



Guide to Family Dispute

Witts Moloney Solicitors Ltd



This booklet is designed to explain the different procedures and terms used when dealing with family dispute law in cases regarding children, divorce and financial matters. Please read this carefully to give you a better understanding of some of the more complicated processes. We may refer back to it at appropriate stages of the proceedings.

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Children



An Overview of Children Orders in England and Wales

Applications for a child Arrangement Order

More commonly known as Residence, Custody or Contact Orders. These orders have now been abolished and replaced with a single order known as an Arrangement Order

An Arrangement Order states who a child lives with and how often and the terms of contact with a parent who does not live with that child.

An application is filed with the High Court, County Court or Family Proceedings Court. The Applicant must serve a copy of the application on each Respondent, notice of application and blank acknowledgement at least 14 days prior to the hearing. A First Directions hearing date is set by the court (normally a conciliation application). Conciliation Appointment is an opportunity for both parties to reach an agreement.

If agreement cannot be reached at the Conciliation Appointment usually both parties have to file written statements regarding the children and a CAFCASS Officer (formerly a Court Welfare Officer) will be ordered to file a report setting out in their opinion where the children's interest are best served. In most parts of the Country this process takes 12 weeks or more. The Court can make a preliminary decision if the matter is urgent and the child is at some risk. If agreement still cannot be reached after the report, the matter is then heard by the Judge.

The Judge/Court/CAFCASS Officer uses a checklist of things to consider when dealing with applications. The checklist is:

- the ascertainable wishes and feelings of the child concerned (considered in the light of his/her age and understanding);
- his/her physical, emotional and educational needs;
- the likely effect on him/her of any change in her/his circumstances;
- his/her age, sex, background and any characteristics of her/him which the court considers relevant;
- any harm which he/she has suffered or is at risk of suffering;
- how capable each of his/her parents, and any other person in relation to whom the Court considers the question to be relevant, is of meeting his/her needs.

Other Orders include Specific Issue Orders (e.g. direction for determining a specific question related to parental responsibility) and Prohibited Steps Orders (which have the effect of restraining the actions of person in relation to a child).

Although it is possible to conduct your own divorce when there are complications in respect of finances or Orders related to children, it is recommended that legal advice be taken.

Guide to Children in Family Breakdown

The law relating to children in situations of family breakdown has been radically altered by The Children Act 1989 which came into force in October 1991 and The Child Support Act 1991 which came into force in April 1993.

We have prepared the following guide to summarise the current position. We would emphasise that the information is given in general terms and there may be special factors relating to your case upon which you will need to seek further advice.

- ⇒ What is Parental Responsibility?
- ⇒ Who has Parental Responsibility?
- ⇒ What factors does a Court take into account in making a Court Order?
- ⇒ What happens if my ex-spouse and I disagree about the arrangements for the children?
- ⇒ Can I take my children abroad without the consent of my spouse?
- ⇒ Can we change the children's surname?
- ⇒ Can I apply for a Court Order to see my grandchildren?
- ⇒ Can I stop my ex-spouse from having the children if anything happens to me?
- ⇒ Can I continue to be involved in my child's education?
- ⇒ What should I do if I require further advice?

What factors does a Court take into account in making a Court order?

In all proceedings involving children the paramount consideration is the welfare of the child. In determining what is in the best interests of a child, the Court will consider the following matters:

- The wishes and feelings of the child taking into account the child's age and understanding.
- The child's physical, emotional and educational needs.
- The likely effect on the child of any change in circumstances.
- The child's age, sex, background and relevant characteristics.
- Any harm the child has suffered or is at risk of suffering.
- The parent's ability to meet the child's needs.
- The Court's range of powers.

NB: The Court will only make a Court Order if it considers that to do so would be in the best interests of the child. Preferably the parents should try to reach an agreement so that it is not necessary to make an Order.

What is Parental Responsibility?

The Children Act 1989 introduced a new concept called Parental Responsibility. This term covers all the rights and duties which by law a parent has in relation to his/her child or children. Since October 1991 the Courts no longer have power to make "custody" or "access" Orders.

Who has Parental Responsibility?

In the case of married parents, both parents have Parental Responsibility.

In the case of unmarried parents, only the mother initially has Parental Responsibility but the father can acquire it either by entering into a Parental Responsibility Agreement with the mother, being named on the birth certificate (since 1st December 2003) or applying to the Court.

Parental Responsibility is not "lost" by either parent on divorce and where it is shared, either parent can act independently from the other. If the parents cannot agree on what is in the best interests of the child, one or other can apply to the Court for:

An Arrangement Order: An Order settling the arrangements as to the person with whom the child is to live and can require the person with whom a child lives or is to live to allow the child to visit or stay with the person named in the order and for that person and the child to otherwise have contact with each other. (e.g. by writing to each other, telephoning etc.).

A Prohibited Steps Order: An Order preventing a parent from exercising his/her Parental Responsibility in a particular way (e.g. an Order preventing the change of surname, the change of school or preventing abduction).

A Specific Issue Order: An Order giving directions in relation to a specific question concerning the child. (e.g. to settle a particular dispute with regard to schooling, medical treatment, permission to live abroad etc.).



Guide to Children (cont.)

What happens if my ex-spouse and I disagree about the arrangements for the children?

Normally the Court will encourage parents to discuss problems and to try and reach agreement. Sometimes it may be of assistance for the parents to discuss matters in dispute with an independent third party who is trained to advise and assist. This process is known as “conciliation” and can be arranged either voluntarily by the parties or through the Court. If conciliation is arranged through the Court very often the parties’ legal representatives will also attend and if an agreement is reached any legal proceedings can be halted. Discussions which take place in conciliation are confidential and cannot be used in Court proceedings unless allegations of child abuse are raised.

If it is impossible for the parties to reach agreement through conciliation the Court may be invited to make a Court Order after hearing both parties’ points of view. If this becomes necessary sometimes the Court will order the preparation of a “Welfare Report”. The Court Welfare Officer will then meet with the parties, the children and any other person involved, for example school teachers, social workers and grandparents. A confidential report will then be prepared for the Court, a copy of which should be supplied to both parties’ solicitors.

Can I take my children abroad without the consent of my spouse?

Previously, Custody Orders made in divorce proceedings contained a general restriction preventing either parent from removing a child from England and Wales without the consent of the other person or an order of the Court.

Under the present law there will normally be no Court Order in existence and on the face of it, there is no restriction on either parent taking the children abroad.

