differentiate between the two categories in the summary asset table, ie the spreadsheet that all cases seem to require if any sort of progress is to be made towards conclusion.
4.	Other resources may need to be considered, including distributions from trusts or occasionally gifts even by inheritance if they are reasonably certain within the timeframe that the court is considering. These are unlikely to be resources that will be "shared" but they are resources that might come into the reckoning up and allocation to meet needs.
5.	**Protection stage** Where necessary the court will take steps to protect an asset that is at clear risk of dissipation or removal in a way that cannot be compensated or remedied at a later stage (for example by awarding the other party a greater share of the other assets). It is not an easy application to win. However, if you are the asset holder then generally we will recommend giving reassurance by promising safe-keeping so as to build trust and help progress towards agreed solutions. In most situations, the court is reluctant to "add back" dissipated assets – it can be incredibly frustrating to see one side frittering away resources when you are seeking to achieve every economy… a court's intervention by freezing order or similar is usually not the way forward.

table continues on the next page…

6.	**Valuation phase** In the third stage, values must be allocated to each of these resources. In some situations (straightforward, immediately realisable investments with little market fluctuation, or bank accounts), the numbers are obvious. Others will require more work. This will include recognising: • any third-party interests • all charges (mortgages or secured loans) • costs of realisation (where the asset will be realised) • incidents of tax (or – usually – latent tax that would be incurred on realisation) • that there may be particular challenges where an asset is volatile in its value or its value is not certain, in particular where an asset is hard to realise (ie not currently available), and then… • if an asset can't be realised immediately or if one party alone will have to spend time and effort on it, to what extent should utility/delayed realisation/later unmatched contributions by one side to achieve liquidity be reflected in the numbers?
7.	Expert evidence may well be required. Usually the assets will be grouped (not only according to matrimonial / non-matrimonial) but also according to whether they are: • realisable • realisable but only after delay or where realisation will be difficult or uncertain (meaning that they can't be relied upon to meet the immediate needs of debt/ housing/ living costs) • business • pension Further groupings may be required as to whether they are "copper-bottomed" or "risky"
8.	In sharing cases, the sorting out from the identification, allocation and valuation phases will often be the end result and you can progress to point 11.
9.	In "needs" cases borrowing capacity (which is simply another resource to meet the all important need of housing) must also be identified.

table continues on the next page…

10.	**Identifying needs** Where each side cannot clearly meet their reasonable housing needs and all future income needs from their share of the assets then "needs" must be identified. These will include: • housing for each side (commensurate with the scale of the available resources and borrowing capacity – ie what is affordable, but also referencing the marital standard of housing) • a budget for each side, in line with their particular circumstances to include changes in that budget that are likely • school fees and other affordable spending
11.	**Distribution stage** First, from the budget and by reference to the income (and usually the child support formula of the CMS) an allocation from income to assist with the costs of the child is usually carved out. This is likely to be imposed even in sharing cases.
12.	For those without tens of millions, the court will engage in a reallocation to enable each party to have a fair start on the road to independent living, which will involve: • the discharge of their debts • the meeting of child-related costs • provision of reasonable housing to each (so far as affordable) and the other reasonable amenities of life such as house repairs etc, equipping a car and so on… • an award of further maintenance (ie on top of any child support) that enables each side to be able to meet the costs of their respective household

Almost certainly, the needs calculation is going to involve some trial and error as an arrangement emerges that meets the competing requirements of the legal code. There is an essential art to juggle the various parts of one party's various needs (housing/living costs/retirement needs etc), and then balance that interconnected system with a scenario that might be imagined for the other party so that each has a fair allocation.

To repeat, however, the reasonable needs will fall into:

Accommodation: each needs a home that is:

- realistic for them and their children
- appropriate for work needs
- ideally within range of established friends and infrastructure
- and, where there are children, appropriate for their schooling and usually within range of the other parent's home so that the children can move to and from

without enormously challenging journeys that may stand in the way of the relationship that they need to maintain with each parent

Outgoings: each side needs the resources that meet their reasonable spending needs, ie with sufficient to fund all the different categories of spend, for example:

Work related costs	Health and life insurance costs	Other financial spends (debt etc)
Mortgage	Utilities etc	Household costs (food etc)
Personal	Holiday	Christmas and other events
Children specific costs	Activities	Schooling?

Future needs: but the above must also be managed in a way that has a weather eye on the future, for example:

- the simple cost of replacing household goods and machinery as they become uneconomic to repair
- paying down debt so that when each reaches retirement, hopefully they have a mortgage-free home sufficient for their later years
- creating a fund to meet university costs
- building up pension etc resources to have a secure retirement

Outgoings must also be managed in a way that has a weather eye on the future

G FURTHER PRINCIPLES

As your case progresses, there will be things that may cause you raised eyebrows… there are a number of subsidiary rules that are so engrained to those of us within the family-law industry that we are likely to incorporate them into our assumptions and guidance without hesitation – or indeed thinking that they need further explanation.

So, for when that happens, and in anticipation: Sorry!

1. Disclosure

Self-evidently, the system relies on the parties providing the complete picture. The courts' expectations are that disclosures will be:

- **full** – identifying all that there is
- **frank** – giving straightforward information whether or not it benefits your case
- **clear** – it will be accessible: so simply throwing out a bundle of documents and leaving the other side to fathom what they mean does not meet this requirement

Because the court is dependent upon co-operation, this obligation is taken very seriously: the person who is discovered to have fallen short (= hidden stuff) is likely to taint their case, by affecting profoundly how the court views the other evidence they give. In a discretionary system (there are no hard and fast rules about what the court decides) taking the risk of being seen as "the bad guy" is a significant one.

Lawyers will never present a picture to the court knowing that it is false.

Continuing duties?

- there is an ongoing duty to disclose anything significant (ie that would affect the other side's negotiation stance) right up to the moment that the order is stamped and dated by the court
- after this point, it is unusual for the court to impose a general ongoing duty to give disclosure, beyond what is needed to implement the agreement or order

2. Confidentiality

Parties obliged to give information should, the court believes, be entitled to rely on the fact that the information will only be used within that process unless the court gives permission. Another party's broadcasting this information (even discreetly) may well be

contempt of court. Whilst the court is often slow to act to punish contempt, the risks to the case of disclosing confidential information should not be ignored.

Note too that information disclosed in the court process can't be automatically produced in the CMS one.

The court will assume that information kept privately by one party (even in the marital home) is entitled to respect. Merely being married does not create an entitlement to access information that is intended to be kept confidential.

3. Transparency and privacy

On the other hand, there is the drive to transparency within the courts. It is not long since all family law issues were all investigated and determined at court behind locked doors (at least until the point the case reached the Court of Appeal). This is no longer the case.

For some years now the policy makers, stung by press criticisms of the court and its processes, have been seeking to invite in members of the accredited media, at least to be able to report on an anonymised basis.

Some judges will routinely open their courts to the press. Appeals are almost always on a fully-open basis, with names and personal information laid bare. Careful thought will be needed as regards the court option where there are risks of damage from such public scrutiny.

4. Cohabitation that merges seamlessly into marriage

The "start" date of the marriage will be important for some analyses, particularly where there is a sharing case and one side brought wealth to the marriage; or there is a dispute

Careful thought will be needed as regards the court option where there are risks of damage from public scrutiny

as to whether the marriage should be regarded as short so that the obligation of future support should be curtailed in amount or duration.

Case law is clear: *the start date of a marriage that has been preceded by cohabitation that has merged seamlessly into it, should be regarded as the start of the cohabitation rather than being triggered by the marriage day.*

5. The ticking clock for CGT

Our capital gains tax rules are changing and need careful attention and specific advice will often be needed. A home is likely to cease to be your principal private residence nine months after you have left it. From here, you may start to build up a potential tax liability (a slice of the gain proportionate to the period you have been out). CGT will only become due if the property is disposed of. Correctly handled merely a transfer to your spouse should not be treated as a disposal triggering a tax debt… but your spouse will receive the asset laden with the accrued debt to tax and which they will have to pay when they dispose of it.

6. Valuation date

Assets are valued at the date of the deal or the hearing, rather than the court tracking back to values that may have existed at the point of separation. In the same way, it will be current values that inform the negotiations. Soaring values are likely to increase what is paid out and collapsing asset-worth will reduce it.

The court has a discretion to exclude from the sharing exercise assets that have been built up post-separation in an entirely new enterprise, but this is the exception and often hard to achieve. For successful wealth creators, moving ahead promptly towards resolution will usually pay dividends.

7. Overspending

The valuation date principle might be seen to create the conditions in which bad behaviour is ignored (and thus encouraged): won't it make sense to engage in some sort of last hurrah, to stock the wardrobe, buy the quick-to-depreciate car, replace household goods and generally engage in a fine time before the reckoning up date?

It is true that such behaviour might go under the radar. The court's approach is that injunctions to protect assets are hard to secure (and preventing credit from being run up is very difficult); while "add-back" (adding back the spending to the spender's side of the balance sheet, as if the money remains, even though it has gone) is:

Assets are valued at the date of the deal or the hearing, rather than the court tracking back to values that may have existed at the point of separation

- only ever done where the spending is significant and wanton
- never done in "needs" cases
- often not done anyway on the basis that a person might need to take the rough of profligacy with the smooth of vast earnings

The brake on such behaviours seems to be that overspending by the financially stronger party makes it much easier for the financially weaker party (likely to be seeking maintenance) to pursue a higher award.

For the weaker party, overspending might be seen to help: surely it creates a higher baseline of "usual expenditure"… unless the court is alive to the antic and elects to take a draconian line over the budget in response.

These are areas where there are only imperfect tools of management and thus a frustrated party may have a sense of impotence. The essential point is that escalating tensions make agreement increasingly hard to find, and create the conditions when the long fight to a final court hearing is more likely – but we accept that seeing things in the light of this bigger picture is not always easy in the immediate aftermath of separation.

8. Net values

Assets are generally assessed on the basis of what would be received net in cash so mortgages are deducted and incidental costs of realisation will be stripped from the numbers.

The tax that will arise on realisation will usually also be recognised.

9. "*Wells v Wells*" sharing

Courts are conscious that:

- some assets are easy to realise for clear and dependable values
- others are hard to realise and have values that are far from certain
- business assets may, on top, need ongoing effort from one party to keep the business effective and functioning until a later disposal date and may need substantial time and effort before any realisation is possible

Here the court will seek to strike a balance to avoid one party having all the risk-laden assets whilst the other has the "copper-bottomed" ones, or if this is unavoidable, then the court may well go further and reflect in the numbers:

- the post-marital endeavour of bringing the business to market
- the risk of the out-turn and
- other hard-to-quantify considerations

10. Gender blindness

The court insists it is gender blind… but it is hard to avoid the sense that male applicants for provision tend to have a harder time of it than would their female equivalents.

11. Costs

When parties do deals, often costs will be taken out of the common marital pool and then the residue is split. In needs cases, clearly costs must be recognised in different ways, depending on how each side then is to provide for their future housing and income needs: existing and future legal costs will have to be paid somehow and the parties have to make do on what is left. But the correct approach, particularly in sharing cases, is that:

- each side has their share…
- and from that share pays off their costs…

  (with appropriate accountancy/add-backs where costs have been paid already).

Currently it is rare to have one side pay for the other side's legal costs, even where a case goes to an adjudication. Costs orders WILL quite possibly be made for the losing party to

contribute towards the costs of the other in relation to interim applications (so this would relate to interim maintenance or orders for further disclosure or asset protection etc); if there is an appeal against any order; or enforcement proceedings.

But following a judgment at a final hearing, one side is only likely to find themselves paying the other side's costs if they have engaged in litigation misconduct, for example:

- breaching their duty of disclosure
- failing to accept an open offer
- consistent lateness in meeting the court's directions

However, this is an area where the policy makers have indicated their determination to make changes and a new culture is set to emerge.

12. Proportionality

This is simply an aspect of costs but it is central and so merits its own heading – it underpins so much of what we discuss in the next section about process.

The judges have long complained about people spending too much of their money on lawyers… often the lawyers take:

- what could have funded private schooling
- 10% of the entire asset base (sometimes 50% or more, called the Piglowska Phenomenon (where the House of Lords found itself determining a theoretical

Currently it is rare to have one side pay for the other side's legal costs, even where a case goes to an adjudication

case as the asset base had been entirely spent on the costs of the process of reaching what was, in 1999, the highest court in the land)

- or at least the difference between the two positions

In 2020, this started to coalesce into:

- rule changes
- a judicial hardening, where judges stop parties from pursuing aspects in the case, or their award addresses needs save that a party is left with no means to meet their legal costs – or part of them – on a "more fool you for letting that happen" basis

This will not feel like warm, kind justice – it is the stuff of devastation. It is difficult to manage because it is unpredictable – but there is one safe way: go forward purposefully; minimise your spend at every turn; acid test each step for whether it is worth it; and be alive to chances to settle.

13. Setting aside

Once a court order is made, it can be set aside really on only two main bases, touched on briefly earlier:

- **"Livesey":** that one side has breached their duty of disclosure
- **"Barder":** that there is a massive change of circumstances, that has the effect of undermining the basis of the order, within a short period of its being made and where the complaining party takes action promptly

14. Death & final divorce order

Note, however, that the powers are only triggered by the grant of the final divorce decree. If one side dies before that final decree then all of the work is set to one side: perhaps to be embarked on as "round 2: a claim for provision from the deceased's estate" under the Inheritance (Provision for Family & Dependants) Act 1975.

Wealth creators, seeking to move on perhaps with a new relationship, are likely to want to drive towards an early conclusion of the divorce process, rather than risk the case being re-run, following their death, because the decree absolute was not in place.

2 PROCESS FOR FINANCIAL ISSUES

A PROCESS FOR FINANCIAL ISSUES

We have considered issues of substance: what should inform the court's decision when it comes to financial issues. This chapter looks not at the outcome but at the process by which the outcome is reached.

Process is the means by which we bring disputed matters to – hopefully – a workable conclusion.

Ultimately, and whatever the dispute, what all couples need is the means:

- to be able to gather all the **relevant facts** relating to their particular dispute
- to be guided about risks and opportunities
- to understand, where there are alternative processes, **what outcomes** they would generate and at what cost (demands of the process, financial, delay etc) and to obtain support to manage that process where needed

And against that backdrop:

- to have a forum in which to **reach agreement if possible**
- to have a process in default, where available, to secure an **imposed outcome** for where agreements can't be reached
- in each case, this structure is likely to need to be reduced into a form that would **permit enforcement** if needed

Almost always the financial deal will be confirmed at court (that is where the parties have reached agreement, following disclosure and advice) – but there is no need to have the court impose the outcome: proceeding by agreement (and just asking the court to ratify that agreement) will be quicker, cheaper and less intrusive.

There are a range of process options for reaching that outcome away from court. The wise choice will often be the one that carries each party safely across to conclusion in the most efficient & speedy and least intrusive & expensive way possible. But unless and until a decision is made to adopt an alternative, all that lies ahead is court: that is the

default process and the process that either side can adopt regardless of the wishes and preferences of the other.

A long journey that no one would want to make

That court process might be thought of as a long and wearying journey up a sharp and treacherous mountain, one that is for almost everyone involved an utterly unfulfilling challenge and one to be avoided if at all possible:

1. It will take a great deal of time.

2. You will find it intrusive and the generality of tedium, step after step, may well be punctuated with a few moments of terror, uncertainty and frustration.

3. The demands that it makes of you will be significant: if you aim to manage a solo ascent, it is likely to take all of your time working out how to do it… if you gather a team around you to manage the terrain with greater safety then you can expect really significant costs.

4. There are some known staging points but a whole range of unknowns, trips and potential slips along the way… but at least at the top, there is closure… yes, there are occasions when the summit that you are hoping for is a false one and you are forced to journey a bit further (which may well be when your resources for a further climb are exhausted and you will have to dig deep) but eventually – and usually – it comes to an end.

Translating this into the process of family law:

1. It can easily take 15 months to get to the door of the court.

2. You will almost certainly be required to explain the minutiae of your finances and the history of how you got here and what you expect going forward in greater detail than you ever imagined would be needed by anyone. You will have to dig out or generate information that you never expected anyone to seek of you and if ever there was a moment when perhaps you made some chancy choices, well you should expect that to be looked at in eye-watering detail.

   You may have to provide this information more than once. There are also some pinch points, usually at court, when things may feel they are moving very fast indeed and are out of control with consequential sub-optimal outcomes.

3. You may have the appetite to acquire familiarity with the legal systems you face so as to be able to run your case on your own. But you would always be at a

disadvantage against those who have spent their working lives doing it and who have the advantage of objectivity. For most, there is too much at stake and the system is too nuanced and intricate for self-representation to be a safe option… but funding the professional team that you may need to get to the end of the way, to a final hearing, will seldom cost less than £80,000 and may cost several times more than that.

4. And whilst the court process has various fixed points, it also has myriad twists, complications and sub-battles along the way…

The summit is the final court hearing. The false summits are…

- Where the case goes part-heard or is delayed or bumped out of the list by an urgent children application taking the time so that you may have to come back perhaps months later.
- Or perhaps it is that one side appeals from the first decision so that it is only when the appeal court makes its determination that there is finality.
- Save of course where enforcement steps are required to convert the court award into reality on the ground.

Sadly, you would also be wrong to expect any profound brilliance at the end of this journey. We all like to think of our courts as discerning truth and delivering an outcome that is redolent of wisdom, insight and justice. The reality of course is that at the end of the journey to court lies just another lawyer – often a profoundly clever and quick-thinking lawyer – but ultimately just another person, doing their best but with too little time and too few resources to get it right every time.

Your former partner faces a different path, with different challenges, but essentially the same terrible journey, with all its dangers and disadvantages and the same miserable impacts on their time, energy and wallet and with the same uncertainty as to the ultimate outcome. So the question immediately arises:

WHY?

… why on earth would we choose to do this to each other?

The reason why these long journeys to court take place is usually because people can't agree the terms on which to stop them. Some people have unrealistic hopes of the summit: that they will emerge through the clouds into a sunlit upland where truth and justice will shine down and where their pain and unmatched contributions will be seen truly and be properly acknowledged and reflected in the outcome. Others are just

so bewildered or angry or numb that they let their Sherpa team of lawyers and other professionals take over and start and then pursue the climb, which continues because no one manages to call a halt. There may even be a minority (in our experience fewer than the popular perception) where the climb is much more about the preferences of the hired help and the financial needs of their bottom-line than promoting the informed choice of the poor trusting client, who is being carried along by their enthusiastic self-interest.

Ultimately fewer than one in twenty will journey all the way to the end: most will find terms on which to compromise along the way, but for many it takes far too long to make that decision and, for a significant few, agreement is reached not really because a good answer has been found but simply because they are too weary and foot-sore to travel further.

And then there are the 5% that do end up at the final hearing…

The right goal and the proper goal is always to work out the way in which the earlier agreement can be reached… usually alongside managing the case up the mountain for the final hearing in case it can't be agreed.

This settlement-aspiration is much more likely to be achieved where your former partner's legal team is of the same persuasion.

This is why managing the way that separation happens, taking care over how the early stages unroll and, if possible, helping with your former partner's choice of legal team can pay such dividends.