But:

- The Child Abduction Act 1984 makes it a criminal offence to remove a child under the age of 16 with whom you are connected from the UK without the consent of each parent.
- A parent who suspects that the other parent is about to remove a child from the UK can apply to the Court for the additional protection of a Prohibited Steps Order.

If a Residence Order or now an Arrangement Order setting out where the child will live has been made no person can remove a child from the UK without either the written consent of the others with Parental Responsibility or the leave of the Court.

But:

- If a Residence Order / Arrangement Order exists there is a general power for a person in whose favour the order is made to take the child out of the UK for less than one month without the consent of the other parent or leave of the Court.

Guide to Children (cont.)

Can we change the children's surname?

Previously a Custody Order contained a restriction against either party changing the surname without either the consent of the other party or an order of the Court. Under the current law in most cases no such order will be in existence and there will be no general restriction against changing the child's surname.

But:

- An aggrieved parent can apply to the Court for a Prohibited Steps Order. If a Residence Order has been granted no person can cause a child to be known by another surname without either the written consent of everyone with parental responsibility or leave of the Court.

Can I apply for a Court Order to see my grandchildren?

Yes, a grandparent or other interested party can apply to the Court for an Arrangement Order, but would normally require permission of the Court to make such an application unless the child has lived with them for more than 3 years out of the previous 5.

Can I stop my ex-spouse from having the children if anything happens to me?

A parent can appoint a guardian effective in the event of his/her death. But the appointment will not take effect until there is no surviving parent with Parental Responsibility. Unless there was a Residence Order /Arrangement Order in favour of the appointing parent in force at the time of his/her death then the guardian and surviving parent would share Parental Responsibility and either can apply to the Court for an Order in the event of a dispute. NB. In the past guardians had to be appointed by Deed or Will. They can now be appointed in writing signed and dated by the appointer.

Can I continue to be involved in my child's education?

Even after divorce both parents retain Parental Responsibility and both parents have the right to be involved in their child's education by attending parent teacher meetings and requiring copies of school reports etc.

What should I do if I require further advice?

If you have any further queries you may like to consult us further.



General Principles

The Welfare Principle

When a Court is asked to decide an issue about the upbringing of a child, the child's welfare shall be the Court's paramount consideration. In other words, the most important factor is what is best for the child.

The Law sets out a number of things for the Court to consider. This list is sometimes called the Welfare Checklist and it is worth looking at all seven factors as the law sets them out.

A Court shall have regard in particular to:

1. the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
2. His physical, emotional and educational needs;
3. The likely effect on him of any change in his circumstances;
4. His age, sex, background and any characteristics of his which the Court considers relevant;
5. Any harm which he has suffered or is at risk of suffering;
6. How capable each of his parents, and any other person in relation to whom the Court considers the question to be relevant, is of meeting his needs;

The range of powers available to the Court under this Act (Children's Act 1989) in the proceedings in question.



The No Delay Principle

When an application is made to the Court for an Order involving a child delay should be avoided at all times. The Courts and solicitors have a duty to avoid delay in children's cases. The Courts are responsible for actively making sure that once an application is made it is no allowed drift.

The Presumption of No Order

If both parties agree the arrangements for a child the Court will not become involved and no Court Order will be made. An Order will only be made if the Court believes that an Order would be better for the child than making no Order at all.



Orders/Parental responsibilities

Orders relating to children

There are many types of Order which the Children Act 1989 make possible. The Orders which regulate private arrangements for children:

- Arrangement Order
- Prohibited Step Order
- Specific Issue Order
- Parental Responsibility Order

The above are set out in Section 8 of the Children Act 1989, and are sometimes referred to as the “section 8 orders”.

We recognise that the practical and emotional aspects of separation can be made worse by the complexities of the Law. Difficulties may arise because people have unrealistic expectations of what can and cannot be achieved.

No solicitor can solve all the problems which divorce or separation bring. Only the individuals involved can hope to do that. Adopting a constructive and conciliatory approach, can help to reduce much of the distress experienced as a marriage ends.

Family law is unlike most other types of legal practice because it is concerned with emotional as well as practical issues. The lives of the whole family are affected by the outcome, so the way in which the settlement is reached can be almost as important as the settlement itself.

Parental Responsibility

Parental Responsibility was a new concept introduced by the Children Act 1989 before this parents had rights over children. Now the emphasis is on parents having responsibility for them.

The Law says that it means “all the rights, duties, powers, responsibilities and authority which by Law a parent has in relation to the child and his property”.

A person with Parental Responsibility cannot surrender or transfer it unless the child is adopted.

- Who has parental responsibility and who can get it?
- Why is parental responsibility important?

Civil Partnerships

A Civil Partnership is a new legal relationship, which can be formed by two people of the same sex. It gives same sex couples the ability to obtain legal recognition for their relationship. Couples who form a civil partnership will have a new legal status – that of “civil partner”.

Same-sex couples who form a civil partnership will have parity of treatment in a wide range of legal matters with those opposite-sex couples who enter into a civil marriage.

The rights and responsibilities of civil partners will include:

- A duty to provide reasonable maintenance for your civil partner and any children of the family;
- Ability to apply for parental responsibility for your civil partner’s child;
- Equitable treatment for the purposes of assessment for child support; life assurance; tax, including inheritance tax; employment and pension benefits; inheritance of a tenancy agreement;
- Recognition under intestacy rules;
- Access to fatal accidents compensation;
- Protection from domestic violence; and
- Recognition for immigration and nationality purposes.

When will my partner and I be able to form a civil partnership?

This came into force on 5 December 2005. This enabled the first civil partnerships to be formed under the standard procedure on 21 December 2005.

How does civil partnership differ from marriage?

Civil Partnership is a completely new legal relationship, exclusively for same-sex couples, distinct from marriage.

The Government has sought to give civil partners similar rights with spouses, as far as is possible, in the rights and responsibilities that flow from forming a civil partnership.

There are a small number of differences between civil partnership and marriage, for example, a civil partnership is formed when the second civil partner signs the relevant document, and a civil marriage is formed when the couple exchange spoken words. Opposite-sex couples can opt for a religious or civil marriage ceremony as they choose, whereas formation of a civil partnership is an exclusively civil procedure.

Who is eligible?

You and your partner must both be of the same sex, not already be in a civil partnership or marriage, be 16 years of age or older, and not be within the prohibited degrees of relationship (i.e. related) due to the closeness of their relationship with each other, are prohibited from registering a civil partnership with each other or, in certain cases, who are prohibited from registering a civil partnership with each other unless certain conditions are met.

In England and Wales and Northern Ireland, individuals who are aged 16 and 17 will have to obtain the written consent of their parent(s) or legal guardian(s) before registering a civil partnership.

Registering a Civil Partnership

What arrangements can I make for my civil partnership?

If you want to register a civil partnership, you have to give formal notice of your intention to do so.

Where can I register my civil partnership?

The range of places you can register your civil partnership is broadly similar to those available for civil marriage. Every local authority provides a facility for the registration of a civil partnership. It is also possible to register a civil partnership at a venue elsewhere, for example at a hotel. Any premises that are presently approved for marriage is deemed to also be approved for the purposes of civil partnership registrations until the current approval is renewed or expires.

What formal requirements have to be met before registration can take place?

You and your partner will need to each give notice in the area(s) where you have resided for at least seven days. When you give notice, you will be asked to state where you wish the civil partnership registration to take place. If a civil partnership is to be registered outside of the area of residence, you and your partner will need to give notice in the area(s) where you live. When you each give notice, you will be asked to give the date and place where the civil partnership registration is to take place so these details will need to have been first agreed with the local authority where the registration is going to take place.

What is the waiting period for civil partnership?

There is a 15 day waiting period once each person has given notice of intention to register, before the civil partnership can be registered. There is a procedure in place to reduce the 15 day waiting period in exceptional circumstances where there are compelling reasons to do so. It is also possible for a civil partnership to be registered at the residence of someone who is housebound, detained or seriously ill and not expected to recover. There is also a procedure to allow couples to form a civil partnership quickly in the cases of former spouses, one of whom has changed gender under the provisions of the Gender Recognition Act 2004.

What time of day can a civil partnership be registered?

Civil partnerships can only be registered between 8am and 6pm (as is the case for marriage). However, where one of the couple is seriously ill and not expected to recover, then the civil partnership may be formed at any time.





Registering a Civil Partnership (cont.)

What information will be made public about my civil partnership?

When you give notice of your intention to register a civil partnership, details from the notice will be available in a register office for public inspection (as for marriage) but the detail will not include the address of you or your partner. It is important that these details are publicly available during the 15 day waiting period, to allow for objections to be made, just as is the case for marriage.

What happens at a civil partnership registration?

A Civil partnership is registered once the couple has signed the civil partnership document in the presence of a registrar and two witnesses.

There are words printed on the document which the couple will be able to say at the time of signing the document. Civil partnership registration is an entirely secular process, and the Civil Partnership Act prevents any religious service from taking place during the statutory steps leading to the formation of a civil partnership.

Can we have a ceremony?

Yes, you can arrange a ceremony in addition to the signing of the legal documentation if you wish, but a ceremony is not required under the Act. It is up to you to decide. Local authorities offer a ceremony but there are other organisations who also offer ceremonies too.

Can we change our names after registering a civil partnership?

After registering a civil partnership, some people might want to change their surname to that of their partner's, or a couple may choose to hyphenate their names. Government departments and agencies such as the Passport Agency and the DVLA will accept civil partnership certificates in the same way that they accept marriage certificates as evidence for changing their names.



Dissolving a Civil Partnership

How will dissolution proceedings work?

Registering as civil partners is a serious commitment, because a civil partnership ends only on formal dissolution or annulment, or on the death of one of the parties.

The process for dissolution is Court-based. The person applying for the partnership to be dissolved has to provide evidence that the civil partnership has broken down irretrievably.

The dissolution process begins with an application to the Court in the form required by the Court rules for civil partnership proceedings.

In order to prove irretrievable breakdown it will be necessary to provide evidence of one or more of the following facts to support the application for dissolution:

- Unreasonable behaviour, that is behaviour such that the applicant cannot reasonably be expected to live with their civil partner;
- Separation for two years, where the other civil partner consents to a dissolution order being made;
- Separation for five years, where the other civil partner does not consent to a dissolution order being made;
- That the other civil partner has deserted the applicant for a period of two years prior to the application.

The Court is required to inquire as far as is possible into the facts alleged by the applicant and into any facts alleged by their civil partner. If the Court is satisfied on the evidence that the civil partnership has broken down irretrievably, a dissolution order can be granted.

Do I have equal survivor pension rights a Civil Partner?

Civil partners will be able to accrue survivor pensions in public service schemes and contracted-out pension schemes from 1988.

The Department for Work and Pensions has just made amendments to the contracting out rules to ensure that pension schemes provide survivor benefits for civil partners on the basis of deceased member's rights accrued from 6 April 1988, to treat them on a par with widowers.

Divorce

The Law of Divorce

This section sets out the law of divorce currently in force in England and Wales. The main legislation is the Matrimonial Causes Act 1973, as amended.

There is one ground for divorce:

that the marriage has broken down irretrievably.

Before a Court can grant a divorce, it has to be shown that the marriage has broken down. This is done by giving evidence in writing of any one of five Facts, as they are called. One of these Facts has to be proven.

The five Facts are:

1. the adultery of the other spouse
2. the unreasonable behaviour of the other spouse
3. two years desertion
4. the couple have lived apart for two years and the other spouse consents to divorce
5. the couple have lived apart for five years (no consent needed).

In excess of 70% of divorces are granted on either adultery or unreasonable behaviour. This is may be because most people want to get on with the divorce rather than wait for the two year period to expire. It is possible (but not necessarily wise) to divorce before the finances have been agreed. If there are financial proceedings, or proceedings about children, they run separately. It is not possible to divorce in the first year of marriage.

Divorce – Legal Procedures

This is a basic outline of the divorce procedure which goes through various stages.

The person who applies to the Court is the Petitioner, so called because the main document to be prepared and sent (filed) to the Court is the Petition.

These documents have to be in a particular format and have to state specific things.

The marriage certificate has to be sent to the Court at the same time, together with the Court fee of £410. Once the Court has checked and processed the documents (issued them) they will then send (serve) them in the post to the other party.

The other person will get the Petition and a document in question and answer format, which has to be sent back to the Court, called an Acknowledgement of Service Form. The person to whom these documents are sent is called the Respondent.

It is still possible to name the other person with whom adultery has taken place – that person is called the Co-respondent. We would advise that such a course is best avoided.

Divorce (cont.)



Divorce – Legal Procedures (cont.)