And providing an initial orientation around those early steps, understanding the mountain climb while simultaneously trying to avoid it is the purpose of these chapters…

Ultimately fewer than one in twenty will journey all the way to the end: most will find terms on which to compromise along the way

The court process

The current court process was founded in the late 90s and its current version will usually have the following staging posts:

		Timeline
1.	**The MIAM** The mediation information and assessment meeting takes place with a mediator before proceedings are started. Most applicants must prove that they have been advised of the advantages of settling their differences by mediation (or some other appropriate process) before they can safely start proceedings.	Early Jan, say
2.	**Issuing** The case is started. The court returns the issued documents for service on the other party (and also mortgagees, pension companies and various others entitled to be notified) along with the timetabling up to stage 4.	Mid Jan Early Feb
3.	**Disclosure** Each party is required to complete a detailed form ("Form E"), intended to capture every nuance of asset or resource and enable each side to indicate their needs and their basic stance in relation to the case.	Late April
4.	**First appointment** The court when it issued, fixed a date when the parties will generally be required to attend court for the purposes of case management. The court wishes to: • decide what further disclosure will be given; • assess whether expert evidence is needed (for example relating to pensions, asset valuations or about how any companies should be regarded); and • manage the timetabling of the case. To enable the court to complete this task, each side is required to provide additional documents, two weeks before the hearing, including: • a list of what each says are the assets and their values in the case; and • the questions to which each says answers are needed to enable the case to progress. Additionally, where expert evidence is going to be needed, formal information on options must be gathered and formal applications made.	Early June (End May)
	And these steps are likely to mean that, prior to the first appointment, each side will usually have visited a barrister: the advocacy specialists likely to be called in for the management of the hearings in the case.	(Early May)

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		Timeline
5.	**Financial Dispute Resolution hearing (FDR)** The period after the first appointment is busy with completing the steps laid down at the court hearing, for example: • each side answering the other's questions; • managing the filing of the expert evidence; • exchanging evidence on mortgage capacity and illustrating housing needs. As these various strands come together so it will be usual to meet the barrister again to consider and refine the offers to be made and the strategy in the case to secure the best outcome. By now the disclosure is often out of date so updating disclosure is usually required to refresh the numbers on the spreadsheet and bring the picture up to date since the information given in the Form E and the replies to the questionnaire. And so at last the FDR hearing arrives: usually an entire day at court, shuttling negotiations via barristers in the corridor, but with input and guidance from the judge, giving their views of the approach that another judge is likely ultimately to take at the final hearing. Whilst these indications can only be rough and ready (because they are based on little evidence and often only a cursory understanding of the paperwork in the case), they are likely to prove a powerful impetus to reaching agreement. Where agreement is not possible then: • directions to prepare for the final hearing are usually agreed; • (if they can't be agreed then usually a separate hearing will be needed); • the final hearing is fixed.	Sept Mid Oct
6.	**The final hearing** Whilst the FDR is fuelled by decent approximations of the factual matrix, the period post-FDR seeks to pin that data down minutely. An open position must be given for a final endeavour by the court to help the parties achieve agreement… but if no settlement: • statements will be filed setting out the main issues in the case; • further reports may be needed; • updating disclosure is eventually provided… … as the whole vast edifice that each side wishes to put forward as their case is finally assembled to be put before the court at the final hearing… Which will be a number of days at court when evidence is given, the barristers give their submissions and which will culminate (usually) in the judge giving the judgment and an order being issued.	April **year 2**

table continues on the next page…

		Timeline
7.	**Implementation** Following the hearing there is usually a fairly long tail of implementing the transactions required by the judge's order.	2-4 months afterwards

Refinements and complications to the basic court process

There is much that may be grafted onto this essential structure – some shortening it and reducing costs – much making it harder, more complex and more expensive:

At the outset:	
8.	**Protective injunctions** The court might be asked to step in to protect assets from being disposed of. Or it might be asked to provide remedies where one side has accessed the other's confidential information.
9.	**Restorative injunctions** Alternatively, the court might be asked to set aside a transaction, where one side disposed of assets to impact the court's ability to deal justly with the resources.
10.	**Interim provision** There may be applications for • interim provision (one side needs help with day-to-day living costs); • legal fees funding (one side, starved of funds, needs resources to meet their living costs).
The first appointment and FDR:	
11.	**Settling the first appointment** It may be possible to reach agreement as to the directions needed at the first appointment. If this can be done early enough, then pressure on the court list may mean that attendance at court can be dispensed with and the court's management of the case actually becomes the parties' agreed management of it.
12.	**Combining first appointment with FDR** For those who can move very swiftly and gather all the information that they will need over the early stages of the case (perhaps because they had already made progress in the case before proceedings were issued), the parties may agree to make use of the first appointment as the "second stage" financial dispute resolution hearing, with radical reductions in costs and a significant shortening of the overall length of the case.

table continues on the next page…

The first appointment and FDR *(continued)*:	
13.	**"The private FDR"** A creation by FLiP and increasingly adopted, the private FDR sees the parties agree to appoint their own tribunal for the FDR stage, so that timetabling better suits the parties. One of a number of known (experienced and respected) lawyers is put in the role of judge, providing the analysis and assistance to help the parties progress towards agreement. Privately financed, they will have read in to the case to a far greater degree and can be depended on for getting far more into the detail and the nuances in the papers than any court judge is likely to have time for, which improves the chance of agreement further.
At and after the final hearing:	
14.	**Transparency** he landscape is moving quickly here – the courts are seeking to ensure that the work of the family court is much more open to the public. The consequence of this is that private information is much more likely to enter the public domain. Detailed information as regards assets, behaviour and history will often be published – anonymising is not guaranteed and even where done "jigsaw identification" is all too easy. The person less worried about keeping all information private may be able to operate at a real negotiation advantage.
15.	**Part heard** If the allocation of court time proves insufficient for the case to be finished – perhaps because of interruptions… perhaps because of an under-estimate… or both – the result is the same: a delay of a couple of months or perhaps much longer before it is likely that the case can be finished off.
16.	**Appeal** Either side dissatisfied with the judge's final award.
17.	**Set aside** There is a rare minority of cases where the final award is set aside because of: • non-disclosure; or • cataclysmic change within a very short time of the award.
Finally:	
17.	**Enforcement** The court will take steps to enforce its award. The person who does not comply is usually on a hiding to nothing, but for the other party, there is still cost and delay whilst compliance is secured.

So what goes wrong?

It seems strange that a process so challenging, long and expensive would be the choice of anyone who could reach agreement to avoid it. But there are myriad ways in which former spouses find themselves making this climb:

- Until A feels safe/has the kids sorted/is able to manage day to day/is able to get their lawyer properly up to speed, they are simply never going to be able to get to grips with the detail of the financial conundrums and the decisions that it seems to require.

- B still cannot understand what their ex seems to want to do to them and the kids… day-to-day is a damp fog through the waking hours – just making it through another day on the calendar is the achievement; decisions beyond this are never realistically going to happen.

- C has been devastated by the end of the relationship; they simply cannot engage with their ex; after trying for several months, eventually their ex starts the legal process just to bring timetabling to the dialogue and try to move things forward.

- D's friends tell them that D should never trust anything that their ex says and that D is going to need to fight all the way if they are to have any hope of not being stitched up.

- E simply never gets to that point of being able to make a decision where they feel that they won't look back and feel that their impossible situation was all the result of being stupid now. The absence of clarity and certainty is what stands in the way of any agreement being possible.

- F has never been centrally involved in the family's finances: there has always been enough and F never had to worry but what their ex now seems to be saying about the realities just seems so bleak and out of kilter with how it always seemed to be…

- G is simply not able to translate all the numbers that are being thrown around into a practical, realistic plan for the future.

- H, eviscerated by the end of the relationship, has had little to do with their ex since breakdown; H feels that the only person who can really be trusted is their

B still cannot understand what their X seems to want to do to them and the kids… day-to-day is a damp fog through the waking hours

lawyer… the lawyer meanwhile is really only engaged in pinning down all the documentation they can in preparation for passing responsibility for the case across to the barrister at the FDR hearing.

- I knows their ex is lying; they stake all on the upcoming cross-examination when surely truth will out.

- I is similar to J who simply hopes that their ex will be called to account for what they have done during the marriage and at the end of the relationship. They seek the hearing because, until justice has been done, the stuff around the finances seems really in the background.

- K is utterly bewildered by the talk around the finances and the proposals for the future that seem unsurmountable and – frankly – unrealistic. Settlement is unlikely to happen because they are never likely to make a decision to say yes to a package that seems too overwhelming a prospect to manage.

- L can't settle without better understanding around the [company] [pensions] [other]… the case advances well into the process whilst this information is gathered… whether it will then settle will depend on how the situation is managed.

- M is barely making it through the day, let alone able to find the time to focus on how the case might finish: they have insufficient funding to meet day-to-day needs and their lawyer is constantly complaining, telling them that it is going to be impossible to take important steps whilst there are outstanding bills. Here the months during the case pass by because the case keeps stalling.

- N would love to settle but their lawyer tells them that the other side's offers are just wrong and the case needs to be managed to put pressure on the other side to improve what they are offering into a realistic zone… and if they won't then the case needs to roll on so that the judge at FDR can put the other side right on the likely settlement zone.

- O would love to settle too and though their lawyer seems really lovely and on the ball, it is just that O never seems to get any clarity around what they should do for the best and what they should expect by way of an outcome.

- P finds that their lawyer and their ex's lawyer can't agree on the day of the week, let alone have communications that continue long enough to identify whether actually they could agree a settlement structure.

- Q finds it difficult to get hold of their lawyer and when they do is always told that there is a next step in the proceedings to manage and so the time to reflect on where it is all going never seems to happen. Q finds communication with their ex really hard (the trust has gone anyway) so that alternative channel for

communication isn't really happening. Q is sure that their lawyer will tell them when the time is right to talk.

- R has a red line in the sand, which is [leaving the current home before the kids are at university] [the children leaving their current schools] [other] yet all that anyone seems to be talking about is not whether that will happen but when. R's answer is "over my dead body" and until a new structure is imagined or R can get their head around the common ground that everyone (including R's lawyer) assumes, progress will be limited.

- S keeps getting different recommendations about what process will be best and who to involve… making a decision yesterday was impossible and today seems just as hard (in fact now someone has given a new set of names)… as it happens tomorrow will prove just as difficult and so it will roll on until the opportunities have passed by entirely.

- T went into mediation very early on ,"perhaps too early"… but after that fell apart so horribly, it just doesn't feel like something that anyone sensible would want to try again.

- U cannot forgive their ex; the litigation process is an agony for their ex and U will continue it for as long as possible – unless their ex comes up with a just incredible offer, U's goal is to spread chaos – it is a strategy that worked well in the marriage and something good may come of it down at the wire where the deals are done.

But the tragedy of each of these scenarios was reflected upon by one of the great judges of the modern era:

> "As can be seen, the parties are £687,000 apart. Not very surprisingly, the combined costs of the parties amount to £652,000. It seems to be an iron law of ancillary relief proceedings that the final difference between the parties is approximately equal to the costs that they have spent." (Mostyn J in *N v F* [2011] EWHC 586)

What in effect he was telling the litigants is that even if they had settled for the worst that the other side was offering them (assuming that they had been able to do so right at the start of the case) then they would have been no worse off. And yes, of course that was the same for each of them, so this truism doesn't help parties to know where along that continuum to settle. And yes, it may have been that these offers were not available right at the start when the costs meters were at nil on each side – but the point remains: in too many situations the legal process gobbles up the resources that could have funded the deal, let alone saved the parties from the agony of the legal process with its uncertainties, worry at doing the wrong thing and the demands inevitably made on the participants as it unrolls.

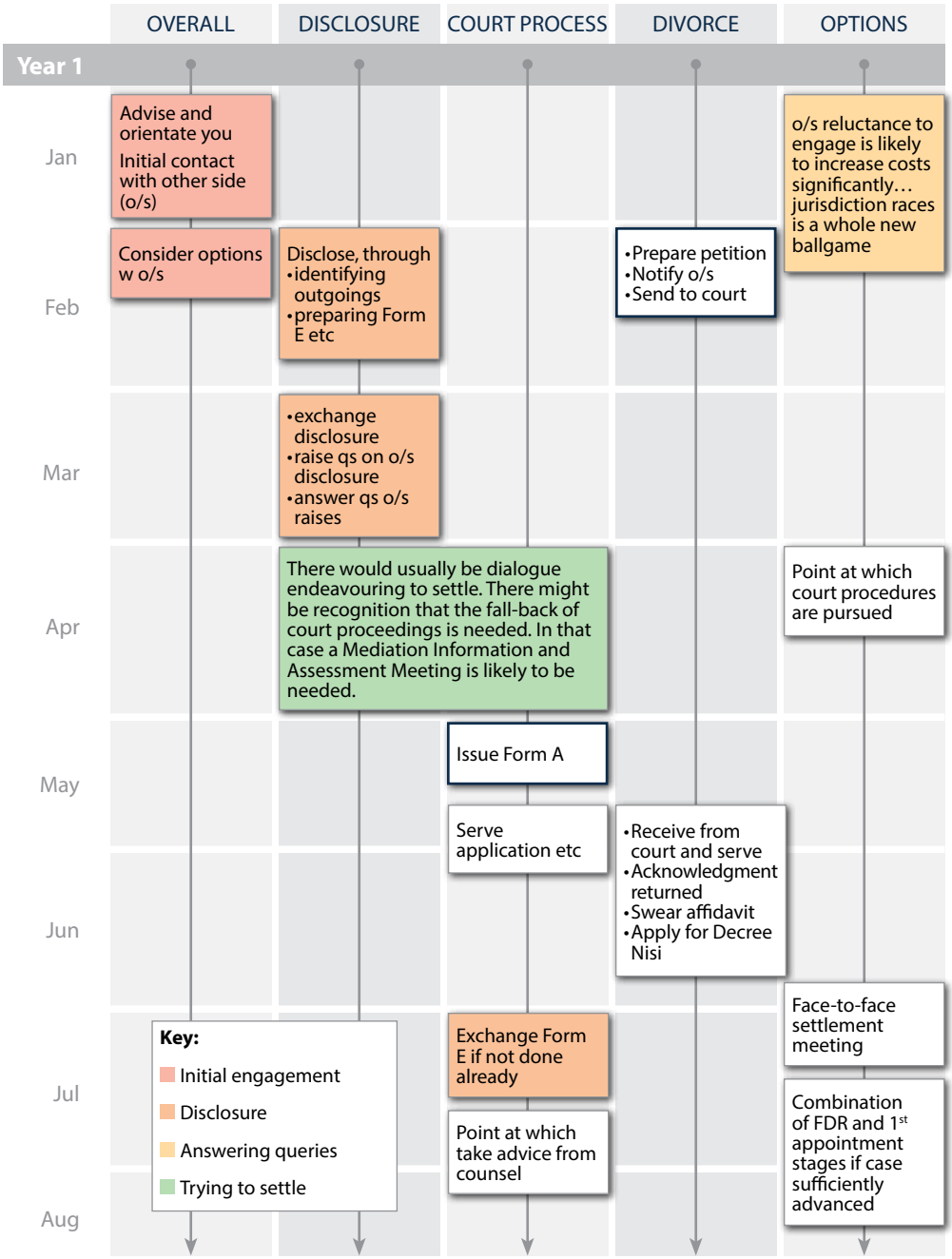
We will be working hard to ensure that this epithet does not apply to you. We hold in mind that it is not just legal fees; there is also the effort involved in disclosing and managing your case, the time it takes and the toll it takes on you (and on any future co-parenting relationship you need to have).

But just because it seems lunacy may not be enough to protect you both. Those involved in *N v F* and all the other many cases that fail to settle as they should are generally not bad or stupid people. The stresses of the litigation process can catch people in different ways and getting into the right process from which the good deal will emerge is seldom straightforward.

Our experience is that you need to get it right the first time: just starting with one process and then expecting to be able to abandon it and move on to the next may not work. Often the breakdown of one set of negotiations is the end of conversation and the start of litigation in earnest. But for many they can't seem to get any form of dialogue going at all.

Sorting out the finances and getting a divorce

An illustration of the steps, stages and spend in a routine case:



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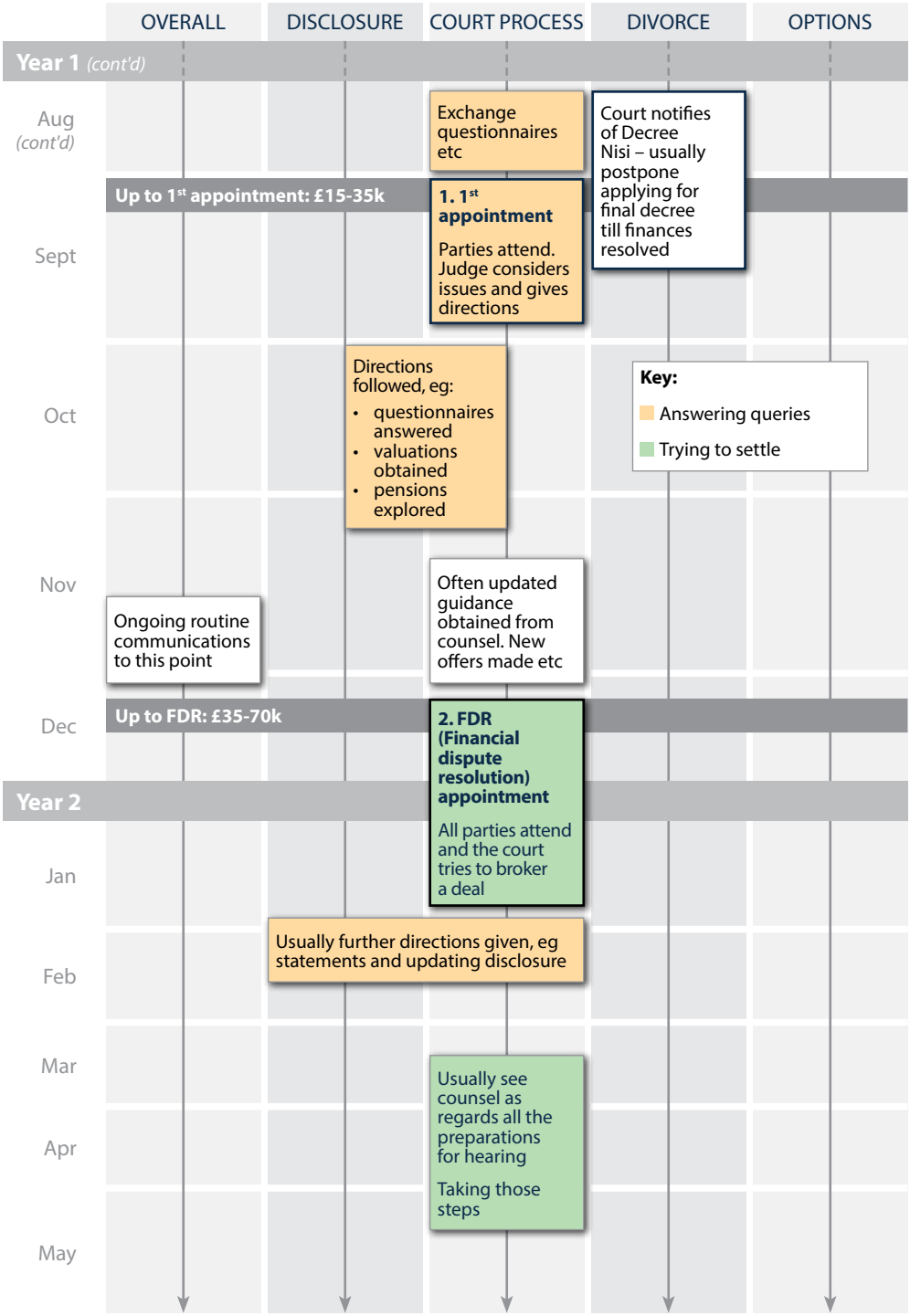

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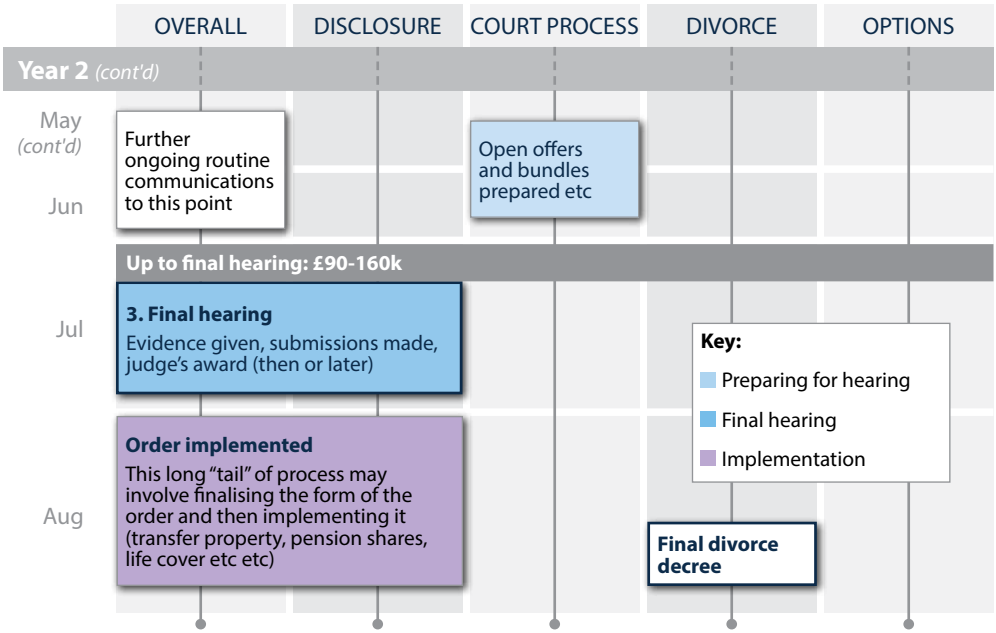

OVERALL
DISCLOSURE
COURT PROCESS
DIVORCE
OPTIONS
Year 2 (cont'd)
May (cont'd)
Jun
Jul
Aug
Further ongoing routine communications to this point
Open offers and bundles prepared etc
Up to final hearing: £90-160k
3. Final hearing
Evidence given, submissions made, judge's award (then or later)
Order implemented
This long "tail" of process may involve finalising the form of the order and then implementing it (transfer property, pension shares, life cover etc etc)
Final divorce decree
Key:
Preparing for hearing
Final hearing
Implementation

B CREATING THE CONDITIONS FOR NON-COURT DISPUTE RESOLUTION ("NCDR")

If court is the long journey up a treacherous mountain then "NCDR" (also "ADR" for alternative dispute resolution or simply "DR") is the picnic site, when a blanket is put out on the ground and each side lays out their analysis of the resources and their arguments and conversation takes place as to how the applications in the case are going to be settled.

Agreement to sit down can be at any point from the carpark to right near the end of the climb, after all the spending has been done but when the agony of uncertainty at the outcome and worry about the process is also at its peak. Of course the earlier that the conversation takes place, the greater the savings (which often means the easier it is to reach an agreement… far better to be negotiating when there is £150,000 to save than at the door of the court when it may be down to less than a fifteenth of that sum).