The Respondent should return the Acknowledgement of Service Form to the Court within 7 days of receiving the petition. Should the Respondent state that he or she wants to defend the divorce (which is unusual unless trying to delay matters, or while the issue of costs or the content of the Petition is negotiated) then a document called an Answer has to be filed within 28 days of receiving the Petition.

If the Respondent does not defend (which is usual) the Petitioner prepares a Statement confirming the factual content of the Petition.

This Statement and a form called an application for a Decree Nisi has then to be sent to the Court, where the documents will be checked. A date for the Decree Nisi will then be fixed.

The Decree Nisi will be pronounced by the Court on the date fixed. Neither person has to attend the Court.

The Decree Nisi is the first of two decrees of divorce. It signifies that the Fact of the divorce relied upon is proven and that the due process of law has taken place.

Six weeks and one day later, the Petitioner may apply for the second and final decree of divorce – the Decree Absolute.

When that is granted, the divorce has taken place. There is usually no hearing. The application to the Court is made on a standard form. If the Petitioner does not apply for Decree Absolute then the Respondent can do so three months later. There has to be a brief hearing before a judge.

Divorce – How to Avoid the Pitfalls

The divorces that cause the most ill feeling are usually those based on unreasonable behaviour or adultery.

When a marriage breaks down, there will be a background of emotional upheaval anyway, but launching into the divorce process can make things even more difficult.

Statements about the other spouse's behaviour can often be the final straw, and where children are involved their future wellbeing is at stake – if parents can no longer talk it is they who lose out.

So here are some guidelines on to how to avoid some of the pitfalls:

- Don't fire in a petition for divorce in the heat of the moment – it may make you feel better briefly but there will probably be a backlash, making it more not less difficult to sort out the real issues;

Divorce (cont.)

- If possible agree to postpone issuing proceedings; starting divorce introduces a whole range of issues that may not be so important later on – certainly when compared with all the immediate problems in the early stages;
- When the time is right, discuss who should be the Petitioner and agree the content of the Petition before it is sent to the Court – again this is something that can be dealt with in mediation or through solicitors, in line with the RESOLUTION – Code of Practice;
- Keep the children and their welfare at the top of the agenda – send a copy of the Statement of Arrangements to your husband or wife so that these can be discussed and agreed beforehand;
- Where the divorce is based on adultery, do not name the third part as Co-respondent.

Here are some of the most common questions that we get asked:

- ⇒ Does it matter who divorces whom?
- ⇒ Which Court does it have to be in?
- ⇒ Do the children automatically live with their mother?
- ⇒ Is a 50/50 split the usual financial settlement?
- ⇒ Should I close my joint account?
- ⇒ What happens to my house if I die?
- ⇒ What happens to the children if I die?
- ⇒ Can I change my child's surname?
- ⇒ How can I keep legal fees down?

Does it matter who divorces whom?

There are some disadvantages in being the one who is divorced. Firstly, you may be ordered to pay the legal fees for the divorce; this may seem extremely unfair. This is based on the old principle in the Courts that if you prove your case then you get your costs, despite the fact that it is not always appropriate in the family justice system. However, if matters are agreed by both parties, it is possible to agree that the two of you will share the legal fees between you, or that the person who files the petition will not seek an order for costs against the spouse.

You may have the unpleasantness of being on the receiving end of some legal description of your private life, especially if the divorce is based on unreasonable behaviour. You are able to file an Answer to the allegations and try to regain control of the process by forcing a compromise on the allegations made, but most prefer to avoid complications and expense of doing so. Nevertheless, allegations made as to unreasonable behaviour do often upset as the contents of the Petition rarely have much to do with the real reason why the marriage broke down.

Who petitions whom rarely spills over in to other more important areas, such as the children or finance. It is worth just checking that none of the allegations in the Petition relate to dealing with the children or to financial issues, since once the divorce is granted, those allegations become a finding of fact.

The usual way of preventing such difficulties is to offer sight of the Petition to your husband or wife in draft before it is sent to the Court. Any items that cause particular upset can be discussed and either watered down or left out. This is not something that every solicitor offers, but is very much in the spirit of the Resolution First Code of Practice which this Firm abides by.

Divorce (cont.)



Which Court does it have to be in?

If the divorce is going to take place in England and Wales, it is possible to get any County Court that has family jurisdiction.

For convenience it is usual to use your local Court. Some use a Court that is out of their area for fear of coming into contact with people they know in the local area. The Principal Registry in London is used by many who do not live in London. For the vast majority of cases it is convenience that is the deciding factor.

Practices and judicial attitudes vary from Court to Court.

Do children automatically live with their mother?

Married parents share joint parental responsibility and come before the Court as equals. The children's welfare is the Court's paramount consideration.

If there is a dispute as to with which parent the children should live, one or other of them must issue an application for a Residence Order. In considering which parent is best able to meet the child's best interests, the Court will apply the "welfare checklist" (s1(3) Children Act 1989).

The application of the Welfare Checklist points towards pragmatism:

- Who is the party best able to meet the child's day to day needs?
- What has the domestic routine been in the child's life to date?
- Even if there is little to choose between the two parents in terms of their actual parenting skills, are the work commitments of one more conducive to having primary care of the children? This last factor is often fundamental and traditionally, has tended to work in favour of mothers, but increasingly, this need not necessarily be the case.
- Even where one parent does have an Arrangement or Residence Order in his or her favour, that does not alter the fact that the other parent retains parental responsibility and has an important role to play in the child's life. In theory at least, an Arrangement or Residence Order is not a passport to making important decisions about the child's upbringing on a unilateral basis.
- In the case of unmarried parents, the mother may have sole parental responsibility.

In the case of very young children, the Courts tend to assume they are better off living with their mother unless clearly shown to the contrary. Nevertheless, there is no presumption of law and the Courts have to consider each case on its individual merits. Although the odds may seem stacked against a father, the facts may mean that this is not necessarily the case.

Divorce (cont.)

Is a 50/50 split the usual settlement when deciding financial matters?

Recent reported cases concerning “big money” – where the assets available for division clearly exceed the parties’ needs – have focused on the concept of equality of outcome. This may or may not mean that the assets are divided 50/50. Contributions to the running of the home and the bringing up of children are valued equally by the Court on divorce to contributions made by economically rewarding work. There are other considerations – for example, the liquidity of the assets, any inheritances received, or particularly bad financial conduct on one side, which dictate that the outcome should not be equal. Fairness is the key – and a 50/50 split will not be fair in all cases.

Each case has to be looked at individually. It depends on the circumstances of those involved. In most cases, the financial settlement will reflect what each person needs fundamentally, money to pay all the bills and to sort out somewhere to live. Having an equal split is sometimes the starting point, but a lot of other factors have to be taken into account.

The great strength of Family law is that it is flexible enough to treat each family differently. But that does make it difficult to work out what is right for you.

Should I close my joint account?

Many couples ignore this aspect of the breakdown of their relationship and do not make any changes to their banking arrangements until financial negotiations are well advanced. There is a risk in ignoring this issue that large sums may be drawn out – or that credit or charge cards may be used inappropriately – it may be safer to take action to prevent this.

The danger is that if an account or credit card is suddenly frozen, solicitors may be involved immediately to ask for maintenance arrangements to be set up – perhaps through the Courts.

Much depends on whether you can trust each other enough to leave things as they are.

If you need to rearrange the accounts on separation we recommend that you try to agree those changes first. Think about mediation.

What happens to my house if I die?

You need to check the way in which your home is owned. If it is in your sole name, it will pass under the terms of your will or intestacy. Most homes are jointly owned either as equitable joint tenants, or as tenants-in-common. Many couples own their home as joint tenants, which mean in such a way that if one of them dies, the other owns the property outright automatically. This arrangement may still be the right one after separation – at least for the time being.

It is possible though to change the way in which you own any property jointly – so that if one of you dies then his or her share passes to their estate and is then dealt with under their Will i.e. to set up a tenancy-in-common. This is called severing the joint tenancy by giving a formal Notice of Severance to the other joint owner. We can prepare this for you. You should always take advice on this point because it may lead to claims against your estate if you die.

It may be helpful to prepare a new Will early on – even if this is only a temporary measure. The decree absolute of divorce automatically alters your Will in so far as it relates to the other spouse. It is important to consider changing your Will at that stage in any event.

Divorce (cont.)

What happens to the children if I die?

Where both parents have parental responsibility, in the event of the death of one, the surviving parent will retain sole parental responsibility.

The exception to this is where the parent who died had a Residence Order in his or her favour, in which case, any guardian appointed in the deceased parent's Will will automatically assume Parental Responsibility in tandem with the surviving parent. If there is a dispute relating to with whom a child should live in the event of the death of his or her primary carer, then an application for a Residence Order needs to be made to the Court who will then determine with whom the child should live.

Can I change my child's surname?

Changing a child's surname is obviously a very emotive step, since the surname may provide an important link to the parent with whom the child does not normally live; it may also express a preference to be known as the child of the step-parent. Neither parent, nor indeed any other person, can change a child's surname without the written consent of every person with parental responsibility or the leave of the Court. Even in cases where the parents are unmarried, the Court has suggested that such a step should generally not be taken without either the other parent's agreement or a Court decision.

The Court will not consider it appropriate to change a child's surname just because it is different to that of their half-or-step-siblings, nor even simply because the child wants it changed. The Court will not sanction a change in surname lightly; there is a presumption in favour of the status quo.

Increasingly, children may be part of a step-family in which children do not all share the same surname. It is therefore important that any such proposal is very carefully thought through and justifiable on quite strict grounds, such as where there is no ongoing relationship whatsoever with the other biological parent and so to retain that name causes distress and confusion.

The uppermost consideration for the Court in considering whether a change of surname is appropriate is the child's welfare and best interests. It is everything to do with the rights of the child and nothing to do with any asserted parental rights.

How can I keep my legal fees down?

Solicitors charge for their time – the more of their time you use up, the more they cost.

- Use mediation to sort out as much as possible – we have a vital role to play even if you mediate, but you may be able to sort out a lot of issues yourselves – and certainly a lot of the financial disclosure.
- Use a check-list of things you want to ask – you will be charged for each call you make, so be sure beforehand that you know all the things you want to ask about – you will save on the additional calls.
- Keep a file (somewhere safe) of all our letters and documents in an organised format. It is important that you can keep track of the advice you have had, and you are likely to have to refer to what has been sent to you. Some of your queries may already have been answered.
- If possible discuss issues directly with your partner with a view to reaching agreement.

Keep a file of all your bank, credit card and charge card statements – and the rest of your financial information.

One of the expensive tasks we may well have to do is examine your financial position; if this is in chaos you will be paying for us to prepare details of your outgoings, your mortgage and life assurance, your pensions and so on.

Resolving Finances



Witts Moloney provides their clients with a high quality service. We think that the following information may answer some of the more usual questions that clients ask us about financial matters.

In the initial interview we will have discussed the following, hopefully this information will confirm the options which are possibly going to apply to your case:

1. Mediation

This is a possible way that you and your husband/wife can get together to sort out financial matters between you. You can sit around a table with a Mediator and hopefully resolve matters without the need for Court. There are agencies which offer this service. If you want further details, please ask.

2. Financial Remedy Application

If the matter is not capable of settling through mediation or through just talking directly to your opponent, an Application for Financial Remedy is made to the Court. This is only capable of being made if there are divorce, nullity or judicial separation proceedings ongoing. Your Application for Financial Remedy will be supported by an Affidavit detailing your financial position to include income, out-goings, your capital position and your position in relation to property.

Normally when the Court issues the application, they will issue a Standard Directions Order which includes an order that both parties prepare an Affidavit (a Form E) detailing their respective financial means. This is usually prepared by his or her Solicitor; questionnaires then follow to find out any further information which may be needed and a valuation of the former matrimonial home if owned. The Affidavit and questionnaire will be accompanied by supporting documents to prove both parties financial status. This information is necessary for your lawyer to be able to advise you as to what would be a fair settlement.

Just because an application is issued, it does not mean that the whole issue of financial remedy is not capable of settlement. Family lawyers almost have a duty to try and find solutions as early as possible; they are minded to keep costs to a minimum. Obviously, we may not be able to advise you on a proper solution unless all the information is already available. At any time of course, you can give instructions to try and settle by making a suitable offer.

If the matter is not capable of settlement, then a Final Directions Hearing will take place at the County Court. This is an opportunity to try and resolve matters at Court. However, if that is not possible, then the Court will list the matter for a full hearing and both parties will have to give evidence and the Judge will decide exactly who gets what.



Resolving Finances (cont.)