Managing a positive separation

This is where process connects to relationship. The way in which the relationship ends and the pacing of the steps after that point will have a major part to play in whether and if so what negotiation process can be embarked upon in preference to the court. One might think of the cliché of the person who is discovered in a long-running affair with a younger partner, or perhaps someone known to their spouse, where there has been surreptitious spending and a back history of lies, where there is a stormy separation and then a follow up with a self-righteous solicitor's letter. It would be little wonder that the parties would each be a good way up the litigation slope before there is much consideration as to alternatives and whether there could be solution through dialogue.

Of course some situations can't start slowly or with decency (in particular where there are jurisdiction issues or questions of safety) but where there are options, engaging (on the topic of disengaging) with sorrow and regret, with understanding and perhaps even some kindness can pay huge dividends. Giving things a bit of time may also be important.

These are big asks – they involve the polar opposite emotions of what very often is driving the separation. It is why getting advice from a relationship professional at this early stage can pay such dividends: being forced to recognise how this is all likely to be for your ex may enable you to make some profoundly better choices as regards timing and how the situation is managed generally.

Many people will manage their separation in the safe environment of couple counselling. It may be heavy and exhausting work but by trying to deal with the issue with honesty, decency and kindness they may be doing more than just the right thing. They may be avoiding a profoundly impactful first mis-step. By far the highest proportion of the thorny

and nasty litigation cases have their roots well manured by a toxic and badly managed separation.

Diagnosis of the problems to help identify the process

Beyond this, we may do well to pause and think what are likely to be our ex's needs to reach solution. Until you have found the process that will help to meet those needs, a solution is not likely to be found. Forgive the stereotypes but you can imagine a different set of needs between, for example:

- the person who has been excluded from finances and has no confidence in being able to run the household budget going forward;
- the person who has been out of the workplace for years, lost confidence in themselves but who must now start to find their way into the workplace again;
- the person who has been kept at arms' length from complex financial structures and who doubts your preparedness to play fair and disclose honestly and completely;
- the person who is terribly depressed and lost;
- the person who is so anxious about their safety or the situation of the children or perhaps has their horizon filled by other family members with their own crisis or challenges;
- the one who is furiously hurt and is looking to understand what has happened and how;

Until you have found the process that will help to meet your ex's needs, a solution is not likely to be found

- the one who has formed a relationship and is just wanting to close things down and move on;

- someone who wants to do the right thing – they just want to know that they are not going to turn around and regret the choices that they have made some years down the line if things get tough.

This is not easy work to do. At the end of a relationship, our own needs for vindication or acceptance are likely to fill the horizon – to be able to really put yourself in your ex's position and characterise and understand their views (rather than caricaturise a viewpoint that excuses and justifies our own) is likely to be challenging. Those who realise its importance will usually want to sit down with a relationship professional to test out and refine their thoughts.

Friends and family

The point of separation is new for you – but also new for your ex. The decisions you each make are likely to be profoundly impacted upon by the thoughts of those to whom you turn.

Friends and family are always well-meaning but so often the support slips into an alliance of criticism against the other party… that makes the settlement picnic less likely and with a renewed sense of entitlement (and clarity around the other party's guilt being built up on each side) the rigorous mountain ascent much more likely to take place. There are some friends-groups where the support seems to be more a form of vicarious gender-aligned campaign.

Friends and family being pushed into partisan camps in this way may be particularly unhelpful later on when the solution emerges and there is an attempt to rebuild what may have become a shattered context of family and friends in which the parties are seeking to co-parent the children.

The best support is usually of the informed variety and the best support from family and friends is often a listening ear, focused on helping a person access the help they need from a professional.

Professional support

There are lawyers who are more skilled in diagnosing what is needed to keep a situation on track for a successful dialogue (or who know where to access those skills) and some who are less well-prepared. There are those who have a fuller range of settlement processes at their fingertips and the skills to manage them well and others who are

Lawyers who have worked with each other successfully in the past may provide a particularly good way forward

looking to catch up (or more worryingly, not bothering to do so). There are lawyers who are resolutely focused on their clients' well-being and an unfortunate minority perhaps more focused on their own financial well-being. Finding the lawyer that is right for you is crucial, but seeing your ex connect up with the lawyer who is right for them may have even more to do with the successful process.

Lawyers who have worked with each other successfully in the past may provide a particularly good way forward if you are lucky enough to be able to manage the situation to achieve this. Where there is a greater level of trust, the process is more likely to progress faster and more cheaply and there will be fewer hurdles to dialogue… and a greater chance that the lawyers' support for the chosen process will make it successful.

The first lawyer to be instructed may be able to orchestrate this or, from having started out in couple counselling or in mediation, you may be better able to agree a mutually beneficial way to go forward.

Communication

Being able to keep open the communication channels between you may be valuable. We are profoundly connected to the people we have married and spent so long with and with whom we may have had and raised children. You may not be the ones solving the issue for the other (your ex is more likely to see you as the problem than part of the solution most of the time) but there may be times when you are able to make small touches that influence the direction in which things now advance and the choices that are made. Where the communication has kept going at some level, it is going to be far easier to take advantage of the picnic sites when they can be spotted, and it is to those that we now turn.

C NON-COURT DISPUTE RESOLUTION OPTIONS

There is a bewildering range of options and hybrids, and also very different styles being brought to the same umbrella-process by different professionals, making for a very different sort of process even within the same group, with different strengths and likelihoods of success in your particular situation.

The success of a process is likely to have a lot to do with whether your lawyers are each enthusiastic about it for you and their views of whether it will be beneficial for you. As such it is probably only helpful to give a broad overview of what each involves and the differences between them as these are likely to be considered in detail as you progress and as the different preferences of the parties and their advisors 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. 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 NCDR will only happen if there are agreements: to do it, when to do it, and the form it will take.

One way of looking at the different NCDR options is to think about who is involved and how…

- Your own advisor
  - none
  - *ad hoc* as you ask for it
  - in the room with you
- A non-aligned professional
  - none
  - a neutral facilitator of views
  - as above with legal information
  - as above sharing views and concerns on the positions being taken
  - giving an opinion on the law
  - giving an opinion on technical issues
  - imposing an outcome

These professionals can come in different flavours, with expertise that might be in:

- the relationships
- the children
- communications
- law
- technical matters such as pensions, tax or investment

The most used alternatives are shown in the grid below:

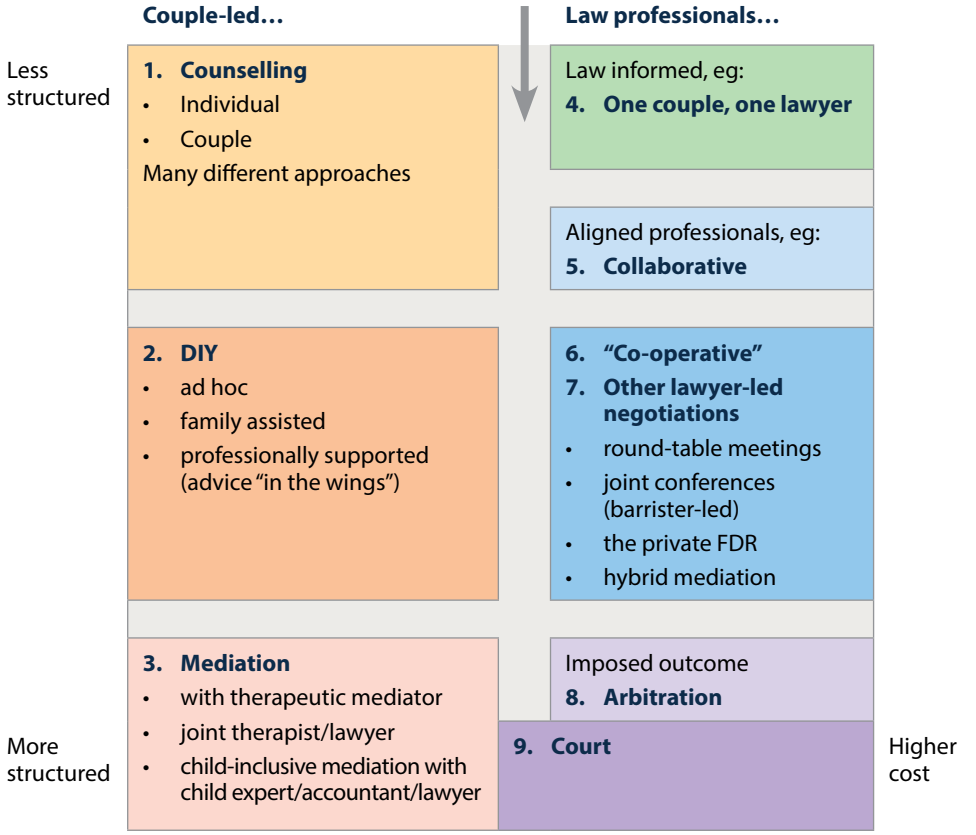
<table>
<tr><th></th><th>No advisor/occasional advice</th><th>Directly involved advisor</th></tr>
<tr><td rowspan="2">No facilitator</td><td rowspan="2">The "DIY" divorce, with or without lawyer support in the wings</td><td>Collaborative practice</td></tr>
<tr><td>Lawyer-led negotiation
This might be negotiations by letter or a one-off or a series of meetings</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 parachuted in</td><td></td></tr>
<tr><td>Facilitator and tester</td><td colspan="2">Crunchpoint/ hybrid mediation
(possibly but more rarely without lawyers)</td></tr>
<tr><td>Help with the law</td><td colspan="2">Neutral Evaluation / Private FDR
(usually but not always with advisors on each side)</td></tr>
<tr><td>Imposing an outcome</td><td colspan="2">Arbitration
(usually but not always with advisors on each side)</td></tr>
</table>

These processes might come in combinations or 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 fixed process commencing in neutral facilitative mediation, but with the unresolved issues then being referred to arbitration if an overall agreement can't be reached.

FLiP's "Settle" sees the harnessing together of 1) counselling 2) mediation or sole lawyer and 3) agreement to arbitrate at the outset. "Together" sees one lawyer acting for both parties but often bringing in other services to help progress.

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 in the following form, which also provides our opportunity for a brief sketch of what is usually going on in each:



So here…

- In the top left is a process with a therapist helping the couple address relationship issues. The parties might attend one therapist 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, one or both might be having individual help. The focus is on 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 divorce as the parties seek to find their own agreement; perhaps one or both are taking advice to help them make decisions.

For many couples one side will not know about the resources and usually neither knows what they might be entitled to receive

- 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 outcomes from one lawyer, for example, the "Together" model mentioned above.
- 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).

Some of these processes (eg 4/5) may sound like the perfect mix but are professionally complex and thus procedurally taxing, which is why they are relatively undeveloped.

The DIY divorce

There is no requirement to involve lawyers in the negotiations around money. Either or both spouse can seek to manage their arrangements through direct discussion/ negotiation.

Upsides include the convenience and low cost. The downsides seem specific and narrow but often prove fatal:

- To reach a binding conclusion, a technical write up is needed which will usually mean that professional help is needed. That is when the hard-worked-at agreement may come off the rails as the lawyer on one side or the other says that the agreement is not fair.

- For many couples one side will not know about the resources and usually neither knows what they might be entitled to receive, and so they are likely to want advice.

- Where, as so often, relationships break down in mistrust, it is difficult to have successful conversations that will generate an outcome that will "stick" and also be capable of conversion into a final binding set of arrangements. More usually assets are simply divided and the claims are left hanging… which means that they could be pursued perhaps years later.

- Usually as an impasse emerges, one side will consult a lawyer and then the other party will follow suit out of fear being out-manoeuvred.

Mediation

A mediator is a non-aligned professional, whose primary task is to facilitate the parties' search for solutions to the issues they bring to the process. Lawyers can't advise clients whose interests are in conflict. So no mediator will be giving advice as to the outcome that would be secured at court, beyond broadly-based guidance.

The process of full disclosure may be undertaken in mediation – but will generally be less rigorous than is normal in the more lawyer-led processes on the right hand side of the corridor.

Recently mediators have become permitted to prepare the court order that reflects the agreement. But many will not do so, preferring each side to obtain their own independent advice. They will frequently give help and recommendations as regards when lawyers should be consulted by the parties to promote progress.

The outcome of mediation is an agreed hypothesis (called the "MOU" or "memorandum of understanding"). It does not bind but is the model that the parties adopt for progressing their case. Usually at that point, lawyers are instructed to advise on the hypothesis and subject to that advice either write it up and convert it into a binding structure (usually by court order), perhaps negotiate any finer points of detail that the hypothesis throws up or perhaps identify these for further discussion and hopefully resolution.

If agreement can't be reached then the transition to court-based resolution is common.

The process has the advantages of:

- **speed to the table:** mediation is quick to set up and everyone is working on solutions from an early stage;

- **speed of dialogue:** rather than slow exchanges (as each idea works its way by emails to and fro) there are meetings, so the exchange of ideas is

instantaneous, meaning they can be picked up, assessed and discarded or built upon very quickly;

- **relationship advantage:** mediation should help to build a problem-solving relationship between the parties: they are helped to solve their issues themselves, which obviously is a resource that will be of benefit for the solving of questions down the road such as in relation to parenting;

- **lower cost:** the parties are paying for one professional between them rather than paying for one lawyer each;

- **high control:** the parties' preferences and values are undoubtedly "louder" in the mix that generates the outcome and there is likely to be a faster focus on what matters to the parties;

- **positivity:** there is the more nebulous but important factor that the relationship is strong enough to seek to sit down to find solutions together. That can only be a good thing.

Potential downsides could include:

- **power balance:** this can feel less of a good option where one person has felt disempowered by the relationship and feels they are entering the discussions with less knowledge of the finances/capacity to manage financial discussions/ negotiation skills generally. Whilst it is the role of the mediator to manage these imbalances, mediation can still feel a challenging option for some people;

- **audit:** as referred to, it will often be hard for mediation to manage the long, hard careful examination of all the numbers that is routinely offered by some of the other processes. Different mediators will have different levels of skill over this but some situations may well be too complex to fit well in this room;

- **support:** a non-aligned mediator will not provide you with the direct level of support that you may need or that your ex may need… which may mean that the process ultimately will struggle to deliver;

- **guidance:** the broad-based legal information gives space for your voices but either or both of you may miss having the guidance in the room as regards what the law would be likely to give you and whether the hypothesis being explored is centrally within the bracket of the sort of solutions that the court would be offering (which might be better… or worse). Sometimes mediations unravel because the advice given by parties outside the mediation room is so clear… and so different!;

- **stress:** mediation is there to enable couples to sort out the issues of separation, often shortly after separation. It is a pretty challenging proposition to sit down and

do this work, when, as is often the case, emotions are still running high. However, all too often it is just as hard to put everything on pause till the temperature is better suited to the challenging work involved;

- **no binding agreement:** mediation does not have a binding outcome… there is a possibility that it will conclude and still fall apart, leaving the disappointed person with a sense of hard work for little purpose;

- **iterative discussions:** it can be easy for the mediation process to continue for too long: agreement doesn't arrive but the attachment to making mediation work can give a sense of going around in circles and, if still ultimately inconclusive, an irritation and an impatience for conclusion.

Across the corridor lie the rooms where the outcome is more guided by legal principle:

Law-informed

This country is only just starting to investigate whether one lawyer can provide guidance to two parties. Largely such experiments seem to be of a "getting there with challenges" flavour; they are not yet mainstream or commonly used. FLiP offers "Together": a one lawyer model where the parties agree to work constructively rather than strategically and be led by the advice they are receiving. They may be a good way to get started, to receive common information at least over the early stages. The solution is more likely to be "law-shaped" than "you-shaped" but it can be a successful model for many couples.

The specifics of each offering will require examination and is likely to be a case of "the right thing for particular circumstances". It may have some or all of the advantages / disadvantages of the mediation offering (whether more of the disadvantages than the advantages will depend on the offering and your particular circumstances), and:

- is a law-based solution what you want? Your own voice in how the future should be played out is obviously quieter on the right hand side of the corridor;

- generally higher cost than mediation.

Collaborative

Invented in the USA, collaborative divorce involves a "participation agreement" or contract, committing the parties and their lawyers to work constructively and for the good of the family; to keep negotiations at the table; to seek no secret partisan advice; to be fair and disclose fully… and ultimately (and if agreement can't be reached) to use new lawyers to reach conclusion.

The system's heyday was in the noughties when many trained in what promised to be a new level of constructive working for clients.

Advantages include:

- often a good working relationship between pairs of lawyers who may have done considerable work together in the past;
- a strong ethical aspiration to do well for the family and to provide each party with what they need to go forwards;
- transparency and respect for the wishes and choices of the couple; and thus
- a genuine intention to keep the law component helpful only (so it does not proscribe the outcome but negotiations are conducted with awareness of what it might provide).

Problems include:

- that many lawyers are no longer active in the model (or never were) so there can be variable buy-in to the ethics, which can leave you stranded or exposed where there is a mis-match of expectations between the lawyers or the parties;
- the iterative discussions: the lawyers too are bought in to reaching agreement (rather than have a failed collaborative)… that can work well but it can also promote circumstances of high expense as parties struggle to make the final concessions needed to generate the bridge of an agreement.

Various forms of lawyer-led negotiation

Next door and looking similar but ultimately differently flavoured are more lawyers acting for their clients. "Co-operative" was supposed to be collaborative without the disadvantages (but which often proves to be an unclear version of collaborative – which can prove to be collaborative but without the safety).

The broad range of lawyer-led negotiations that really applies here may be:

- a highly constructive dialogue between two solicitors with the clients in the room
- a dialogue by phone or email between lawyers
- a round table meeting or perhaps shuttle negotiation
- it may involve the engagement of barristers who then take the lead

- it may be pre-proceedings or very late in the day (perhaps even at court waiting for the hearing to begin)

There are two options in this range that have acquired particular popularity:

First is **the private FDR**.

- it apes the FDR that is (usually) the second visit to court in the court process described above;
- like that process, it usually involves the parties being represented by barristers. It is highly driven by the views of the court-based outcome;
- unlike that process it takes place when the parties and their advisors decide – so it will often take place far earlier than the court's FDR ever would;
- it does not depend on having a court judge because the parties identify their own judge, usually a senior barrister, to hold the court and express their view and generally seek to propel the parties over the line to agreement.

However, the private FDR is still a relatively late-arriving event, when often considerable costs have been incurred. Hand in hand with that preparation usually comes the phenomenon that each side is likely to be relatively "dug in" to the sense and appropriateness of the positions that they have adopted. Indeed the FDR will almost always be preceded by without prejudice offers where each side hones and refines their best legal case. Many of the harder situations are still susceptible to solution at an earlier stage before this hardening of stance has taken place, which has created space for the success of the more recent development, **hybrid mediation**.

Generally:

- (but not necessarily) each side has their legal representation in the room (Zoom or otherwise) with them
- progress is generally achieved by a mediator moving between the rooms
- there will often be no endeavour to hammer out the right legal answer… each side is left with their views of the application of the law but with encouragement to recognise that as both sides can't be right, perhaps neither is and "right" probably lies somewhere else
- there is focus on the benefits of settlement and creativity around what might be needed to achieve closure
- the lawyers are on hand to assist and to progress the agreement often achieved

Arbitration

Whilst a mediator facilitates a dialogue between the parties (and should keep their own views as to the "right" outcome to themselves), the arbitrator's view of the outcome is like the judgment of a court and it will bind the parties.

Arbitration is perhaps best thought of as BUPA-justice: the parties are not dependent on the court to progress their case; they advance it themselves and vest an independent third party with the power to make decisions where they cannot agree.

So arbitration only happens by agreement but, once started, the arbitrator is given the power to impose arrangements as to process and the ultimate outcome.

Whilst a court process may take 12-15 months, the arbitration process will commonly unroll in 2-5 months. All of the information that the court process would require, the arbitrator will require; they are required to apply English law and will generally adopt court rules as their fall-back save that they are required to manage the case to minimise costs and delay whilst also ensuring a fair hearing.

Commonly there will be:

- discussions/ negotiations between the parties' lawyers as regards the choice of arbitrator
- the signature of the ARB1FS
- disclosure by Forms E
- a first meeting where the arbitrator will seek to map up the stages for progressing the case
- questionnaires/valuations/expert reports (just as in the court-based process)
- statements/updating disclosure if needed
- and then a decision either to progress to a hearing (on private premises) before the arbitrator, a bit like the court, or a "papers-based" disposal where each side puts their case to the arbitrator in written submissions

The process will be timetabled around the preferences / availability of the parties and their lawyers. It may build in hiatus for without prejudice negotiations (settlement meetings or a private FDR). It will be as light touch in its process as the parties agree (or in default of agreement as the arbitrator decides) and can be restricted (thus saving time and expense) to determine only the issues on which the parties haven't yet reached agreement.

Drawing the strands together across this continuum:

	DIY	Mediation	Early neutral evaluation (ENE)	Collaborative	Lawyer-led negotiation	Arbitration	Court
Cost	Minimal	Cheapest	£2-5k, but unlikely to provide a solution on its own	£5-£30k	£10-20k	Depends on case, say £20-£150k or a lot more	
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	Up to 15 months or more
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	

D PROGRESSING FOR THE BEST?

There is no one best way forward for all situations. (There is no one best process, or there would only be just that one).

If the situation is pretty good between you and your ex, then:

- if you have appointed lawyers who have a good working relationship then this may be a good way to make progress – or at least it is worth testing out whether you are able to get to an agreement this way;
- alternatively, if you and your ex are able to agree on a mediator (particularly if you have lawyers and your lawyers agree this is a good choice) then this can be a very good way for exploring the options;
- others have had success through their lawyers "bookending" the process, by which the parties come together in a five-way meeting to discuss parameters and approach. Ultimately and where there is sufficient clarity perhaps a financial professional (financial planner or accountant) is engaged to fine tune a structure that is emerging from that conversation, which is then a) converted into a binding agreement between the lawyers and b) implemented by the financial professional;
- for others, the ethical uncoupling provided by collaborative is the right way to go and here the imperative is to find two lawyers who are good at this work and practice it regularly.

Increasingly, though, what we have experienced is the need to find a way to manage stasis: progress is blocked, perhaps the lawyer on the other side is being horribly slow or unfocused or unrealistic in their approach or their client (your ex) is holding back endlessly. With no sign of change, what is needed is a way out of the doldrums.

Here there is a definite series of escalating phases to ensure that ultimately the situation can be brought to a conclusion:

1.	**Clarity around your plan:** the first steps will involve your being clear so far as you can as regards the likely bracket of outcome, the process options by which you might get there and their likely cost and your overall strategy, so that you are able to plan a bit for the future.
2.	**Counselling input:** within this stage, you are likely to have wanted to have help to understand your ex and their stance in the process to see if there are insights as to how best to engage to achieve progress.

table continues on the next page…

3.	**Dialogue:** we seek to engage with the other side, to create an enthusiasm for closure and so far as possible: • identify and build on the common ground • minimise areas of disagreement • explore and agree a low cost, reasonably speedy and efficient plan for resolving those issues
4.	**Managing the interim:** Alongside stage 3 and if time is going by without any chink in the clouds (and building on the work done at 2) you are likely to want to think through, and put in place, how you are able to cope with an extended delay. So far as possible, you should seek to be able to get on with your life so that delay (more delay and then some) will not be maddening. Many poor outcomes are generated just because one side is not able to put up with the interim any longer and is willing to settle even on poor terms just to see things concluded (an approach that seldom works out well). Your becoming fit for delay will include putting in place an efficient management of your legal advice team (hence needing to get you properly equipped as to what to expect at 1.) So far as possible therefore you are not feeling constantly anxious about the future – the monthly drip-drip of substantial legal bills can be a hefty part of what can bring you down. So get your plan and settle down for it to unfold as you have designed it.
5.	**Insight where there is inaction:** if, after due regard to the strategy emerging from insight from 2, you feel that you need to push things on (the *"or we could be here forever"* factor) then take steps to move matters ahead. Avoid at all costs being the person 6-12 months down the road saying to yourself *"if only I had started things more formally back then, I wouldn't be in this mess now and I would probably be nearing the end of the court process instead of being so far in and still – effectively – in my tracksuit at the starting line."*
6.	**Action where there is inaction:** Back on the pages dealing with the court process, you will have noted that there is a long period at the start of the case before anything major happens… first the MIAM then waiting for the court to issue before finally the wait for the first appointment (in theory no more than 16 weeks but in reality at least that). In consequence getting your application at court started will often make perfect sense… court is the one thing that the other party can't ignore and procrastinate over. Given that the first appointment is probably still over four months away, your position will be: • *I am issuing not because I want to see the case resolved at court, but because I don't… I just need to see it resolved.* • *My hopes are that we can negotiate still… The period before the first appointment is sufficient, I think, to see things resolved between us…* • *If, despite my hopes and my good intentions we can't do so, then we will have the appointment at court; and…* • [**see point 12 on page 48**] *We can surely then use the 1st appointment as FDR to be helped by the judge to get agreement over the line.*

table continues on the next page…

7.	**Strategic care prior to issue:** At the point of issuing, you will: • Consider making an open offer. Your offer will be on the basis that it erodes by all the costs that you incur from that point onwards. An early offer can put you in a strong strategic position as the costs of the case start to have an impact. • Often offer arbitration (as a faster and cheaper alternative to the court). This may bolster your credentials at court and also your ability to complain to the court about the costs of the court-based process. • You have to attend mediation (to secure your MIAM certificate) **see point 1 on page 46**. You will do your best where relevant to have the mediator engage your ex if you think that there is a realistic prospect of mediation providing a route to closure.
8.	**Stepping forward** • At this point and if there is no positive response, you will issue your application. • If you have not already disclosed, you will press on with this quickly (arguably your open offer cannot be effective without this material anyway). You will also be full and meticulous in the (probably ridiculous) number of questions that are raised on your disclosure, treating them as an opportunity to clarify your case and bring the judge on board.
9.	**Act on non-compliance:** You will be rigorous where your ex does not meet their obligations to comply with court directions. (This is probably more detail than is needed at the start of the planning phase, but the endeavour is to ensure that you meet all deadlines in full all the time and that justifies your complaining where your ex fails to do so.)
10.	**The imminent court date:** as the court date draws nearer, there will usually be engagement. All being well, the case may settle. If not then the information that has been drawn together will enable that first appointment to be treated as FDR… it may not be possible, but you will have tried (including trying to rescue the family from unnecessary legal costs). At least your preparations will be further forward than they would have been and you are probably able to show the court who has been responsible for the delays and seek to persuade the judge to take a strong lead to now move things forward. If you can't use the 1st appointment as FDR, at least you should be able to avoid attendance at the hearing (by agreeing the directions that will be given (**point 11 on page 48**). There is also a good chance that the other side will now agree to a private FDR, offering perhaps the best chance of early settlement of the slow-to-engage case.
11.	**FDR (private or court based) and in so many cases closure** This may not have been the best answer to the questions raised by the case – it will not be the cheapest. However, it is still closure and finality and a great deal better than some of the alternatives that may have involved uncertain or unsustainable delays and at least it propelled the situation forward within a reasonable-ish time frame to enable everyone to then move forward with their lives.

This is one tried and tested route through the maze – there are many others.

E WHO IS INVOLVED

It has been trailed in the preceding pages that there may need to be a variety of people involved in managing the process to conclusion.

The therapist, family consultant, counsellor

- likely to be involved to build insight as to your ex's view of the world, enabling you to work out how best to manage the situation;
- may also have an important role in your managing the situation in which you find yourself (to include frustrations as to the legal process).

The senior solicitor

- likely to be at the core of the strategic and day-to-day management of your case, to include the other professionals involved;
- perhaps involving a junior so as to permit the split of functions between higher-cost, strategic aspects (where seniority and experience may be crucial) and more routine day-to-day work.

The assistant

- in good firms, costs are slashed by involving highly experienced trained assistants in an administrative role, removing from the professionally qualified a lot of the day-to-day functions that otherwise would be charged at higher hourly rates.

A therapist, family consultant or counsellor is likely to be involved to build insight as to your ex's view of the world

Barristers are on the front line day in day out and so are highly skilled court technicians, often with a greater capacity to "call" the outcome of a case

The barrister (aka "counsel")

- barristers generally go out at lower hourly rates (they have lower overheads);
- through their being relieved of the routine functions of case management, they are at the coalface day in, day out and so are highly skilled court technicians, often with a greater capacity to "call" the outcome of a case. We will involve them when the data begins to come together for their objective review of your situation, their estimate of the likely court decisions in your case, for analysis of gaps, tips and traps and strategic guidance generally, and for specific drafting tasks.

Accountants, pension advisors, financial planners, valuers

- any of the above may be involved to give expert guidance to the court, for example as regards values (companies/pensions/properties, cars, antiques etc), generally as a "SJE" (single joint expert);
- these professionals may also be involved in a partisan way, perhaps to challenge the view of the JSE or perhaps just to plan or enhance the presentation of your case;
- a financial planner may well be sensibly involved by you as the re-investment/rebuilding process begins or to provide advice as regards the resources released by the litigation.

Implementation team

- the partnership of marriage reaches into almost every aspect of our lives – little wonder that at its ending there is likely to be considerable "sorting out", even after the deal is struck: there will usually be properties to transfer, sell or buy; there are wills to write; pensions need to be managed and financial security rebuilt, generally; there will also be bank accounts to separate out or close and a whole raft of matters to "DIY" and we will give you checklists about this, in due course.

Some of these "transactional" pieces can be got underway sooner and we will help you through each of them at the relevant time, offering you connections to our tried-and-trusted professional contacts as we go and otherwise clarifying what needs doing when.

3 SPECIFIC/HARD SITUATIONS

Legal systems adopt a set of principles for the courts to apply that approximates to their citizens' culture of fairness (to a greater or lesser degree). No set of principles will provide a perfect answer and there are usually outlier sets of circumstances where justice does not even feel approximate. There are other areas where the principles we examined in section 1 seem to apply imperfectly and yet… the approach that we describe below seems to be the way that the court will progress (at least for now and until the next big change arrives). Almost certainly specific and detailed advice will be needed – and in less usual circumstances or combinations of circumstance, particularly so. These principles need some working through and all we aim to do in this short chapter is provide an overview of some of the more regularly encountered of these harder situations by way of illustration.

Earnings

High – and uncertain – earnings

Almost everyone who earns well has insecurity of earnings. Anyone would reasonably want to say to their judge: "fine to look at my decent earnings but be cognisant that I am never far away from their ending – it is only fair that this is recognised and taken into account."

However, by and large, the court will not do so. Its approach tends to be "We cannot know. These are the findings that I make for now… if there is a change then come back and we can vary the arrangement…" That will not always be fair – but it will often be what is done and it may feel like rough justice.

Infill from high earnings

That sense of injustice may feel particularly rank where the court looks at the higher future income and decides that it is fair to depart from an equal division of available capital or pensions (in favour of the financially dependent party), on the basis that the higher earning party will infill (ie replace the shortfall in their share) from the future income surpluses.

This in itself may be hard to put up with given the magnetism of equality and the mantra idea that future income is only invaded to meet needs.

It is so much the harder given that:

- capital and pensions are divided (pretty much) on a once and for all basis
- it is only income orders that can be varied if there is a change of circumstance (in this case a fall in income)…

- so if the high earnings catastrophically end, there is generally no way back to adjust the capital shares that were made on the assumption that all would be well

In such cases and where uncertainty is high and a clear argument made, the court may:

- be slower to depart from equality
- try to make capital provision in a way that could adjust if there were such a down-turn, but options may be limited and unfairness can result

Duration

Neighbour to the issue of insecurity (through for example market downturn, technological change or redundancy) is the question "when is retirement reasonably to take place… and if the earner continues after this time, is it reasonable that they retain the fruits of that endeavour?"

This will be important because some sort of assessment has to be made about when pensions will be drawn down (the earlier they are drawn down, the thinner they will be) and generally when the parties move from primarily meeting their regular needs from earnings to meeting them primarily from retirement resources.

In our experience, the court is seldom particularly forensic about this… the decisions are likely to depend upon the prejudices of the judge (beware therefore 70-year-old judges where you are hoping for a mid-50s retirement date).

Variable bonus and fluctuating incomes

A recent solution, founded in the 2013 case of *H v W* and adopted with enthusiasm in many cases, looks at "basic" and "higher" needs… where appropriate:

- an award of spousal maintenance is paid from the basic salary

Some sort of assessment has to be made about when pensions will be drawn down (the earlier they are drawn down, the thinner they will be)

- and, from the end of year bonus, is paid to the financially dependent spouse a percentage of that bonus up to a cap so as to enable the recipient to meet needs at a higher level where income has run at a higher level

The starting years for complex earners

The start-up period for those whose incomes are built out of, for example, basic salary, end of year cash bonus plus end of year bonus paid in deferred shares, is likely to be somewhat intricate and need careful attention.

A range of different approaches is likely depending on whether the case is one that is ultimately resolved according to the sharing or needs principle, and if needs then what needs are being met. But into the mix may need to come…

- The fact that within the apparently healthy numbers is the reality that there are unpaid taxes to fall due on income already earned. (So the bank accounts will be inflated by the fact that tax due on the income they store is only going to be paid in the following January/July).

- The fact that the court is likely to consider the applicant spouse as entitled to share in the deferred share bonuses already earned at the point of separation (even though the benefits are not scheduled to fall in for some time and the scale of the future resource can only be guessed at)[6]… this may mean the spouse receives their share when the bonus finally falls in or perhaps some deal is made where the earner retains these future benefits for a price.

But what should not be permitted is double counting, ie:

- treating the earner's income as high on account of those receipts (and pitching the maintenance award accordingly)

- at the same time as sharing those receipts as if they are capital

6 One of the febrile areas for discussion is the period during which the spouse is entitled to share in this way. One judge decided that the spouse could share until the bonus related to a period twelve months' clear of the point of separation. Other judges have criticised that judge for pronouncing an impermissible rule of thumb.

Companies

Elements in the analysis

The shareholding in a company through which the earner does their work has a value. Where it has been built up entirely during the marriage (or simply built up further during the marriage) it will be treated as a thing of value in which each spouse is entitled to share. The process of valuing this asset and then working out how value can be obtained to share it between two separating spouses is often a difficult and expensive part of finding an outcome.

It is obviously complex where the company must provide the resources to make the payment and some ingenuity may need to be brought to the task of creating the liquidity for the payment to the applicant spouse.

But where, perhaps, the company has no obvious route to creating this liquidity, there is often further complexity because:

- the company is generating an income from which a claim for maintenance may in some cases be made
- but the level of the income is what will often be used to calculate the value of the company
- there is a principle against "double recovery" (ie, as we just saw, claiming on the value of a resource as if it is capital but then claiming against it again as an income-generating asset)

Many business owners who live and breathe the realities of their business life every day find it hard to boil down clearly for the benefit of the court how their business works. Where the court cannot appreciate some of the real challenges of maintaining the

Many business owners who live and breathe the realities of their business life every day find it hard to boil down clearly for the benefit of the court how their business works

Pensions… the court will operate in different ways depending on whether the sharing or the needs principle is uppermost

business, it can overestimate the value or underestimate the challenges to continuity of making one payment or another.

A business owner should be careful to communicate the challenges and workings, and connect the explanation to the published company accounts and management accounts. The court will be conscious of the importance of the ongoing health of the company but will be demanding, exacting and creative as regards how the value that it perceives should be shared or which is required to meet needs is to be extracted.

Pensions

It is difficult to avoid the idea that the family law industry doesn't really cover itself in glory when it comes to pensions. Chastisement from those really in the know (largely from the pensions industry itself) means that changes are underway. Properly guided, the court will operate in different ways depending on whether the sharing or the needs principle is uppermost.

Where sharing applies a straight division of the defined contribution fund or a broadly equal division of the defined benefits is appropriate.

When it comes to needs cases, there is of course an interface between maintenance regimes and pension sharing. We suggest that what the court will generally need to do is hypothesise a point at which the clean break of maintenance will be imposed, then share pensions, and then assess whether the financially dependent spouse will:

- have enough from that pension to meet their retirement needs; or
- be able to build up enough through a combination of a pension share and future contributions towards some form of retirement saving out of income (or through making use of other capital resources – perhaps downsizing from a more substantial home to release capital).

But we don't often see this level of discipline involved. Quite often the court will operate more on the tacit basis of "well the pension seems quite large, so that probably sorts the retirement years… now what shall we do about maintenance in the meantime…"

The sad reality of course is that even quite substantial pension numbers will generate relatively modest levels of income (currently, for example, £100k of pension fund is assumed to generate £2,500 gross of income p/a[7] from age 60. So this may be another situation where edging oneself towards dialogue and then horse-trading to a conclusion may be the messy and unpredictable but ultimately profitable approach.

Farms

Farms can generate outlier outcomes. Unpredictability can come from a range of factors, including:

- where one is in front of a judge with an emotional reaction to the continuity of a farming lineage
- because of the mismatch between high capital value and low income
- perhaps because of the different views that may be taken of the benefit of the farming life and the barter economy that so often is part and parcel of the farm world

Trusts/3rd party ownership/white knights

The word "trust" covers different situations and myriad complexity…

One might be talking about the substantial value, built up during the marriage but now wrapped up inside some form of international trust (BVI trust, owned by Guernsey company or similar), where the issue is whether these assets are truly outside the control of the settlor of the trust or whether the settlor is really presenting the trust as a shield against intrusion into assets that otherwise the settlor will retain to enjoy.

Or one might be considering the trust as an ongoing resource, the question being more the extent to which the beneficiary should be expected to enjoy future income and the impacts this should have on the orders that the court should make.

Family support

The latter situation is not dissimilar from the increasing numbers of cases, up and down the income scale, where there have been substantial resources coming from one spouse's family. Sometimes, these are presented as if they have been a loan and need to be repaid. Sometimes, they are presented as founding a share on property (the sums

7 Single life, 3% escalation, five-year guarantee. The sum rises to £3,300 if taken at 65.

were advanced for the purchase of the family home and now there is argument over whether the formerly generous family member now has a share in the property itself). On other occasions the focus shifts to the future and the discussion is whether one side will have their needs met in whole or part through the generosity of, for example, parental support… and these arguments will crop up in particular (where relevant) on the question of interim provision.

Future inheritance

A person may expect their spouse to inherit substantial sums from family members in the future. The court will be reluctant to build such sums into the calculations on the basis of uncertainty:

- What sums might be received?
- When they will be received?
- Whether in fact arrangements will be changed entirely such that there is no inheritance at all.

However, it may be possible to have the court structure a settlement in a particular way. For example, rather than have payment of a large Duxbury fund to the dependent spouse, there is a "wait and see" arrangement with ongoing maintenance in case the inheritance falls in.

Resources for the financial applicant

Where one party receives maintenance then focus will shift towards the resources that they can call upon to meet their needs and thus reduce or terminate their dependence upon long-term periodical payments.

Obviously the windfall of inheritance or similar may remove the need for maintenance (and the paying party should take prompt steps to ensure that the maintenance order is terminated), but what else can be called in aid?

Health & earning capacity

We have seen how the current legal culture involves an expectation that the applicant for financial support will also seek to achieve contribution through a) on the one hand some curtailing of spending that might otherwise have been thought reasonable but also b) an endeavour to earn. The extent of that expectation is not clear… nor is the level of evidence that should be needed yet obvious.

For example, is someone in their early 50s, married to a very high earner, but who has themselves been out of the earnings market for 20 years, to be expected to return to work for a relatively insignificant £12-15k net p/a… are they expected just to work at something or are they expected to adopt work that is contrary to their likes just because it pays better? Does the answer change if they are in the mid-50s or late 50s?

Anecdotally one sees courts reaching assumptions of a recipient's capacity to earn on fairly flimsy evidence. This is perhaps at odds with the research suggesting that returners to the world of work have a far from easy course to steer to secure a job. The paying spouse will have to judge whether they do better to produce evidence of available work; or leave the court to draw conclusions where the applicant has not made serious attempts to secure work.

Many judges have decided that they derive little benefit from expert evidence because of the ease with which a prospective employee can deliberately perform so badly in interview.

Health will certainly weigh in the balance alongside considerations of:

- recent relevant experience
- professional qualifications
- geographical proximity to relevant work

Overspending – incompetence

On the other hand, will the paying spouse be "on the hook" long-term where there is financial mismanagement?

As we have seen (**here**) the court may be reluctant to become involved to curtail overspending or profligacy, prior to its first order. In a sharing case there will be a simple division of the assets and a clean break: all claims are terminated and each will make what they will of the future. But in a needs case, is it open for one side to fritter away the resources and then come back asking for increased maintenance to make good the consequent shortfall?

Anecdotally, one sees courts reaching assumptions of a recipient's capacity to earn on fairly flimsy evidence

Financial shortfall is a vacuum that many judges cannot resist making orders to remedy

The courts insist that someone paying support is not "an insurer against all ills"… but it is rare to see a court imposing that principle in a robust way: financial shortfall is a vacuum that many judges cannot resist making orders to remedy. In the *North v North* case in 2007, Mrs North had frittered away her resources in a series of poor investments and other choices, leading her to come back seeking further provision. The court saw the problem, saying:

> "In any [such] application… the applicant's needs are likely to be the dominant or magnetic factor. But it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility. The prodigal former wife cannot hope to turn to a former husband in pursuit of a legal remedy, whatever may be her hope that he might, out of charity, come to her rescue."

However, further provision was still ordered.

This is another one of those situations where "overpaying" at the time of the first financial hearing for the benefit of a well-structured order that will deliver longer-term protection may prove to be a wise investment.