There is almost a formula available, which Family Lawyers and Judges apply to this case, to enable them to assess who should receive what Order from the ancillary relief proceedings. This is governed by Section 25 of the Matrimonial Causes Act 1973. The Court has a duty to have regard to all of the circumstances of the case, first consideration being given to the welfare of any minor child of the family.

The Court will look at 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:

1. the case of earning capacity and any increase in that capacity;
2. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
3. the standard of living enjoyed by the family before the break down of the marriage;
4. the age of each party to the marriage and the duration of the marriage;
5. any physical or mental disability of either of the parties to the marriage;
6. the contributions which each of the parties has made or is likely to make in the foreseeable future to the welfare of the family;
7. the conduct of each of the parties, if that conduct is such that it would be in the opinion of the Court, inequitable to disregard it;
8. 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 each by reason of the dissolution of the marriage, that party will lose the chance for acquiring.

The Court also has powers to make Orders in relation to children and in such cases, they will have regard to the following matters:

1. the financial needs of the children;
2. the earning income capacity, property and other financial resources of the children;
3. any physical or mental disability of the children;
4. the manner in which he was being, and in which the parties to the marriage expected him to be educated or trained;
5. the considerations mentioned to the parties to the marriage in paragraphs a, b, c, and d above.

When deciding whether or not any awards should be made to any child who is thought of as a child of the family, but not a child of that party, the Court shall also have regard to:

1. whether that party assumed any responsibility for the child's maintenance, if so to what extent;
2. to whether in assuming or discharging such responsibility, that party did so knowing that the child was not his or her own;
3. to the liability of any other person to maintain the child.

What Orders are available?

Periodical Payments

An application for periodical payments for the spouse (commonly referred to as maintenance) can be made in an application as soon as the Petition for a divorce or judicial separation is filed. If the party making such an application has remarried beforehand, then the Court cannot award periodical payments to the remarried party. However, if the application is made before remarriage, then the application can be considered. An application for periodical payments can be made either as an interim application, before any final Orders are made, or when a final Order is made upon Decree Absolute.

The Court's position in relation to periodical payments for children is more complicated than it used to be, given that the Child Support Agency now has the jurisdiction in relation to child maintenance. The Courts can make Orders in relation to periodical payments for children, but these are limited to what they refer to as a "qualifying child". If you want further details about this, please ask.

Lump Sum

This can be applied for either you and/or your children. A lump sum is usually allocation of an amount of savings, policies or any other capital. These Orders cannot be made until Decree Nisi in divorce, or upon the granting of the final decree in judicial separation. If the Orders are made in divorce, then they do not take effect until Decree Absolute.

Property Adjustment Orders

Again these Orders can either be made in your favour or in your children's favour. Similar to the Lump Sum Orders, they cannot be made until Decree Nisi and do not take effect until Decree Absolute. Property Adjustment Orders refer normally to the former matrimonial home, and any other property that may be vested in either your opponent's name or your joint name. Orders include transfer of property from joint names to possibly your sole name. At this point, your husband/wife is either "bought out" by you, or a charge is put on the property, to be realised in the future.

Sometimes a trust is created, where you would be able to stay in the house with your husband/wife paying the mortgage either for life, or until your youngest child reaches 18 or leaves full-time education. Another alternative is of course, to sell the former matrimonial home and divide the proceeds. This is all governed by financial needs and resources. Normally, if you are the person whom the children live with, then it is likely that you will be able to stay in the former matrimonial home. Normally, in those situations, your opponent would receive his or her share of the property and the youngest child no longer needs a roof over his/her head, remarriage, cohabitation or death.

When the former matrimonial home is subject to a tenancy, again it will be decided who should be awarded the tenancy. Sometimes, it is wise, not to apply for Decree Absolute until the issue of the tenancy is sorted out, because such an application can sometimes be governed by the Matrimonial Homes Act 1983, which cannot be used once Decree Absolute has been granted. The advantage of using this procedure is if the tenancy prohibits an assignment or transfer, then the Court can override that.

All these Orders are available in either divorce, nullity or judicial separation. In judicial separation, there can be no clean break, because ultimately you would still be married. A clean break means that any settlement or Order granted would be in full and final settlement of all your claims against each other. These Orders can either be made by consent, i.e. that negotiations have worked and a Consent Order is drafted, which is submitted to the Judge for approval. It would detail the agreement reached, and dismiss all future claims against each other in the future. Alternatively, if the matter has gone to full trial, then the Judge will make a suitable Order after considering all of the evidence before him/her. Normally, there will be a clean break ordered.

Funding the case/Pensions

1. You will have been advised at the initial meeting whether or not you maybe eligible for Public Funding. If you are a privately paying client our charges are calculated mainly by reference to time spent by the solicitors and executive staff dealing with your matter. However, due to the administrative charges incurred at the start of a matter this firm has a minimum charge of £125 plus VAT.
2. Should it prove necessary to issue Financial Remedy proceedings to determine matters the overall costs are likely to be £3,500 plus VAT for the first hearing, £7,000 plus VAT for the second hearing and £15,000 plus VAT for the third and final hearing.

This summary is intended as a guide only and may not necessarily relate to you own matter. Please speak with your lawyer over any points which concern you or over which you have a query.

Pensions on divorce

Financial Information

When considering the division of matrimonial assets the family home usually comes to mind first, normally being the asset of highest value. Second to that, in terms of value, is often the other parties' pension benefits, a fact about which increasing numbers of divorcees are fortunately becoming aware.

When looking at pension benefits one must consider not only how they are valued, but also how the value will then be treated in the division of assets. The following provides an overview, and hopefully allows you to determine whether your circumstances warrant further enquiries and action.

What are the Options?

Once the current value of future pension benefits have been agreed the following options are available. Offsetting or "Trade Off" is where the value of the pension is "traded" for another capital asset. For example joint ownership of your home worth £250,000 after repayment of the mortgage, and your spouse's personal pension fund of £250,000. If offsetting is agreed, you might agree to keep the house and your spouse keeps their pension. This is never on a pound for pound basis.

Earmarking is where an agreed percentage of the pension is identified as yours, and "earmarked" as your benefit on your spouse's retirement. This should not be the option of choice in most circumstances as it does not allow for a clean break. In addition, the pension dies with your spouse, or your spouse elects to defer taking this particular pension until the age of 75, an action that is beyond your control.

Pension Sharing was introduced in 2000 for all types of pension except the basic state pension which can only ever be owned by the individual concerned. Pension sharing provides for the immediate pension to be split into two separate pots, each individually owned, thereby removing the dependency applicable to the earmarking arrangement.