New partners

In *K v K* [2006] Coleridge J suggested "should not the financial consequences of cohabitation (following a previous divorce) be the same as the financial consequences of a further marriage; namely that any then existing order be discharged". But this approach is not the common one:

- a new partner will be a significant factor in the mix
- support being paid for children will be unaffected

- remarriage would terminate spousal maintenance – the MCA 1973 is clear that maintenance must stop on remarriage

- generally, however, the court shies away from an arrangement of terminating support where there is simply cohabitation, for fear that the relationship subsequently ends, the spouse is unable to claim upon the former partner, and is utterly dependent upon the former spouse to be able to meet their financial needs

Compensation

At the start of this booklet, we touched in a footnote on "compensation". It is rare but in that rare case when it crops up, it is significant. As we have seen…

In the sharing cases, resources built up during the marriage are substantial and what has been built up is shared, generally and broadly, equally and each has more than enough for their needs. There is no sharing of earnings or income after the order is made.

In the needs case, the spouse emerging from the marriage with a stronger earning capacity or ability to bounce back may be expected to provide for the other from those resources. The goal is independence where achievable, and the focus of the court is on the scale of needs, the resources that might meet them and the duration of the provision that is going to be needed to fill the gap.

So it is often said that sharing looks backwards into the marriage and what were marital assets. Needs ignores provenance and looks forward into the future and considers how two viable households will be maintained.

There is a third limb though which is compensation. It exists where the resources are more plentiful than merely a needs case and one spouse had an established career or the certainty of one but gave it up for the sake of the family. They cannot now recover the earnings that they would have had in the future as a result of those lost years.

Here, compensation may be ordered to top up a needs or a sharing award where the other spouse would otherwise exit the marriage with high earnings that the lower earning spouse could now never emulate.

Looking at it another way:

- future earnings are never shared as of right;

- they are only "invaded" to meet needs; but

- an order for some sort of provision may exceptionally be ordered to compensate for the career foregone.

Sharing and the case of *Sharp*

We also touched briefly on the case of *Sharp*. Until February 2017, the family law profession had been blithely progressing on the assumption that, where two financially independent people came together, the right approach…

- would often entail an equal division of the equity in the marital home
- what the marriage generated would usually be divided, and divided equally
- that would probably then just leave the pre-marital assets which would often "result" back to the party who produced them… clean break, and all was done

Not so, clarified the Supreme Court. What justified the departure from equality in this case was the existence of these three factors:

- a short marriage (six years)
- no children; and
- the parties maintaining separate finances

We are still working out the reach of the principles in this case but there was very much a focus upon the parties' separate financial regime, which could therefore make it appropriate that the massive bonuses (here earned by the wife during the marriage) might properly remain with her.

What helped the wife was:

1. That the unit was dual income: the husband was earning during the marriage and was clearly able to meet his needs afterwards. This case was not about needs – it was about how you divided the excess-to-needs resources that the parties, between them, held.

2. The parties kept their finances largely separate during the relationship.

    a. The judge found that there was a "marked degree of separation" of the finances, albeit no "deliberate and agreed intention on their part to maintain strict separation of their finances". For example, they would, not infrequently, split restaurant bills and regularly would each pay half of any utility bills on their two properties. There does not have to be a strict separation, so some pooling of assets would not stop there from being a *Sharp* argument.

    b. Although the husband was aware that the wife received substantial bonuses during the relationship, he was never privy to the details and in addition to providing the total purchase price of their two houses, the wife fully funded

the couple's various holidays and bought a series of three Aston Martin cars for the husband.

c. The husband in *Sharp* made no contribution to the source of the wife's bonuses and it was not a case where, save in the final year of the marriage, the husband contributed more to the home life or welfare of the family.

3. One final point that arose in *Sharp* and is worth thinking about, is the reality that parties in a relationship may not generate wealth at a similar rate over their lives. It was seen as unfair that the husband share in the very good years of the wife just because they happened along in the marriage when, both before and after, her income had been and was likely to be at substantially lower levels.

Contents

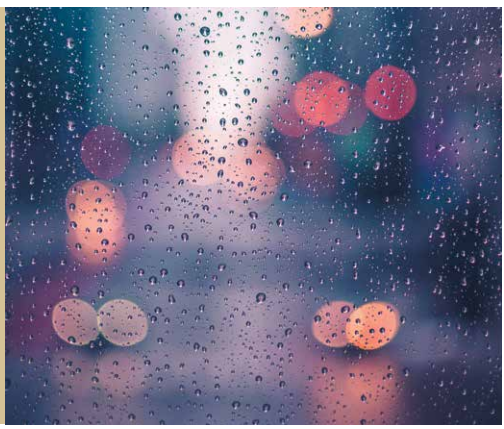
The term often used at court is "chattels", referring to moveable property such as cars, contents of home and so on.

By and large, these issues are resolved by direct discussion: the court has little appetite for working out solutions to the division of (perhaps much-loved) items.

Items of significant value may be worked into the capital balance sheet but where what is involved is the sharing of the contents of a home (for example where the home is being retained), best may involve either:

- making an allowance for the departing spouse to have a re-equipping budget factored into their numbers
- or (in our view, more disruptive and less satisfactory) for a broad division of items to be carried out and then each side facing the cost of purchasing replacements

The court has little appetite for working out solutions to the division of (perhaps much-loved) items



for their new home. Obviously where the former family home is being sold and each purchasing anew, this approach may make more sense.

Some valuable items may be categorised as heirlooms, ie are to be passed down in the family and so may be taken out of the reckoning… this is generally the approach with jewellery, unless clearly there is a case for sale to meet, say, income or capital needs.

Perhaps the most problematic of all are questions around pets. They have a strong magnetism for children and so their location may be very important. The court will not make decisions on the basis of the pet's welfare but is usually driven (if it has to be involved at all) by reference to equitable principles: Who paid for the pet? Was it given to one party? Etc.

4 CHILDREN

Different needs for different stages

Where divorce and separation takes place and the children of the family are older, a broad range of challenges and considerations are thrown up. A good starting place is this *Guardian* **article** (but we have a collection of other really good articles that may provide important help/orientation). This chapter is more for the situation where children are dependent, say up to university age. In fact by the time children are 16, courts will not make orders about them at all – 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, 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, or at least being free of a less than ideal situation, 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, as:

- one parent restricts the other's time or involvement, bad mouths them or makes allegations
- or 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 seem at war with each other

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 usually be the case) there seem to be so many points at which things can

leave the rails. The aim of this section is to provide some suggestions about what might be needed to give yourself the best chance of keeping things on track so far as can be done, especially over the early period.

The five categories

Separating parents might be segmented into the following categories:

1. Those who feel that they can sort things out themselves and who categorically want no intervention or suggestions.

2. Those who will work it out but who are open for help and to resources to generate ideas for doing things for the best.

3. Those who are struggling but will probably get there with some assistance (provided it is the right assistance, probably of an experienced mediator).

4. The families who become "cases" because there are difficulties that can't be talked through to a solution and where court intervention may be needed to settle structures that the parents are then able to adopt.

5. Situations of intractable difficulty: court decisions will come and go but seem to be ineffective to secure the solutions – here the challenge of care for children can blight their entire childhood, as well as their parents' lives. Engaging in the issue seems to solve nothing and only makes things worse.

We don't think that the category 5 case is capable of solution in a way that promotes the child's well-being. Often, ultimately they "resolve" with one parent withdrawing from their children's lives, at who knows what cost to all concerned.

There is no sufficient research to enable us to know but we may come to discover that the category 5 cases are a minority, synthesised from the particular characters involved. But we don't believe that this is usually the case. We think that the category 5 case is actually engineered: it is caused by the way that the parents engage with each other and react, and keep on reacting to each other's reaction. The purpose of this section is to avoid this phenomenon and share some thoughts on how parents can create the best environment for their children.

Mostly this booklet will be seen by those at the early stages where, whatever the fears of how bad things could be, you are more likely to be in categories 2 and 3 (if you are a category 1 parent, you will already have moved past this section). So we address ourselves primarily to those who are hoping for help to get things sorted well and who need a bit of a peek over at what might be the fall to the safety net of the court if

things get tough (if only to ensure a re-doubling of effort to make it work now without the court).

Specific (non-court) help is almost always going to be of benefit (after all, most of us in this situation haven't got too much past experience of how to co-parent children out of two homes) and there are no end of further resources to direct you towards, for example:

Books

- ***Divorce and separation: a guide*** (ask us for a scan/hard copy – currently hard to find)
- Christina McGhee's book ***Parenting Apart***, Vermilion (2011)

Online material

- **www.cafcass.gov.uk/grown-ups/parenting-plan.aspx**
- A website packed with guides, resources and practical tips: **divorceandchildren.com/**
- An online project from the well-researched One Plus One charity: **theparentconnection.org.uk/pages/is-this-for-me/**
- The broad range of support and help available from the Parent Practice: **www.theparentpractice.com/**

Workshops

- **flip.co.uk/area/parenting-issues-child-support/parenting-after-parting/**
- **www.cafcass.gov.uk/wp-content/uploads/2017/12/spip_factsheet.pdf**

Direct support and help

- **flip.co.uk/person/jo-harrison/**
- **divorceandchildren.com/**

Basics

Boiled down into the barest essentials:

1.	**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.
2.	**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 solutions that you can have imposed by a judge at court.
3.	**Pace it and be patient:** things may be horrid today, but giving back in spades is likely to generate a race to the bottom, with your kids as the losers. Yes, there may be some battles that you have to fight but generally try to pull back rather than end at loggerheads. Consider making use of **www.ourfamilywizard.co.uk/** if communication is hard.
4.	**Keep the child informed:** but only at an appropriate level and only as regards the things that they need to know about.
5.	**The child has a voice:** and that should be heard – but the parents make decisions. The guideline is "voice not choice".
6.	**Try to create a clear structure** but operate it flexibly.
7.	**Fix your principles:** agreement to a set of principles is likely to make it easier to make consistent day-to-day arrangements and to do so with greater ease.
8.	**And always think ahead:**… consider how the other parent will view your actions… create a culture of doing what is best for your child and being patient… pacing is all.

A note to the parent who does not see themselves as the main carer

Prior to separation

Our lives are busy – holding down careers takes us out of the home for extended periods; as soon as our children are older, they too are increasingly taken away by school, activities and friends. Family life can end up being had in snatches by the one who is doing more of the ferrying & feeding and timetabling… there is a real likelihood of the other parent's knowledge of the children being had vicariously, finding out about the children from the other parent. Take away that relationship and the "vicarious" parent can feel very much cut adrift. Often the number one anxiety is marginalisation: the fear that the other parent is going to push them out of the child's life entirely and their role in their children's lives becomes subsidiary, save for being a financial provider.

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, insist on equally shared time and prepare to defend the position… these are the very actions that will 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.

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 backing your involvement with your child. Thus raising the emotional temperature is the one thing that jeopardises your otherwise legitimate expectations of securing what you want… You can move from the system's instinctive desire to support co-parenting to a situation where safety is the magnetic feature, and that may well involve a range of restrictions upon how you are involved with the family.

A note to the parent who does see themselves as the main carer

It may be that, prior to separation, one parent took the lead on childcare and their career took a back seat as they took the lead on supporting the children and the family overall.

When a separation takes place that parent can feel financially threatened and fearful for their future. They may feel anxious that they will be left with an excessive burden of care of the children or they may be worried about the other parent now spending more frequent time with the children separately from them.

More on the overview

There is no automatic assumption of 50/50 time – but there is enshrined in law 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. If possible, arrangements that worked during the relationship can be cemented and increased after separation to ensure that a child spends good regular time with each of their parents. If you can keep things calm, positive and respectful then there is every chance that the whole family will benefit from well thought out arrangements; the burdens are shared; there is a culture against excluding a co-parent; and, in short, your involvement is a benign outcome that is "there for the losing" rather than one that requires rolling up sleeves for the fight.

And "the fight" is the one thing that will do lasting damage and has the capacity to set back the parenting relationship years (as well as tens of thousands of pounds). Any descent into threats or worse (or anything that could be represented as coercion or domestic abuse) must be avoided at all costs:

- police involvement is the norm
- generally the court will direct statements and then a hearing of a day or more whilst findings are made as to what events took place or did not… it is a process that will delay the start of normalisation for months and will create a shadow that will last far longer…
- despite the traumas of this process, erring on the side of caution is normal
- exclusion or at least reduced or supervised arrangements will be the norm whilst the issue is investigated and considered

And as the story is rehearsed and repeated and re-examined, it will become the central motif of the separation, even if the story is far distant from the reality.

And the fact that you are then left to rebuild from a shattered place and a low starting point is sadly likely to be in the category of "just one of those things that can't really be put right".

So, wherever relationships are in difficulty and there is any risk of escalation, then leave. We recommend most people (and yes, men are particularly vulnerable in this territory) to have a bag packed and a plan in place… never allow tensions to rise to the point that the police are called – if the situation risks getting worse then be gone long before there is an opportunity for it to develop. This way, you will have freedom to come back and pick up and try to get things on a better track forward.

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 (rather than dictating) and arguing things through as a full and equal parent
- being available after separation to step in to help out the other parent, rather than taking the line "your problem to solve"
- giving recognition and appreciation for the role undertaken by their co-parent, rather than minimising and belittling
- being attentive to the reasonable needs of the other parent, rather than leaving them to struggle and hoping for failure

- being patient: real care will be needed around pushing forward with changes – introducing new partners will need particular care and should not be done save in a planned way and usually with advice

And they will be careful to be a full and equal parent about things that matter. These will include decision making and major plans. But there may come a point when things are not turning around and then decisive action in the courts will be the way to contain the situation rather than there being a chance of a drift towards the unsolvable.

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 11 tasks:

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 a relationship.

2. Safety

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

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.

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 dealing with the 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 if things don't go well. It is usually better than the child's worst fears and there are usually second chances.

7. Goals & 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
- 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

8. Good arrangements

This is the way that parenting will work over the first chapter, 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, festivals 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 more so.

Shaping and explaining the separation in an authentic way that also enables the children to make sense of it to themselves will help them, and it may enable more of that 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 thirst for 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. Often third-party help is 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.

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.

There is a considerable literature around the approaches that might be taken by parents 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.

Let's look at the stage that is likely to come up first: informing. Here the common view of what works best includes the following:

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 to avoid straying into difficult territory… small and simple may be all that the children will be able to hear at the first stage.

Each will want to reflect on whether they are able to do their part and whether they will be able to manage their feelings.

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 generally. 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 regretful about that. 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 depend on you.

3. Changes

Children will usually want to know a whole raft of things… things that may not yet be decided. It is ok to say that you don't yet know… that things are likely to be a bit messy for a while but that you, as parents, will be doing the best you can to provide for the best possible outcome 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 mum and dad's love for them is unaffected, that they will each always be there to support them and each care for them.

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 may circle back to the question time and again.

6. Sticking to it

Needless to say, sticking to what you have promised/committed to is crucial.

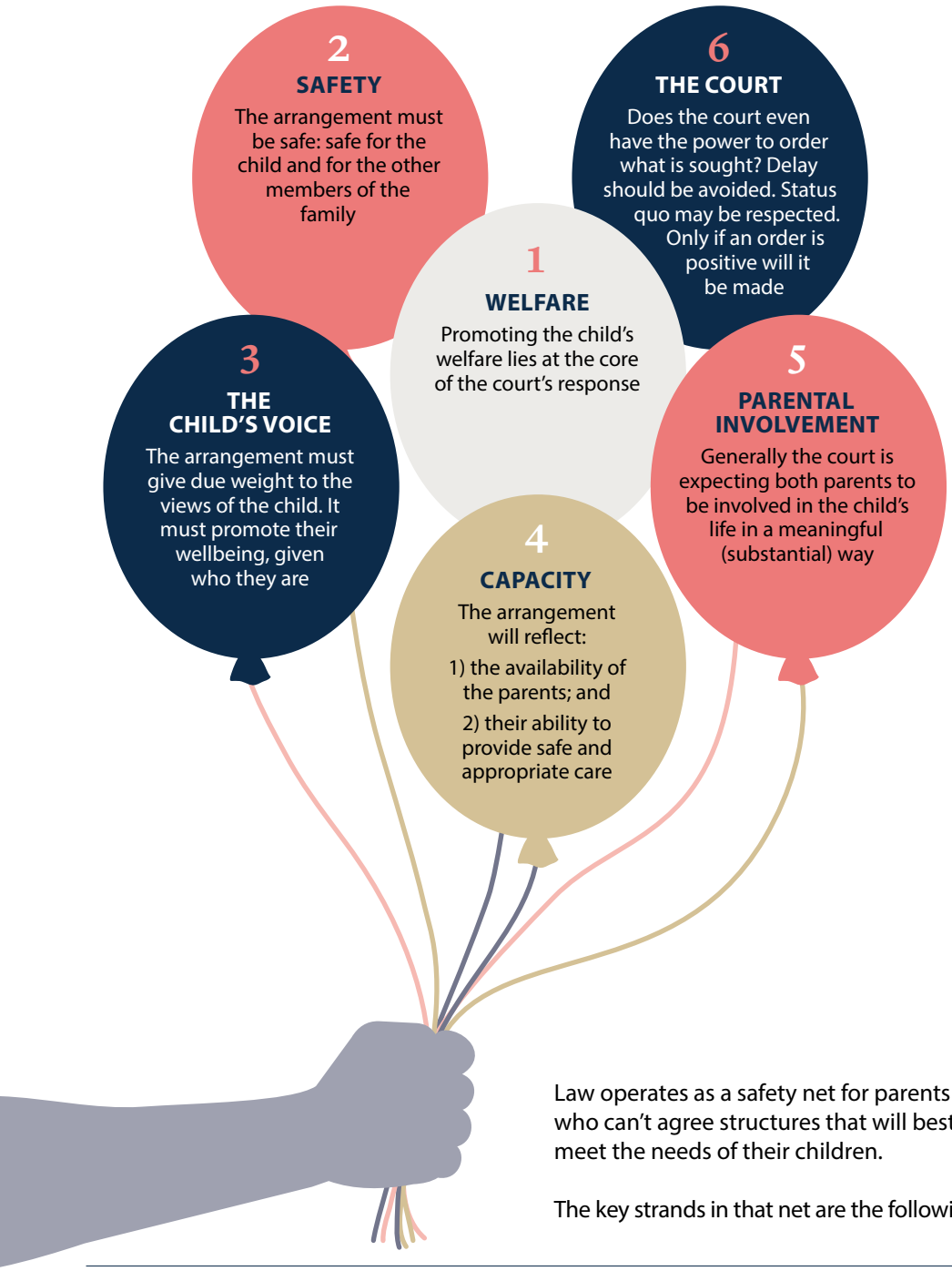
7. Make it real

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.

The legal dimension

Having said that it is better to steer clear of the court, 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:

Parenting arrangements: the essentials



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 net are the following:

1. Jurisdiction: which legal system decides?

Where children and their parents are based 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 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. However, only in extreme circumstances and when there is no alternative will an authority intervene, ultimately by taking the children into its care.

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 has PR for the same child.

The mother automatically has PR as she has given birth to the child. The father has it automatically if he is married to the mother when the child is born or if he jointly registered the birth of the child. 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 its 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.

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)).[8]

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 what steps the court is to take.

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

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

- 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)), but note:

- this does not dictate equal time…
- 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))…
- the assumption being 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 from that 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

As seen at point 6d above, to be kept in mind is the range of powers that the court has by which to pursue the goal it seeks. 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 sorts of order set out below. These are somewhat clunky but seek to promote agreement 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:

- "lives with" orders, which define the main home of the child (with one parent, or the other, or both)

- "spends time with" orders, which define the arrangements for the child to be spending time with the other parent, in order to maintain their relationship with that other parent

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

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.[9] 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 process that will so often generate criticism and allegation, and polarise feelings and make co-operative parenting so much harder

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.

9 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.

The law may be needed to help decide big issues or to address issues of safety, but is unlikely to be what will help co-parents navigate their children for the best through the challenges of their upbringing

Some of these problems can be managed better by appointing an arbitrator to make the decision that otherwise the court would… but children would prefer to know that their parents are able to work things out.

The law may be needed to help decide big issues one way or the other (relocation say, or schools) or to address issues of safety, but is unlikely to be what will help co-parents navigate their children through the challenges of their upbringing. That is a challenge even in one household. It may be a harder set of challenges when there are two, but is likely to be particularly hard 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:

- whether, with proper support, the parents are likely to be able to reach agreement
- if not, whether the court – or an arbitrator – is likely to make the sort of order that will make things better

"Better" 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 and carries with it particular challenges. We are not a poor parent when we feel that we could be doing a better job – and it may be that we need further help and ideas.

Mayim Bialik records **here** some inspiring tips from a point three years in.

5 THE RELATIONSHIP

Why the relationship may matter most…

At the start of this booklet, we suggested that

- the financial outcome, rather than being a legal analysis, is largely dictated by 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, polarisation and cruder outcomes
- similarly, when it comes to the parenting relationship, without any doubt, the capacity of the parents to maintain a dignified, respectful business relationship with each other over their dealings in relation to their children is the single largest contributor to the well-being and happiness of their children during and after separation

Reasons for dealing with it least

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 it is actually central to all that is going on
- it seems abstract, but is highly practical
- to engage with a professional seems 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 where things go wrong is far greater

In short, children may benefit significantly 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?"*

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, most of this ultimately depends on 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
- 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:

- will provide integrated help and direction or provide direct and practical support
- will seek to build understanding around the habit/dynamics of the relationship, providing answer 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 stilled

Most of this depends on the flipside: what is going on in the connection between the separating partners

- may focus on direction and suggestions around the practicalities of parenting, particularly where things are difficult

The need for unique assistance

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

Extreme reactions

First, the end of an intimate relationship is overwhelmingly challenging. Relationships are about integration and little wonder therefore that the fears and issues touch into every aspect of our lives and those of our partners, generating and raising issues of panic, fear, uncertainty, self-questioning, self-esteem… the list is endless… right up on the stress scale alongside death of a life partner, as is discussed **here**.