Pensions (cont.)

Valuing Pension Benefits

CETV (Cash Equivalent Transfer Value) is a value produced by the Scheme Administrator and represents the value of the member's benefits assuming they are leaving pensionable service at that time. whilst this may be appropriate for a money purchase scheme, for more complex arrangements it does not take into account such additional benefits as death in service payments, spouse's rights and discretionary benefits provided by the Trustees. In other words the result is not a fully valued CETV.

Financial Orders

Legal advice is vital whether financial issues can be agreed or not. The Decree Absolute does not terminate spouse's obligations to each other. Therefore even if the Decree is finalised, applications can be made for financial help at any time thereafter. These are sometimes made many years later. The assets are then usually valued at the date of separation not the divorce. Negotiations are likely to be going on throughout the process. If agreement is reached and the Court approves then the agreement will be turned into a Consent Order. If it cannot be agreed then the Court procedure can be started by either party, but this does not stop an agreement being reached.

Either party files notice claiming **Ancillary Relief** using **Form A** – that party is known as the Applicant.

Upon receipt the Court fixes a **first appointment** and serves notice to both parties.

Interim Orders may be made if either party needs financial assistance prior to the final hearing.

Form E is filed at least 35 days before first appointment. Statements of property and income are exchanged to which are attached:

- Property valuations
- Mortgage statements
- Values of insurance policies
- Last 12 month bank statements
- Last 2 years business accounts
- Pension valuations
- Last 3 months payslips and P60
- Any other useful information.

14 days before first appointment both parties must file and serve:

- Chronology
- Statement of the issues
- Questionnaire seeking further information
- Notice stating whether the party can proceed to the **Financial Dispute Resolution Appointment**.

Both parties must produce a first **Costs Estimate** immediately before the first appointment.

Injunctions



Violence within the home is not uncommon. A relationship may break down due to such behaviour or result from the breakdown. Physical violence is a criminal offence. However, prosecution under the criminal law may be inadequate in some cases and therefore there are civil remedies which may be more appropriate. A non-molestation Order can be obtained to prohibit violence and anti social behaviour. Where the persons concerned live in the same home an Order can be made requiring one person to move out. Orders may also be made to protect children within the home.

Primarily, there are two types of Orders that can be made under the Family Law Act 1996:

Non-Molestation Orders

This type of Order can be made to prevent a person from using or threatening to use physical violence or to prevent a person from harassing, pestering or intimidating someone. An Order can be made on a free standing basis or within existing proceedings.

There needs to be proof of molestation:

1. There must be evidence of molestation (harassment, intimidation, pestering, violence or threats of violence)
2. The Applicant (or child) must need protection; and

The judge must be satisfied (on the balance of probabilities) that judicial intervention is required to control the behaviour which is the subject of the complaint.

The Applicant or relevant child must be at risk of 'significant harm' or at risk of significant harm if no Order is made.

There are two ways of obtaining a non-molestation Order. The first is by way of an urgent application to the Court on what is known as an "ex parte basis". Secondly, by application 'on notice'. the ex parte application is only done in the most urgent and serious of cases. This means that the Order is made before the other party has any knowledge of the application. Once an ex parte order is made, it has to be served upon the other party.

An Order is only effective and enforceable once served upon the party named in it. You will need to return to the Court within a few days of the ex parte order being made in order that the Court can review the situation. The further hearing will be on a date and time specified by the Court. Both parties should be in attendance at the second hearing. If the Respondent does not attend, then provided service of documents can be proven, the Court is likely to make a final Order in his or her absence. If the Respondent does attend at the second hearing hopefully a final Order can be made. The further Order has to be served on the Respondent regardless.

A non-molestation order will usually remain in force for 6 months. The Order will run to a date and time fixed by the Court. A non-molestation Order can be extended but a further application does have to be made to the Court. Further evidence would have to be filed at that time.

When an application is made on notice, both sides are informed of the hearing date and the Respondent is served with the application in advance of the hearing taking place. The Respondent therefore has the opportunity to attend the Court hearing and challenge the evidence before the Court. However, if no challenge is made, a final Order can be made. If evidence is challenged then the Court will list the application for a final hearing. Both parties may be required by the Court to file further statement evidence.

Injunctions (cont.)

Occupation Orders

These Orders are used where the future or immediate occupation of a property is in dispute. One person could effectively be required to leave the home because of his/her violent behaviour towards the other or the effect that his/her presence is having on the children.

In deciding whether to exercise its powers in relation to an application for an occupation order, the Court shall have regard to all the circumstances including:

1. The housing needs and housing resources of each of the parties and of any relevant child;
2. The financial resources of each of the parties;
3. The likely effect of any Order (or of any decision by the Court not to exercise its powers) on the health, safety or well-being of the parties and of any relevant child;
4. The conduct of the parties in relation to each other and
5. Whether the Applicant or any relevant child is likely to suffer significant harm attributable to conduct of the Respondent; and
6. Whether the harm likely to be suffered by the Respondent or child if the provision is included is as great or greater than the harm attributable to the conduct of the Respondent which is likely to be suffered by the Applicant or child if the provision is not included.

An occupation Order usually runs for a fixed period of time. Other applications can be made concerning transfers of tenancies and other issues regarding property in that period under different legislation if appropriate. Again an occupation Order can be extended but a further fresh application with supporting evidence needs to be made. Again an Order is only enforceable once it has been served upon the party named in it. Injunctions are entirely at the Courts complete discretion.

Applying for an Injunction

Injunctions in family cases are applied for under Part IV of the Family Law Act 1996. This is done by formal application made to the Court expressing what is sought. A sworn Affidavit Statement in support also has to be filed. The overall costs for this type of application are likely to be in the region of £1,000 to £6,500 plus VAT in respect of which you may or may not receive Public Funding.

Undertakings

An undertaking is a legally binding promise given to the Court to do or not to do something. Undertakings can in certain circumstances take the place of a Court Order. Where an undertaking is accepted by the Court and subsequently broken by the person who gave it, there are serious consequences which can include imprisonment or a fine. An undertaking could be, for example, that the person states that he/she will not use violence against the other or pester or harass the other person.