Changing reactions

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

- react with blind fury to the circumstance of 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.

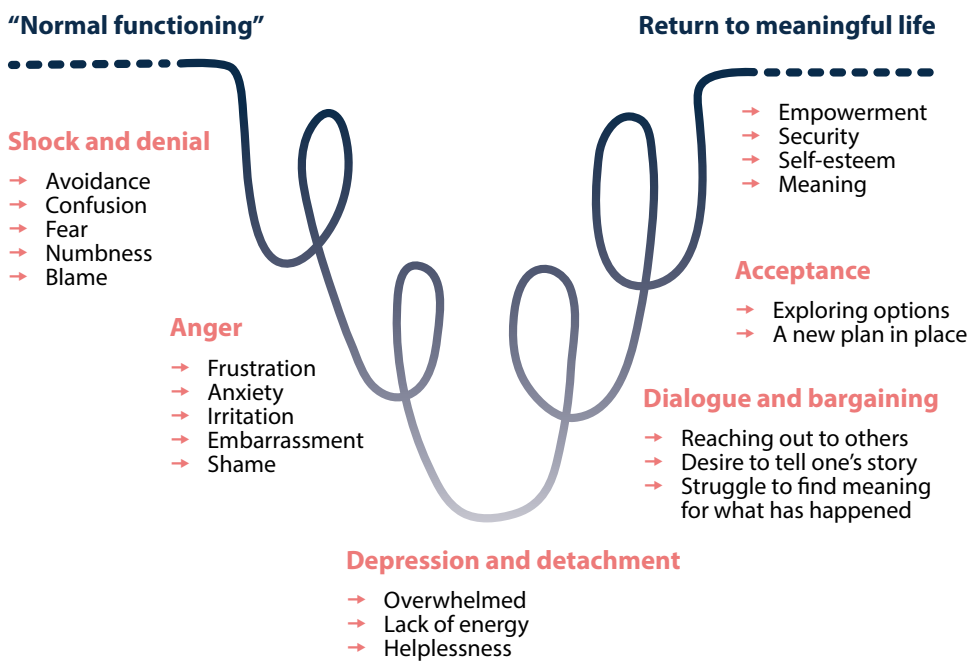
It may be only at the point of the FDR (in the financial procedures, for example) that your partner will engage with their barrister or hear what the judge is saying and be able to identify what approach sensibly they should be adopting to see things concluded.

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

Very often what you may be seeking to do is to help your former partner 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, there is some research that helps. Many clients recognise what they – and their spouse – have been through in the bereavement curve, observed by John Bowlby and made famous by Elizabeth Kubler Ross, which is often presented:



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. 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. We don't see this as the best way forward for most as, however well-meaning, such contacts often have their own issues, and don't have the years of training nor the structures in place to enable them to deliver progress in this sensitive and crucial work. Importantly, they tend to operate as an echo chamber for your thoughts rather than challenging you to look wider and deeper, as is so often needed. We often find that a Greek chorus of family and friends can be an obstacle to progress, providing a way of pulling you or your former partner along by well-meaning but often unskilled views, that are not well thought through.

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 an 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.

6 THE DIVORCE

Mindset

And so, at last it will seem, we arrive at what we thought the situation was ALL about: "the divorce"… only to discover that all of the tough-stuff has already been dealt with. Where:

- we know what jurisdiction the case is going to run in
- we have sorted the finances and the children
- then for most people this is just admin…
- and perhaps a hook from which we can hang any litigated proceedings relating to finances we need

Ultimately you will need the divorce, because without it:

- you can't share pensions (and that is pretty likely to be part of the financial plan)
- you can't have confirmatory orders - or dismiss potential financial claims, without which you cannot confirm the agreement and make the arrangements safe
- and at some point, someone may want to remarry and without finalisation of the divorce a stretch at Her Majesty's pleasure beckons for the crime of bigamy

But all being well and given that divorce has nothing to do with fault and is largely an administrative process, we should be able to neutralise concerns around the process of divorce so that it can proceed co-operatively and well. So this is usually a non-controversial element, but it just needs a bit of careful management to ensure that how it is addressed and the timing and pacing of its being addressed does not trip up any of the other practical parts. This is why, though there are online options for managing the divorce yourself, we often don't recommend them for people who have complex issues around the finances to manage too…

- the costs of our processing the divorce are not great (£600 + VAT) on top of the standard fees, but
- the costs of checking back with you to ensure that the divorce is being managed in the right way could become significant and the costs if it is got wrong could be really serious

Before beginning the process, early consideration may need to include whether you should be starting the process in a foreign jurisdiction – usually for financial advantage

Hold in mind that you will want to see this to a conclusion… sorry for the cheery thought but if you were to die before the order is finalised, the financial order CAN'T take effect, even if it has been made and you or your spouse's personal representatives have the unhappy task of relitigating the process, dealing with a claim under the parallel statute we saw earlier, the Inheritance (Provision for Family and Dependants) Act 1975.

First thoughts

Before beginning the process, early consideration may need to include:

- Whether you should be starting the process in a foreign jurisdiction – usually for financial advantage and we have looked at this issue in the earlier pages **here**
- Whether a "judicial separation" would be more appropriate (you then remain spouses and widow(er)'s pensions can continue to be received by the surviving spouse, which may be done where this will increase the overall resources to be shared between you)
- Whether (and if so how) this might mesh with any religious considerations or requirements if there is a religious divorce needed too
- A range of potential implications which might include tax, immigration, inheritance, trusts and pensions, and in some cases employment benefits and similar
- Whether you feel your situation means you can make a joint application for divorce, or whether you apply as sole applicant bearing In mind the fact that it is "no fault" either way

Some terminology

- The person seeking the divorce is the "Applicant"; if there are two applicants making a joint application they are "Applicant One" and "Applicant Two"
- The document they submit used to be called a "petition"; now a "divorce application"
- The other party to a sole petition is the "Respondent"
- The "Conditional Order" is the court formally saying that, having considered the papers, a divorce can be granted; the "Final Order" is the order of the court that formally ends the marriage
- As mentioned above, the divorce proceedings are the hook off which the financial proceedings arising from the divorce are hung

The law

1. It is only possible to obtain a divorce if you have been married for more than one year (however judicial separation is available during the first year of marriage).
2. Thereafter, the process is actually fairly straightforward if both parties co-operate. It can be a paper exercise with no need to attend court.
3. There is only one "ground" for divorce, namely that the marriage has broken down irretrievably.
4. That it has irretrievably broken down is evidenced by the completion of a statement confirming that fact.

Defending the proceedings

It follows that a person receiving a petition for divorce has only a limited right to dispute the proceedings, where they say:

- the court has no jurisdiction to deal with the case
- the marriage wasn't valid
- that a divorce has already taken place in another jurisdiction

Timing and expense

It is recommended that applicants who are making a joint application agree to share the costs but from a practical point of view, Applicant 1 must pay the court fee to submit the application. The court fee is currently £593. Solicitors' fees for managing the process would be in addition.

The minimum time that a divorce can take from the application being issued to the grant of the Final Order ending the marriage is six months. This comprises a mandatory period of 20 weeks from issuing to making an application for the Conditional Order and a further six weeks until the Final Order.

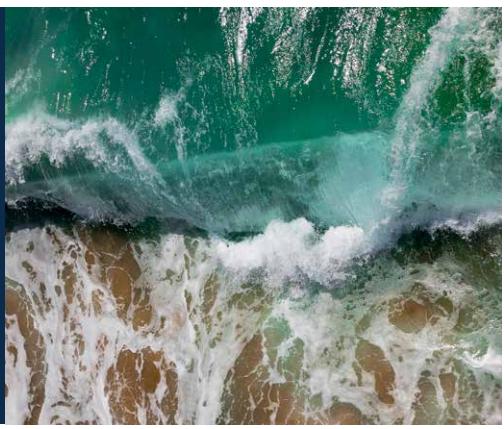
However, there can be sensible reasons to defer finalising the divorce until after financial matters have been resolved and the timing of this should be considered carefully. Generally agreement is reached to hold up the final order until after final financial arrangements are made to minimise the period between a divorce and any pension sharing order taking place.

It is possible that either party to a divorce can seek to pursue it through to a final order and there are different procedures depending on whether the divorce is a sole application, a joint application or a secondary sole application having initially been a joint application. (Where joint applicants are not able to continue the divorce proceedings consensually, either one of them can continue the application on a sole basis either at the Application for Conditional Order stage or the Application for Final Order stage).

The effect of being divorced

The pronouncement of the Final Order (which formally dissolves the marriage) has the following effects:

The minimum period to finalise a divorce is usually six months – but there may be good reason, relating to tax, pensions or other practical matters to seek to delay the financial arrangements beyond this



1. It enables either party to remarry (but take care, additional rules may apply before you may remarry abroad; you would need to check with advisors in that jurisdiction).

2. It enables final financial orders to take effect.

3. It prevents a party from applying for a divorce in a different country (important if the rules about finances would result in a different outcome there).

4. It may change who receives what if one of the spouses then dies. Under the rules in England & Wales:

   a) where no will has been written, the surviving former spouse loses any entitlement;

   b) if a will is in existence which dates from before the Final Order, then the decree cancels any gift to the surviving spouse and any appointment of the surviving spouse as an executor or trustee;

   c) it may affect the appointment of guardians for any children.

5. It may affect pension entitlements, where there is provision for a widow(er) under the scheme. Many schemes have provision for a surviving spouse – but this disappears on divorce because there can then be no widow/widower. This is the main reason why the application for the Final Order is often delayed until after financial matters are resolved and alternative financial arrangements are put in place.

6. There may be other impacts – such as on private health insurances that give automatic cover to spouses (but no cover to former spouses) and occasionally because there are specific work-related benefits (eg reduced cost travel for spouses). Occasionally there may be impacts on trusts which make specific provision for spouses but none at all for former spouses.

7. It may have implications for Capital Gains Tax and advice should usually be taken about whether delaying finalising the divorce may also delay or avoid tax charges.

8. It may affect state pension entitlements. You should obtain advice from a financial adviser about this (and other matters generally when contemplating divorce) especially as these rules are changing.

9. Note also that if you remarry before making financial claims, it may not be possible to pursue them later.

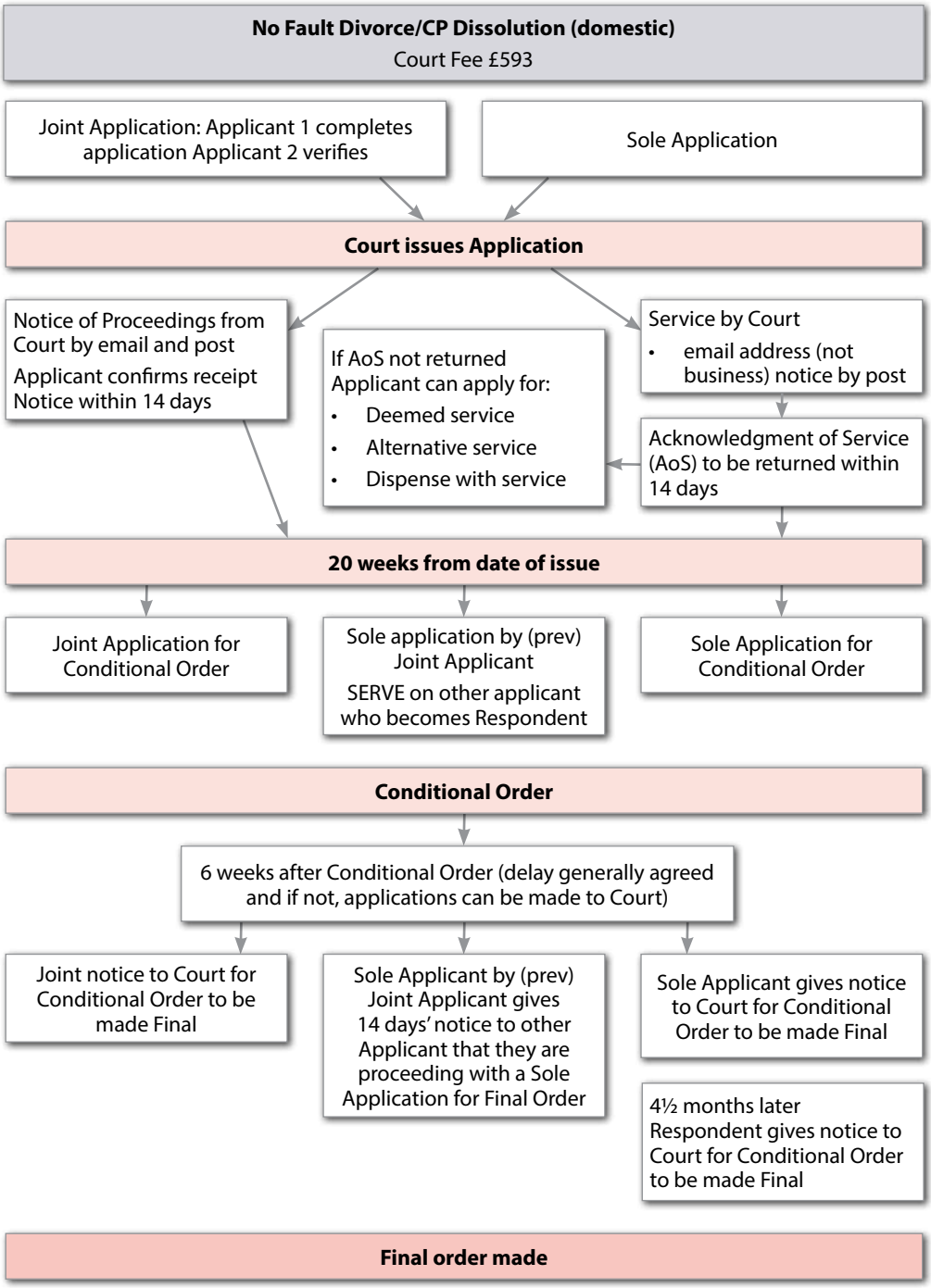
The process (an example timeline)

Week	Step	What is involved
1	**Obtain marriage certificate**	The court must know that there is a marriage and if the original marriage certificate is not available then an official replacement must be obtained (note that, generally, the court retains the marriage certificate so you do not get it back). Where the certificate is in a foreign language, an official translation must be provided.
2	**Agree the approach**	It is now possible to make a joint application for divorce or to apply on a sole basis (as has always been the case). The court fee is £593 for both routes. When proceeding on a joint basis, Applicant 1 must pay the fee when submitting the application.
3	**Prepare the application**	The process is started by making the divorce application online using the court portal. Standard information such as the date of the marriage, address and contact details of the parties is required. The court now sends documents by email, you are advised to provide personal (and not work) email addresses for this purpose.
4	**Applicant 2 to check the application**	Where you are applying on a joint basis Applicant 2 will be invited to check the form before returning it to Applicant 1 to be submitted. Applicant 1 will not be able to make any further amendments.
5 – 7	**Application submitted and issued**	The application is submitted to court via the online portal to be "issued". The default process is for the court to send Notice to both Joint Applicants. For a sole application, the Court will "serve" the Application on the Respondent by email and confirm by post.
8 (say)	**Acknowledgement of service filed by the Respondent.**	The proceedings cannot advance unless the court is satisfied that the Respondent is aware of the proceedings. Generally, this is done by the Respondent returning the acknowledgment of service court form to the court, confirming their stance in relation to the proceedings The court timetable specifies that this should be done within 14 days of receipt (a little longer when the respondent is served abroad). If the Respondent does not co-operate, there can be delay and additional costs before matters can proceed. For a joint application, the applicants will confirm that they have received notice of the application.
25-27	**Application for Conditional Order**	At the end of the period of 20 weeks from the date the application was issued and as long as the proceedings are not disputed, an application can be made for the court to make a conditional order. In the application the applicant(s) must verify the information that has already been provided and confirm that they want to continue with a divorce.

table continues on the next page…

Week	Step	What is involved
	Notification of Conditional Order	If the proceedings are not disputed, the court can deal with the request for divorce administratively and without the need for the parties to attend a hearing.
30 (hard to estimate)	**Making of Conditional Order**	The Conditional Order is pronounced – a judge reads out in open court a list of all the divorcing couples' names. By pronouncing the Conditional Order the court is declaring that the Applicant(s) are entitled to a divorce.
36	**Application for Final Order**	An application for a Final Order (finalising the divorce) can first be made six weeks after the Conditional Order. Notice does not have to be given to the Respondent. Joint applicants will apply jointly. A joint applicant wishing to apply on a sole basis will need to provide notice to the other applicant. If financial matters are not resolved, often parties will agree to delay: the recipient of a pension sharing order is likely to seek a delay of 28 days after the financial order is made. The person applying for a pension sharing order will want to delay the Final Order application until 28 days have passed from the financial order. It is also possible for the parties to apply to court to ask for a moratorium on applying for Final Order
37+	**Final Order pronounced**	The court should pronounce the Final Order promptly (a few days) after receiving the application (but there can be delays at court). Upon the pronouncement of the Final Order the marriage is formally dissolved. The court retains the marriage certificate.
If the Applicant does not apply for the Final Order, the Respondent can apply 4½ months after the Conditional Order but they have to give advance notice to the Applicant. If the Applicant objects, there would be a court hearing and it is likely that the court would only grant the Final Order if neither party would be prejudiced.		

It may be useful to see the process through this basic diagram:



APPENDICES

TOP TIPS

You and your support network

Get support from your place of work

- this is going to feel like a full-time job at some stages and if you already have one of those, you are going to feel under considerable pressure and you will need to be cut slack from work to get through it in good shape

Minimise the number of friends and family you feel you have to keep in the loop

- they will try to help but they won't know the detail and they will simply complicate the decisions that you need to make

Get relationship help…

- you need to get yourself "match-fit" for this process quickly
- even if you are fine, getting insight as to what your ex is going through will materially improve your chances of reaching agreement

Generally, structure in help from a financial planner – this is likely to enable more financially-intelligent choices in the division to be made and it will enable you to get on with the job of financial repair faster afterwards.

Mindset generally

It is difficult to generalise but for those who are financially high-achieving, generally faster progress will serve you better. Over time, often…

- assets (that would have been post-marital) will be built up; delaying will just mean that you have to share them, whilst
- costs will rise and tax complications mount

Pacing is everything

- people will change through a process: what seems so important now may become irrelevant later… for your ex as well as for you
- if you have an eye for perfect pacing, you may have an easy run at things because you deal with issues at the right time, when they aren't problems
- what that probably points towards is starting early, so that you have the patience to accommodate delays: hanging on and on may just make you desperate to see the whole thing finished and then you may lack the flexibility that you need

Don't sweat the small stuff

- avoid the lure of winning an argument
- it will be easy, for example, to get sucked into long, to-and-fro correspondence… you may well be right… the other side may eventually (but probably will not) accept this fact – but if it hasn't actually changed anything in the final analysis (which, let's face it, is pretty likely: correspondence isn't usually even seen by the court) then it is all so much wasted money

Good enough rather than perfection

- beware trying to make things perfect
- this process is dangerous; the sooner that you can exit it, generally the better… the just about good enough deal may be very valuable if it is offered early. Agreeing an approach around your children before you feel at loggerheads may mean that the relationship is intact and there can be later improvements

Take opportunities to build trust with your ex

- this is not generally a "win at all costs" game

Approach to the court

Trying to understand the system will be more cost effective than trying to swim against the tide: it may be wrong, it may work unfairly, but it isn't going to change (or at least not easily or affordably)…

- also remember that the court system is more likely to deliver problems than solutions

- in financial issues, the difference between you is probably less than what it will cost to argue out; over children, you cannot bank on getting what is right

BUT you may have to use the system to ensure engagement. (And see "pacing is everything" above.)

Your ex

Generally, try to help your ex get into a place where they can make their best decisions too (rather than seek to grind them down)…

- recognise too that your ex is likely to change over time… we saw in the relationship section how a person can change during a case

- by and large your job is going to be to help your ex get into their most productive, highest-functioning space: that is the place at which they are likely to make cost-effective decisions that will enable the process to end

Your lawyer

As one former client put it, "identify the lawyer worthy of your life's savings"…

- work out what it is you need and then really think through whether the professional you have in the frame is going to deliver it… if you don't feel that you are "clicking", raise it and if your concerns are not addressed, move on… you only get one go at getting the right answer at this stage and you should look back feeling that you gave it your best shot

Don't push back against the system – it may be wrong, it may work unfairly, but it isn't going to change

- the legal directories are really a guide to who has been running the billion pound cases at court in the last few years. If you are not one of those (a billion pound case OR aiming to go to court) then those leagues may not be your best starting point for a search

- recommendations from friends and contacts who have been through the process recently may be the best place to start

Make good use of your lawyer…

- remember that even brief calls to your lawyer are probably £50 a pop. Try to minimise your questions

- we will always respond if you ask us stuff… and charge you for it… so think about whether those responses are actually going to add value to what you are doing

- try to grasp what you need to know from information packs (such as this) and then gather together your questions and do them in one hit rather than "on the drip", which may well end up generating a range of answers that probably just generate more questions

- make sure your lawyer has a clear plan and is clear with you about what you need to do so as to advance it

And then those ruddy charges/bills/ fees…

- get estimates

- get funding in place (or at least have options) in case things have to go even further in the process than your worst fears. If you don't have the money to see the job through, then plan for this at the start… starting and then having to stop is likely to be catastrophic

Tactics

- establish when the deal could happen and, working back from there, assemble only what is needed to achieve closure at that point. Minimise other spends

- meticulous disclosure builds court confidence in what you are saying and will make the other party more likely to want to do deals

- being (carefully) generous in what you say to your ex and about your ex on formal documents may cost you little but radically improve:

a) how the court will see you; and

b) how likely and positively your ex will engage in the search for solutions

Your children

Be mindful of your kids throughout… they will have views and will be affected by the distorted versions of this process that filter through to them. Almost always get help on how to make it work better for them and above all keep them out of it… even where (or perhaps particularly where) your ex *is* involving them: nothing will snuff out that potentially devastating play faster than your just stepping right back and removing the oxygen of assertion and denial from the situation.

A look here may help too **divorcediaries.co.uk/**

CHECKLIST OF THINGS THAT MAY GET OVERLOOKED

In our relationships, it can be easy to pass responsibility for whole areas of our lives up to the other person and then fail to pick up the threads again as we move forward with our independent futures. Things that we have saved people from overlooking (or that they have raised with us having overlooked) include the following:

Social	
Notifying wider family members and friends	
Copied addresses/Xmas card lists, phone and birthday records of friends and family	
Facebook/LinkedIn and other profiles	
Any registrations with bodies such as schools, old schools, universities, clubs, charities or membership organisations	
Post	
Redirected where needed	
Pets	
Tags, chips, their care, their costs, in some situations contact	
Trusts, inheritance and agency	
Wills	
Are there any assets held jointly? If so, the share of the first to die passes to the survivor. Does that joint tenancy need to be converted into undefined but separate ownership?	
Family remembering to adjust Wills involving former spouse where adjustment is appropriate	
Entitlements under family trusts	
Powers of attorney/enduring or lasting powers of attorney	
Contents	
House/garage etc	
Other items in storage	
Photos	
Computer records	

table continues on the next page…

Outgoings	
Are all utilities and insurance in the names of the person who is using the service?	
Standing order/direct debit arrangements on above	
Claim for single person council tax discount where appropriate	
Insurance & pension	
Nomination of life policy/pension benefits	
Travel insurance	
Health insurance	
Address for receipt of pension/insurance documents	
Assets and accounts generally	
Run through all bank and credit card accounts, shareholdings, premium bonds and policies to make sure that all is in order, eg separating out any joint accounts/ checking standing orders allocated accordingly; check any second credit card that may need to be cancelled	
Hire purchase	
Registered addresses for guarantees	
Membership of clubs/societies etc	
Benefits, tax and other public bodies	
Address for receipt of benefits/allocation of child benefit/tax credits	
Address with HMRC	
Nomination of private principal residence (for CGT exemption)	
Passport/driving licence/doctor's records – update address	
Other professionals	
Think through professional services, eg if you both want to continue with an existing IFA/accountant – do you need to clarify separation?	
Change of name	
If names are going to be changed, please take advice	

GLOSSARY

Ancillary Relief – the name for court proceedings about money issues connected with ("ancillary to") divorce proceedings – now usually "Financial Remedy" is used

Applicant – a person who starts legal proceedings or makes an application

Arbitration – a procedure where the parties appoint their own "private" judge and agree to be bound by the outcome. The process is faster and cheaper than the court and preserves confidentiality

Attachment – see Pensions

Barrister – Barristers (also referred to as counsel) are the specialist lawyer-advocates, generally selected by us to provide input for hearings but used in many other ways too

Bills – another of the array of words that is used loosely in a number of different ways concerning charging, eg "I bill at £x per hour", "my bills total £y" or more technically "this is an interim bill" (the right is reserved to re-charge the work at a different rate should circumstances dictate); "this is a final bill" (it may not be the last bill but the amounts for that period will not be altered later). FLiP's bills are all "final bills"

BR19 & BR20 – the forms we will need to submit to the Pensions Service early on, the former to clarify your basic state pensions record and the latter to identify the extent of any second state pension that may exist… thus paving the way to negotiations to divide these entitlements appropriately in the context of the other arrangements being made

CETV (or Cash Equivalent Transfer Value) – one of the valuations given to a pension fund (roughly, if the fund were transferred to another pension provider at the given date, the figure that the new pension provider would receive). It is a figure that the courts and family lawyers will need to implement (if not negotiate) the division of pensions

CGT – Capital Gains Tax is a tax that is charged when an asset is disposed of and which is linked to the amount of increase in value of the asset during ownership

Chattels – personal possessions

Child arrangements order – means an order regulating arrangements relating to a) with whom a child is to live, spend time or otherwise have contact and b) when a child is to live, spend time or have contact with any person… we are now forced to use the terms "a spending time with" or "a living with" order in place of the previous "contact" and "residence" order

Chronology – the document required to be lodged at court prior to the First Appointment, setting out the main events of the marriage and divorce and subsequent proceedings to enable the court to identify the relevant history

Clean break – the situation where the court has terminated all orders that could be made between parties (apart from any ongoing orders for the support of children). The "clean break order" is the order made by the court achieving this

CMS – The Child Maintenance Service, purveyors (in replacement for the Child Support Agency and the Child Maintenance Enforcement Commission) of calculations carried out under the Child Support Act 1991 to determine the level of general maintenance paid by a "non-resident parent" to a "parent with care" for their "qualifying child"

Collaborative law/process/practice – a dispute resolution process centring around four-way meetings between the parties and their advisers, with the professionals agreeing to act only in relation to the negotiations and be prohibited from being instructed in any litigation; court applications being made only by agreement during the process

Conditional order – the penultimate step in applying for a divorce to end the marriage

Confidential – refers to information and documents that are personal to an individual and which are in consequence protected from being used by anyone else until they have been given/confirmed to that person (eg because of a duty to disclose information or discover documents)

Consent order – the order that is often made by application in writing without either side attending because both have agreed its contents

Contact order – archaic term describing an order requiring one person to co-operate in a child visiting, staying, having letter or telephone communication with another. (Formerly known as "Access" now known, snappily, as a "spending time with order")

Co-respondent – the person with whom the "respondent" has had a sexual relationship, thus forming the basis for an adultery petition; they are a rarer animal given that it is now considered good practice not to identify such persons by name

Costs can refer to –

1. the order that one party pays a sum contributing to the fees incurred by the other (the court might make an order "husband to pay the wife's costs")

2. the fees incurred with the solicitor (the solicitor might say "my costs are £x")

3. more confusingly still, they might be referring to the overall sum that the client is due to pay or the smaller part of the bill that their firm is due to receive – ie

the total of the bill including counsel's fees and court fees etc, or just the amount after VAT that they will receive

Counselling – counsellors might look at how the relationship could be put on a stronger footing (in individual counselling or more often couple counselling prior to a permanent breakdown) or, recognising the end of the relationship, individual counselling might help an individual to make sense of what has happened and how it should now be managed for the best… and thus avoid struggling to find answers to these points at far greater cost (for less competence) with their lawyer

Decree – the historic term for a form of divorce order: Decree Absolute (now the Final Order, ending the marriage) or Decree Nisi (now the Conditional Order, the unavoidable step before Final Order where the parties know that the marriage will be ended when an application is made as required)

Detailed assessment – the process by which the court decides what sum you should pay towards the costs of your opponent (see Taxation, which was the old name for this)

Disclosure – the process of providing information or the information that is provided

Discovery – refers to the documents produced to back up and confirm the disclosure

Dissolution – the term applied to the end of a civil partnership instead of "divorce"

Domicile – your domicile Is determined by the domicile of your parents at your birth (domicile of origin) or by your later choice (domicile of choice)

It is a factual question and jurisdiction can be based on the answer

A "Duxbury" lump sum – the fund paid by one spouse to the other, calculated by reference to a range of financial and actuarial assumptions, to provide a stream of income to replace maintenance payments for the rest of their life

For example, a husband might pay a sum of £100,000 to his wife aged 60 to provide her with an income of about £10,000 a year (including her pension) for the rest of her life

DRA – This will be a later hearing in the court process addressing decisions relating to your children. More of the evidence will be "in" and there will be a concerted effort to reach agreement. (See also FHDRA)

DX – a postal system operating between most solicitors, barristers, banks, mortgage lenders etc; next-day delivery is pretty much guaranteed and losses are rare

Ear-marking – see Pensions

Fact-find(ing) hearing – in litigation concerning children, the court will often fix a hearing just to address the allegations, in particular around safety – the overall decisions to be made are then made in the light of those fixed points

Family Procedure Rules 2010 – the code setting out the steps & stages and the court rules for dealing with the applications made to it in connection with separation and divorce and its consequences

Fees – the sum charged by counsel or by the solicitor or other professional – or indeed by the court (as in "court fees") or the Land Registry

FDR/financial dispute resolution hearing – the second court hearing in the court's process for determining financial applications, at which the judge endeavours to help the parties broker a settlement of the financial claims. This hearing takes place on a without prejudice basis

FHDRA – stands for First Hearing Dispute Resolution Appointment, which is the first time parties will attend court after issuing an application as regards their children. It is the intake hearing that addresses safeguarding, sees the settlement of the case if possible and otherwise plans the future management of the process. (See also DRA)

Final hearing – whether in children or finance matters, this will be the end point to the court journey when (unless agreements are reached at the door of the court) the judge will hear evidence and exercise their discretion to apply the legal principles and impose their decision on the applications that have been made

Final order – usually refers to a final order of divorce which brings and end to the marriage and ends the legal status of a spouse

Financial remedy – the range of orders that a court can make to redistribute assets and provide for maintenance payments

First Appointment – the first stage in the court's process for determining financial applications, at which the judge identifies the issues and timetables the production of information that will be required to enable the case to move forward

Form A – the form that starts financial remedy proceedings

Form E – the bulky standard form document which is completed in financial cases to confirm the resources and needs of the person completing it

Forum – the country in which the legal proceedings will advance, so a "forum fight" refers to a contest between different court jurisdictions for the case. Also "*forum conveniens*" which refers to the doctrine that the court may apply which is to determine the court that is most appropriate or convenient to determine a legal contest

IHT – Inheritance Tax which may be charged on the value of a person's estate (generally) at death

Inheritance Act claim – see I(PFD)A

Injunction – a court order that requires action or prohibits action

I(PFD)A – refers to the Inheritance (Provision for Family and Dependants) Act 1975, which gives spouses, former spouses and children (as well as others) the right to claim capital or monthly sums from the estate of a person who has died. (The Act also gave the courts the power to terminate the right to make those claims in the future when hearing the financial claims at the time of divorce)

Indemnity costs / Standard costs – Good to get, horrid to pay: Indemnity costs are awarded where the court disapproves of the way that a case has been conducted. It is likely to involve making a payment to the other side of a high proportion of their total legal bills (perhaps up to 95%). If a costs order is made (an order that one contributes to the legal costs incurred by the other) this is likely to be a Standard costs order and likely to involve a payment of between, say, 65% and 85% of the actual costs incurred

Issue – the process of making a court application by completing the relevant form, paying the fee and having it sealed by the court. The application is then referred to as "issued" and is ready to be "served". (See also Statement of Issues)

Intestacy – the grossly negligent act (usually) of dying without a will ("he has died intestate"). Intestacy laws lay down the rules by which "an intestate's" estate are divided between family members – usually in a sadly inappropriate fashion

Joint single expert – an independent professional, appointed usually by order of the court to give expert guidance to the court about things such as property values or tax, or to give psychiatric assessments etc. (See also Part 25 expert)

Joint tenancy – see Severance of joint tenancy

Leave to remove – refers to permission to take a child out of the jurisdiction, usually permanently, ie to live abroad (see also Relocation)

Litigant in person – also "self-representing", the individual who advances their own case, without lawyer assistance (or such assistance being "in the wings"). They may have help from a "McKenzie Friend" – an advisor, usually without other professional qualifications who sits with them and gives recommendations and guidance

Mediation – a process of negotiation between the couple, assisted by professionals who may also be lawyers; it runs (or should do) alongside the advice given by lawyers but offers a different way for couples to resolve themselves the issues they face

A "Mesher" order – an arrangement that does its best to address a common problem where resources are limited, where on the one hand it would be good for the children to stay in the property they know, but on the other, inappropriate for the other parent to lose altogether the value of the property

The court allows the financially dependent party plus the children to stay in the property; but on certain trigger events (perhaps marriage, cohabitation for a certain period, a child reaching a certain age, a particular date, or a combination of some or all of them), there is a sale; and the proceeds are then shared between the two parties (with the waiting party usually being hit by CGT

Memorandum of understanding – the part of the mediation documentation that expresses the proposed deal

MIAM – the mediation information and assessment meeting that will usually pre-date any application to the court: the Applicant should hear about the possibility of mediation's delivering an appropriate solution and ideally the respondent will attend too so as to see whether a successful mediation can be generated

Molestation – as in non-molestation injunction – refers to the court order prohibiting (usually) most forms of conduct that could in any way harass or pester the applicant

Parental responsibility – this refers to all the rights, duties, powers, responsibilities and authority which a parent can have in relation to a child. Where parents are married at the time of a child's birth, or subsequently marry, they each have parental responsibility. Each of them may act alone. Where this is not the case, the mother has parental responsibility alone until she agrees that the father should have it (a short form must be filed at court) or the court grants it to the father

Part 3 – reference to part 3 of the Family Procedure Rules, which contains the court's powers to promote resolution of a case away from court. When professionals refer to this they are considering whether appropriate efforts to settle have been made or the options now for adjourning the court process for such efforts to continue

Part 25 expert – the professional appointed to give expert evidence under the regime laid down by FPR 2010 Part 25

Pensions – may be state-provided or provided by private institutions. Up to three different options may be available to deal with each (and usually it will be most economic to involve a pensions specialist to provide recommendations if mistakes or loss of value are to be avoided):

- **Attachment** (formerly "ear-marking") will siphon a specific share of benefits to the spouse – much of which is conditional on not having remarried beforehand

- **Sharing** (formerly "splitting") creates a second and separate pension fund for the spouse either with the same provider (the "internal transfer") or with a new provider (the "external transfer")

- **Offsetting** – when no specific arrangements are made in relation to a pension – it is left with the person in whose name it now is because that is appropriate in the circumstances of the other financial arrangements being made

Petitioner – the spouse who presents a petition; they will generally continue to be referred to as "the Petitioner" throughout the proceedings – see also Respondent and Co-respondent and Applicant

Prohibited steps order – forbids the taking of certain steps in relation to a child, eg removing them from the UK or the care of a certain person

Privilege – refers to the documents that are exempted from the obligation to disclose – crucially this will be communications with professionals about the case (for example, correspondence and advice letters between solicitors, barristers and you, the client are privileged from disclosure), but also documents that have been exchanged, relying upon the negotiation privilege of without prejudice

Questionnaire – often the form E disclosure will leave gaps or leave things unclear. Each party can raise questions of each other, for approval by the court at the First Appointment in financial remedy cases, and they then need to be answered within specific timeframes

Reasonable requirements – what used to make the world go round until the arrival of *White v White* at the House of Lords on 23 October 2000 (see below)

Relocation – the proceedings and eventually (perhaps) the order that gives permission to change the residence of a child: within the jurisdiction ("internal relocation") or abroad ("external relocation") (previously "leave to remove")

Remuneration Certificate – the certificate issued by the Law Society confirming the level of fees that it considers appropriate to be charged. It is only obtained on request from the client complaining about their solicitor's bill (or occasionally at the instigation of the solicitor themselves). The process is not available once proceedings are issued. Here the court will carry out the determination (see "detailed assessment" and "taxation")

Residence order – used to settle the arrangements about where a child should live. After the Children and Families Act 2014 it became called a "child arrangements order". Prior to 1991, it was termed "Custody")

Respondent – refers to the party in the proceedings who is responding to the Applicant's proceedings, which of course gets very confusing where a husband petitions for divorce,

the wife issues proceeding for financial remedies and the husband applies within those proceedings for an injunction. Wife or husband can then each be the Respondent, depending on which bit of the proceedings are being referred to. Judges usually resort to "husband" and "wife", even when the divorce has long completed

Retainer – Could solicitors have anything as simple and straight-forward as "terms of business"? Of course not. We have a "retainer" which refers to the whole range of contractual and professional obligations to our client and the terms on which our client instructs us

Search and seize – an order granted by the court authorising (usually) a neutral solicitor to enter premises to look for, identify and take information relevant to a particular issue. These orders are hard to get (available only in particularly difficult situations), expensive to implement and have profound impacts on goodwill in the process: probably never to be used by the faint-hearted nor in marginal circumstances

Section 8 order – refers to s8 of the Children Act 1989 which created "the residence order", "the contact order" (now "child arrangement orders") "the specific issue order" and "the prohibited steps order"

Section 8(5) order – refers to s8(5) of the Child Support Act, which gave the court power to make orders for maintenance for children where their parents are agreed about the level and wish to exclude the CMS

Section 25 factors – refers to s25 of the Matrimonial Causes Act, which lays down the factors the court should consider before exercising its powers to divide the finances and make maintenance orders

Serve – the process of delivering formally a court document to those who must be notified of it. Generally documents are "served" by post or "DX". The court now serves divorce applications by email, confirmed by post. Some other procedures have special requirements dictating that the documents are delivered personally

Severance of joint tenancy – where two or more people own property, they will often hold it as joint tenants (if one dies their share goes automatically to the other) or as tenants in common (their share in the property is dealt with according to their will or the rules of intestacy if there is no will). Severing the joint tenancy converts the joint tenancy into a tenancy in common. It is a step that needs to be considered on consulting a solicitor

Sharing – see Pensions

Specific issue order – contains directions to resolve a particular question which has arisen in relation to a child (eg where they should go to school)

Standard costs – see Indemnity costs

Statement of Issues – the items identified by each side before the First Appointment in financial remedy proceedings that each side says the court must determine to settle the case

Statement of Truth – a technical term referring to the prescribed declaration that the contents of a document are true and which therefore carry with them the potential consequence of perjury sanctions

Statutes – the Acts of Parliament that lie at the core of how the court is empowered and required to deal with the applications that are made to it. These may be fleshed out by Regulations and then guidance is given on the application by prior cases in senior courts, called the doctrine of precedent. Key statutes are:

- **the MCA 1973** (the Matrimonial Causes Act 1973), which lays down the law as regards divorce and allied financial claims
- **the I(PFD)A 1975** (the Inheritance (Provision for Family and Dependants) Act 1975, defining the claims that can be pursued against the estate of a deceased person
- **the CA 1989** (the Children Act 1989) lays down the approach to resolving parenting disputes and, in its Schedule, the financial claims that can be made in relation to children
- **the CSA 1991** (the Child Support Act 1991), with its myriad formulae and rules defining who pays what for children under the DWP's system administered by the Child Maintenance Service
- **ToLATA 1996** (the Trusts of Land and Appointment of Trustees Act 1996), confirming how the court is to approach financial claims raised on an equitable basis independent of the discretion that exists where there is a marriage

The Statutory Charge – refers to the right of the Legal Services Commission to recover, with some exceptions, the costs incurred under a legal aid certificate from what has been in issue in the proceedings. Where neither side has had legal aid, the statutory charge plays no part

Taxation – this has nothing at all to do with tax, but was the process by which the court assessed the level of costs that should be paid. (It is now called "detailed assessment" but the old word may still be used)

Tenancy in Common – see Severance of joint tenancy

Undertaking – a promise that should be treated as a solemn assurance to the court. The person giving it may be sent to prison or fined if breached (though such draconian steps are reserved for flagrant situations)

White v White – the ground-breaking case that required family law professionals to look at dividing things equally in two, or think about why this was inappropriate

Will – the document without which so many of us crazily choose to die; an item which should be an early agenda item with your solicitor

Without Prejudice offer – is one that "may not prejudice the court" and so it is prevented from ever being shown to the court. It is an attempt to find a settlement and save costs and so cannot be shown to the judge, save that the judge hosting the FDR, the court's settlement meeting, certainly will see them and will base their interventions upon how to close the gap between the parties' positions. Meetings can also take place on a without prejudice basis when what is said, shared and done is generally protected from being produced in the ongoing litigation

LAW QUOTES

The law relating to division of the assets

Some clients tell us that they have found it easier to come to terms with the approach of the court by reading the words of the judges in the senior courts, seeking to explain the principles that the judges should apply on a day-to-day basis. So here with a bit of infill / introduction are some of the key words from Parliament and the courts.

1. Within marriage, the ownership of assets can become muddled by the accidents of choices made during the relationship. Earning capacities can become enhanced or can atrophy through the choices as to roles. Parliament, recognising the special status of marriage, gave our courts powers to adjust legal entitlements through transferring property, paying a lump sum or varying nuptial trusts.

   In December 2000, it acquired powers to share pensions. It has long had powers to order one party to make maintenance payment to the other.

The main staging posts

2. How the courts exercise those powers is more difficult, but the staging posts are:

   a) "Section 25" (see below) must always be applied;

   b) The goal is fairness;

   c) Fairness is achieved through the principles of compensation (rarely relevant – data to follow where applicable) and:

      i) needs: enabling each party to have an equal start on the road to independent living and

      ii) the principle of sharing the fruits of the matrimonial endeavour.

      In some situations, it will be the principle of sharing that generates the award (say there is £40m all built up during the marriage); more commonly, it is the principle of need: how are these resources now to be divided in a way that:

      - promotes independence
      - creates two viable households, that can be sustained where each party plays their part?

3. In carrying out all of these tasks one must be careful to avoid discrimination. So for example awarding one party a lesser share of an asset from a lack of respect of the marital contribution of that spouse would generally be discriminatory. However, a reduced share on the basis for example of the shortness of the marriage might not be.

Section 25 of the Matrimonial Causes Act 1975

4. The courts' directions from parliament are contained in section 25 of the Matrimonial Causes Act 1973:

Section 25 – Matrimonial Causes Act, 1973: Matters to which court is to have regard in deciding how to exercise its [financial provision] powers

1. It shall be the duty of the court in deciding whether to exercise its [financial provision] powers under section 23, 24, 24A or 24B and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

2. As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c) 24, 24A or 24B in relation to a party to the marriage, the court shall in particular have regard to the following matters -

   a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

   b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

   c) the standard of living enjoyed by the family before the breakdown of the marriage;

   d) the age of each party to the marriage and the duration of the marriage;

   e) any physical or mental disability of either of the parties to the marriage;

   f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

   g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

   h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

25A – Exercise of court's powers in favour of party to marriage on decree of divorce or nullity of marriage

1. Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers… it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

2. Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

Fairness

5. There are certain aspects that are clear: for example, spousal maintenance cannot continue past the recipient's re-marriage but, more generally, how these broad concepts should be applied to the particular and very different circumstances of families in England and Wales is what consumes a large part of the courts dealing with family matters up and down the land. The guidance handed down from the senior courts is seldom sufficiently precise for anyone to predict what the outcome of a case will be. However, we know that the goal is fairness. Lord Nicholls of Birkenhead said so in *Miller and McFarlane* [2006] UKHL 24:

> "In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former. The claimant is not a suppliant. Each party to a marriage is entitled to a fair share of the available property. The search is always for what are the requirements of fairness in the particular case."

6. He sought to expand on what fairness means:

> "4. Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.

5. At once there is a difficulty for the courts. The Matrimonial Causes Act 1973 gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a 'clean break'. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.

6. Of itself this direction leads nowhere. Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties."

Needs, compensation and sharing

7. Lord Nicholls went on to clarify the principles of needs, sharing and compensation that are the routes by which fairness is identified or achieved:

"… several elements, or strands, are readily discernible. The first is financial needs. This is one of the matters listed in section 25(2), in paragraph (b): 'the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future'.

11. This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

12. In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.

…

16. A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical

purposes equal partners in marriage': *R v R* [1992] 1 AC 599, 617. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."

8. In the same case, Baroness Hale of Richmond added:

"The ultimate objective?

144. .. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living."

Conduct and positive or negative contribution

9. The case also gives clarity as regards the parts of conduct and contribution. Most individuals at the end of a relationship instinctively frame their presentation of entitlements in a form that emphasises their own efforts and seeks recognition of the other parties' failings. But the guidance from this case is that it remains wrong to do so in the majority of cases:

"Conduct

59. Next is the question of the parties' conduct. The relevance of the parties' conduct in financial ancillary relief cases is still a vexed issue. For many years now divorce has been based on the neutral fact that the marriage has broken down irretrievably. Some elements of the old concept of fault have been retained but essentially only as evidence of irretrievable break down. As already noted, parties are now free to end their marriage and then re-marry.

60. Despite this freedom, there remains a widespread feeling in this country that when making orders for financial ancillary relief the judge should know who was to blame for the breakdown of the marriage. The judge should take this into account. If a wife walks out on her wealthy husband after a short marriage it is not 'fair' this should be ignored. Similarly if a rich husband leaves his wife for a younger woman.

61. At one level this view is readily understandable. But the difficulties confronting judges if they seek to unravel mutual recriminations about

happenings within the marriage, and the undesirability of their attempting to do so, have been rehearsed many times. In *Wachtel v Wachtel* [1973] Fam 72, 90, Lord Denning MR led the way by confining relevant misconduct to those cases where the conduct was 'obvious and gross'.

62. The Law Commission then considered the problem. The commission concluded that courts should be obliged to take account of conduct where to do otherwise would offend a reasonable person's sense of justice. To this end the court should be free to examine sufficient of the matrimonial history to enable the judge to 'get a feel of the case': see the Law Commission report on *Family Law – The Financial Consequences of Divorce* (1981) Law Com no 112, paras 36-39.

63. Parliament gave effect to this recommendation in paragraph (g) in the new section 25(2) introduced by the Matrimonial and Family Proceedings Act 1984. One of the matters to which the court should have regard is 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. It is implicit in this provision that conduct outside this description is not conduct which should be taken into account.

64. This history is well known. I have mentioned it only because there are signs that some highly experienced judges are beginning to depart from the criterion laid down by Parliament. In *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011, 1017, para 34, Thorpe LJ said the judge 'must be free to include within [his discretionary review of all the circumstances] the factors which compelled the wife to terminate the marriage as she did'. This approach was followed by both courts below in the present case. Both the judge and the Court of Appeal had regard to the husband's conduct when, as the judge found, that conduct did not meet the statutory criterion. The husband's conduct did not rank as conduct it would be inequitable to disregard.

65. This approach, I have to say, is erroneous. Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of having regard to all the circumstances of the case. It is not as though the statutory boundary line gives rise to injustice. In most cases fairness does not require consideration of the parties' conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account.

Contribution

66. A point of a similar nature concerns the approach to be adopted when evaluating the contributions each party made to the welfare of the family.

Apparently, in this post-*White* era there is a growing tendency for parties and their advisers to enter into the minute detail of the parties' married life, with a view to lauding their own contribution and denigrating that of the other party. In the words of Thorpe LJ, the excesses formerly seen in the litigation concerning the claimant's reasonable requirements have now been 'transposed into disputed, and often futile, evaluations of the contributions of both of the parties': *Lambert v Lambert* [2002] EWCA Civ 1685; [2003] Fam 103, 117, para 27.

67. On this I echo the powerful observations of Coleridge J in *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam); [2002] 2 FLR 1143, 1154-1155, paras 33-34. Parties should not seek to promote a case of 'special contribution' unless the contribution is so marked that to disregard it would be inequitable. A good reason for departing from equality is not to be found in the minutiae of married life."

10. As referred to at the paragraph numbered 67, the guidance was a reflection of what had been said more colourfully a short while earlier by Coleridge J:

"Hardly a case is heard nowadays than that one party (usually the husband) seeks to establish that he has played a markedly more valuable part in the accumulation of the wealth and the marriage partnership so that he should be specially rewarded by way of a greater share of the assets.

I wonder whether, with respect to the members of the Court of Appeal in *Cowan*, they would have made the extensive remarks they did (about the possibility of a special contribution) if they had realised the forensic Pandora's Box that would be opened in actual practice. The effect is not at all dissimilar to the 'conduct' debates of the 1970s. In those days 'conduct' was similarly raised against wives to try and limit their claims. However, the court, recognising the undesirable consequences inherent in those arguments and further the impossibility of fairly adjudicating upon them introduced the concept of 'obvious and gross' very effectively to limit their application.

It is suggested by some that these current 'special contribution' debates are reintroducing conduct by the backdoor. I would say by the front door. For what is 'contribution' but a species of conduct. 'Conduct' (subsection 2(g)) refers to the negative behaviour of one of the spouses. 'Contribution' (subsection 2(f)) is the positive behaviour of one or other of the parties. Both concepts are compendious descriptions of the way in which one party conducted him/herself towards the other and/or the family during the marriage. And both carry with them precisely the same undesirable consequences.

Firstly they call for a detailed retrospective at the end of a broken marriage just at a time when parties should be looking forward not back. In part that

involves a determination of factual issue (and obviously the court is equipped to undertake that). But then, the facts having been established, they each call for a value judgment of the worth of each side's behaviour and translation of that worth into actual money. But by what measure and using what criteria? Negative 'conduct' is one thing (particularly where it is recognisably 'obvious and gross') but the valuing of positive 'contribution' varies from time to time. Should a wealth creator receive more because eg his talents are very unusual or merely conventional but well employed? Should a housewife receive less because part of her daily work over many years was mitigated by the employment of staff? Is there such a concept as an exceptional/special domestic contribution or can only the wealth creator earn the bonus? These are some of the arguments now regularly being deployed. It is much the same as comparing apples with pears and the debate is about as sterile or useful."

The court concluded as to the contributions: "Does that put the husband into that narrow category of wealth creators whose special gift or talent is the foundation of great wealth? I cannot so find in this case. I cannot evaluate the husband's contribution as greater than the wife's without discriminating against her on the grounds that the work she did over just as long a period was of less value than the husband's. That is precisely the approach foresworn by Lord Nicholls. The husband in this case was a hard working, dedicated husband, a father and provider over 32 years. By the same token the wife was a hard working and dedicated housewife, a mother and homemaker over the same period. 'Each in their different spheres contributed equally to the family' per Lord Nicholls. To find otherwise would, on the facts of this case in my judgment, amount to blatant discrimination. The husband's role was the glamorous, interesting and exciting one. The wife's involved the more mundane daily round of the consistent carer. That was the way in which the parties to this marriage chose, between themselves, to organise the overall matrimonial division of labour. How can it then be said fairly, at the end of the day, that one role was more useful or valuable (let alone special or outstanding) than the other in terms of the overall benefit to the marriage partnership or to the family?

The court commented on the costs incurred (£400,000): 'That is not especially unusual in this class of case. But the parities are not assisted to achieve compromise when they are encouraged by the law to indulge in a detailed and lengthy retrospective involving a general rummage through the attic of their marriage to discover relics from the past to enhance their role or diminish their spouse's. Perhaps 'obvious and gross' has a renewed role here. 'Obvious' because it imports the concept of very easily discernible and 'gross' in the sense of it being abnormally large. Unless this or something similar is soon introduced to curb these debates I fear there is a real danger that the forward-looking *White* innovations will be lost in a sea of post break-up, backward-looking mutual recrimination and the court's task and role in this already uncertain area will thereby be set back at least a generation.'"

11. So we can and should be clear that all the behaviour in a marriage is highly likely to have a veil drawn over it – whether it is exceptional efforts or turning the other cheek or limitless support on one hand, or lies, failings and abuse of trust on the other.

12. We can clarify this further by looking at the reported cases where conduct has come into the calculations, to see how extreme the behaviour has to be before it resonates:

    - the step-father who groomed his wife's grandchildren and sexually assaulted them
    - connivance in a husband's suicide attempts for material gain
    - an assault upon a WPC, rendering her unable to continue in her work
    - hiding from the husband the paternity of the child he had in consequence brought up as his own over nine years.

13. Whilst overspending during the marriage is unlikely to "register", it is possible that overspending or other conduct after the end of the marriage but before the court determines the outcome can do so.

    It is a pretty narrow gateway and our experience is that only in the extreme case is this an avenue worth pursuing.

    From *Vaughan v Vaughan* [2007] ECWA Civ 1085, we have this:

    > "in the words of Cairns LJ at 342H,
    >
    > > 'a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably.'
    >
    > The only obvious caveats are that a notional re-attribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) and that the fiction does not extend to treatment of the sums re-attributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation."

14. What we learn is that in needs cases, it may be difficult even to bring in wanton overspending post separation.

Consequences

15. Fairness is the watchword. Anyone applying common sense might say that it is a strange fairness that is blind to almost all of the history, even where this has had impacts upon the balance sheet of resources and needs that ultimately comes to the court. It will seem strange that a veil is drawn over the behaviours that may have continued throughout the marriage but there may be a careful examination of the way that each party has conducted the case.

16. … strange, but that is still the law. However, judges are still people and will be swayed in their analysis of the law either higher or lower in the bracket of legitimate outcomes by their perspectives of what is appropriate and their sense of what meets the justice of the case – it is simply that you may have to be careful and nuanced in the way that you progress.

Bringing all this together, the recently appointed Lead Judge of the National Financial Remedies Court Included the following explanation In his recent judgment; *ND v GD* [2021]EWFC 53:

"The Law

38. As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution; *Charman v Charman* [2007] EWCA Civ 503.

39. The objective of the court is to achieve an outcome which ought to be 'as fair as possible in all the circumstances'; per Lord Nicholls at 983H in *White v White* [2000] 2 FLR 981.

40. There is no place for discrimination between husband and wife and their respective roles; *White v White* at 989C.

41. In an evaluation of fairness, the court is required to have regard to the s25 criteria, first consideration being given to any child of the family.

42. S25A is a powerful encouragement towards a clean break, as explained by Baroness Hale at [133] of *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186. I only add that in my view the very real and substantial benefits of a clean break, both financial and emotional, should not be underestimated by parties in these cases

43. The three essential principles at play are needs, compensation and sharing; *Miller; McFarlane*.

44. In practice, compensation is a very rare creature indeed. Since *Miller; McFarlane* it has, to the best of my knowledge, only been applied in one first instance reported case at a final hearing of financial remedies, a decision of Moor J in *RC v JC* [2020]

EWHC 466 (although there are one or two examples of its use on variation applications).

45. Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail; *Charman v Charman* [2007] EWCA Civ 503.

46. In the vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged.

47. Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary; *Scatliffe v Scatliffe* [2017] 2 FLR 933 at [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in *K v L* [2011] 2 FLR 980 at [22] there was at that time no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs. As far as I am aware, that holds true to this day.

48. The evaluation by the court of the demarcation between marital and non-martial assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case; *Hart v Hart* [2018] 1 FLR 1283. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended. I accept the submission on behalf of H that in the ordinary course of events (acknowledging, of course, that each case will turn on its own facts) the attribution of income derived from a non-marital asset towards the domestic economy will generally not convert the character of the underlying capital asset from non-marital to marital and therefore susceptible to the sharing principle; I am fortified in this analysis by the decision of Roberts J in *WX v HX* [2021] EWHC 242.

49. Needs are an elastic concept. They cannot be looked at in isolation. In *Charman* (supra) at [70] the court said: 'The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e)'. Mostyn J said in *FF v KF* [2017] EWHC 1093

at [18]; 'The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise'. To that I would add that the source of the wealth is also relevant. If, as here, it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in *N v F* [2011] 2 FLR 533 at [17-19]

50. Counsel for H submits that needs should be 'relationship-generated'. The logic, in its purest form, is that W's health is not causally linked to the marriage, was diagnosed after separation and therefore none of her needs occasioned by health fall to be met by H. He shied away from pressing me to reach this conclusion, but invited me to bear this in mind when considering needs in the round. In my judgment, this approach cannot be right. The statute does not limit consideration of needs in this way (s25(2)(e). In *Miller; McFarlane* at [11] Lord Nicholls said: 'Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.'

51. At [137] of *Miller; McFarlane* Baroness Hale refers to factors which are linked to the parties' relationship, either causally or temporally, and not to extrinsic, unrelated factors such as disability arising after the marriage has ended. I do not read her as saying that in such circumstances needs cannot or should not be provided for by the paying party, particularly as she signals no dissent with the observations of Lord Nicholls cited above. It would be odd if W's health is excluded from consideration if a diagnosis is made 1 month after separation, but included if the diagnosis is made 1 month before separation. Further, in this case it is likely that the diagnosis, coming as it did shortly after separation, was the end result of a period of deterioration during the marriage; it is not possible or fair simply to take the diagnosis as the start date of the condition.

52. What does seem clear from paragraph [140] is that the compensation principle does depend on a direct causal link between the additional economic disadvantage and the relationship; that seems entirely logical given that the principle goes beyond core needs.

53. During the hearing, as I have observed, I was presented with a number of capitalisation calculations by an IFA who used underlying assumptions which differ from the Duxbury model. In *JL v SL (No 3)* [2015] EWHC 555 Mostyn J reviewed the Duxbury assumptions and concluded that they remain sound. The Duxbury model has stood the test of time since the eponymous case of *Duxbury v Duxbury* some 30 years ago. As has been often stated, it is a tool and not a rule. The court has the flexibility to depart from it to the extent necessary in any given case, as, for example, in *A v A* [1999] 2 FLR 969. There, an elderly applicant was, by reason of her age and length of the marriage, entitled to less under the Duxbury model than would have been the case had she been younger and/or the marriage

shorter; the so-called Duxbury paradox. Singer J departed from the strict Duxbury application to meet this unfairness. True, the court is not barred from considering capitalisation calculations other than by the Duxbury methodology (eg *Tattersall v Tattersall* [2018] EWCA Civ 1978) but I am firmly of the view that there would have to be a very good reason to go down a different route.

54. W relied on a number of, now somewhat outdated, authorities, to demonstrate that the court should not throw upon the state the burden of providing care for W if the family's financial resources can meet such needs; *Barnes v Barnes* [1972] 3 AER 872, *Delaney v Delaney* [1990] 2 FLR 457, *Peacock v Peacock* [1984] 1 AER 1069 and *Foot v Foot* [1987] FCR 62. I do not consider these authorities to be of any particular relevance as it seems to me to be unlikely, on either party's proposal, that W will become so destitute as to require state assistance.

55. Where there are issues of liquidity, per Wilson LJ in *Behzadi v Behzadi* [2008] EWCA 1070 '…it is for the owner of property to establish, if such be the case and unless it is self-evident, that its value cannot be realised (which includes being borrowed against: *Newton v Newton* [1990] 1 FLR 33 at 44) or, if realised, that its proceeds cannot be transferred to the place at which it is suggested that they can be deployed'.

56. Finally, given that in this case life expectancy is a central issue, I have been referred to dicta of Munby J, faced with a similar situation in *PJC v ADC and others* [2009] EWHC 1491 that 'I must do the best I can on the basis of available evidence.'"

Parting words

Well done on getting through to this end page! We suspect that the best next step for those who have done so is to connect up with a lawyer for specific advice, now that you are familiar with the basics and are in a position to speak the same language.

If you don't yet have a lawyer and are interested in hearing from FLiP, you will probably have a sense from this booklet as regards whether we would be a good fit. What we seek to provide our clients is good outcomes via, first, support (that is kind, available, technical, intelligent, cost-effective and efficient) and, secondly, connection (whether that is respecting the role you have to play in all of this or through the other professionals who can and should be part of your building a brighter future for you and your children – and often thus incidentally your ex).

Currently our best intake route is via an information-gathering portal that you can find on our website… It enables us to know the basics about you from the "get go". Look for the "get started with" buttons especially on our individual-profile pages on **www.flip.co.uk**

For those who feel that they have further preparation to do, we would say "*be careful about over-doing the detail… The most important thing at the start is a glimpse of the big picture and the interconnectedness between the parts of the problem that you need to solve… There is also a lot to be said for just focusing on reaching the place of getting the conversation started.*"

But more information might well be needed (if not now then at least later) as regards:

Financial claims generally

- The **Family Justice Council** has good guidance
- The plain English edition is **here**

Pensions

- In particular the report of the **Pensions Advisory Group**
- Though many are now saying "better still, try" **AdviceNow**

Creating good transitions for children

- **Click** is a mine of great resources including videos

- The **Family Justice Young People's Board** promote the voice of children at the point of separation and in particular where parents are going through court process
- Other good information is available **here**
- CAFCASS has good information on its **site**, including around parenting plans
- From Texas, Christina McGhee has had particular influence on the system here in the UK and her **website** has a wealth of her accessible common sense – her "how to" booklet is available from FLiP in pdf format
- Also try **here** for information from the excellent National Association for Child Contact Centres
- And **here** for an app that can really help where communication is difficult
- There are a whole range of parenting programmes and information and links are on our website: **https://www.flip.co.uk/news-resources/our-podcasts-and-videos/**

Process

- For all things court-based and more, go to **PinkTape** for the queen of the family law blog
- Good information about family mediation is available from the **Family Mediation Council**, our own **FLiP podcasts**, **Wells Family Mediation** and the **Kent Family Mediation Service**

Domestic abuse issues will generally call for immediate professional help which is why we have not dealt with them extensively in this booklet – background support is available, for example, from the **government**, the **National Domestic Abuse Helpline**, **Rights of Women** and **Women's Aid**.

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.

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FLiP Family Law in Partnership

Separation and divorce generally engage every aspect of the lives of those involved (and the lives of their children). They will often mean unwelcome choices or intrusion into areas that are held most dear.

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.

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