An undertaking can also relate to the occupation or otherwise of a property. An undertaking will only be accepted by the Court if the party, originally applying for an Order, will be adequately protected. If not, then an Order will be made. An undertaking will be for a fixed period of time, i.e. 6 months. Undertakings when offered by a Respondent are done so on the basis that no admissions of the allegations are made and no finding of fact against a Respondent in relation to allegations made by the Court. An undertaking is a promise as to future conduct.

Injunctions (cont.)



Powers of Arrest

An application for a non-molestation injunction or an occupation order can also include a request for a Power of Arrest to be attached to the Order/s. The Court will grant a Power of Arrest if it is satisfied that the Respondent has used or threatened violence against the person applying and that there is a risk of significant harm to the person applying attributable to the conduct of the Respondent if the Power of Arrest is not attached immediately.

A copy of an injunction with a Power of Arrest has to be sent to the police. A Police Officer can then arrest a Respondent if a breach an Order occurs. The Respondent is then usually kept in Police custody and will then be brought before the Court at the earliest opportunity. It is then for the Court to decide what punishment the Respondent should face. A Power of Arrest will not be attached to a non-molestation order relating to intimidation, pestering or harassment.

A Power of Arrest cannot be attached to an undertaking. It can only be attached to a Court Order.

Enforcement

If a Court Order without a Power of Arrest attached is breached, then the applicant has to make an application to the Court for the Respondent's committal to prison providing precise details of the breach alleged. The committal application is served on the Respondent and then heard by the Court. The Court has the power to fine or imprison the Respondent if the Court finds that a reach has occurred. The Court usually prefers less draconian methods. The Court could start with attaching a Power of Arrest to an Order before considering other option. Otherwise the Court may feel that warning the Respondent has to be future conduct is sufficient together with a further Order.

A breach of an undertaking is dealt with in the same way. However, the Court do have the power at a committal hearing to make an injunction order with or without a Power of Arrest in the first instance.

Cost Orders

The person applying for the Orders may ask the Court to make a costs order against the other party. This is not always granted even if the application for the Order is successful.



Injunctions (cont.)

Public Funding (previously known as Legal Aid)

Public Funding may be available on an emergency basis, or with the Legal Services granting a certificate subsequent to a full application being made. The person applying for a certificate will need to qualify both financially and with the merits of the case justifying representation.

First Appointment

- Aims to identify relevant issues in dispute
- Documents considered and requests for further information, clarification, evidence etc. required to make a decision
- FDR date set if appropriate or date for further directions
- District Judge has power to make interim orders, treat appointment as FDR etc.

Financial Dispute Resolution (FDR) aims to help parties reach agreement – if so the Judge may make appropriate Consent Order. If not a Final Hearing date is set.

Before Final Hearing both parties file and serve **statement of open proposals** explaining what they think the best solution is as well as comply with any direction from the FDR.

At the Final Hearing the issues will be considered and a Court Order made. This will include one or a combination of the following:

- Lump sum payment from one party to the other
- Lump sum payment for the benefit of any children (more unusual)
- A periodical payments order to the other party for as long as the Court decides (maintenance)
- Make a periodical payments order for the benefit of any children (child maintenance) – this is only if the matter is agreed. If not the Child Support Agency must deal with the matter except in certain circumstances i.e. a very high earner/resident outside the UK.
- Transfer property from one spouse to another
- Sell property i.e. the marital home, share etc.
- Share a pension fund

Although it is possible to conduct your own divorce when there are complications in respect of finances or orders related to children, it is recommended that legal advice be taken.

Litigation

Debt Recovery Services & Credit Control

Getting your debtors to pay their bills can be difficult and time consuming but it is a task all businesses have to confront at some points. For many companies, outstanding invoices are their biggest assets and overdue bills continue to be expensive to collect and a distraction.

We can help with debt collection. Once a third party is involved it is often the case that debtors pay faster as our letters carry a lot of extra weight and are no longer an idle threat.

In some cases debts can be recovered simply by corresponding with the debtor. But if this is not the case then our legal team can deal with any unfortunate monetary problems and will advise you about the range of options which are open to you and provide full support and efficient assistance at every stage of the debt collection process. We can deal with sending out initial letters of demand right through to potential court proceedings and enforcement action.

Once you have requested these services you can rest assured that debtors will be pursued vigorously and the debt is recovered as quickly and efficiently as possible. In some cases we may recommend the service of a 'Statutory Demand' which will depend both upon the amount due and the nature of the debtor. If you are chasing a large debt over £5k and court action is necessary or the case is likely to be disputed and complicated then using a solicitor in this field is essential. However if a case is not contested and a court order is obtained then we will advise on how the judgment may be enforced.

Overall the options of debt recovery go far beyond 'sending in the Bailiff' and solicitors in this field will consider all carefully. And even if this fails then insolvency proceedings can be pursued as a means of recovery.

A good credit control is important to manage customer purchases and debts, ensuring that the business has a healthy cash flow. If credit control is not managed sufficiently and debts outweigh the profits then insolvency is a major risk. Therefore it is a good idea to seek legal advice as soon as your business starts getting into trouble. Typical warning signs are when you can not cover debts, a County Court summons arrives, staff wages can not be paid and there is an acute lack of working capital.

Property Disputes

Problems can often arise in relation to your property, whether it is owned or rented. Very often these involve highly charged emotional issues and we recognise this. Lawyers at Witts Moloney who deal with property disputes are senior and experienced solicitors. They will give your case the sympathy and understanding it deserves, while at the same time taking a step back from the emotional issues before giving you best legal and pragmatic advice.

Homeowner's issues that might arise include the following:

- boundary disputes
- ownership issues
- problems with neighbours or neighbouring land
- issues concerning covenants and their interpretation
- trespass
- building disputes
- rights of way (public and private)

issues with mortgages

We have experience in dealing with issues that arise from residential tenancies and if you are a landlord we can advise and guide you through the letting process including:

- tenancy agreements and their interpretation
- your liability under various health & safety regulations
- dealing with rent arrears and tenancy problems

Separation



Judicial Separation

Although not used very often, this is a half way house that falls short of a divorce but still involves the Courts to recognise in a formal decree the fact that the couple is living apart. The marriage, however still exists, which can be important if there are pension rights to consider.

For some, this option may also be preferable because of strong personal or religious views about ending the marriage. The main advantage over the Separation Agreement or Deed is that the Court is involved and so can sort out issues about money or the children.

For example, if your husband or wife is reluctant to hand over details of his or her finances, then it is possible to issue proceedings and force that to happen through the Courts – just as in divorce proceedings.

Disadvantages:

- The same procedures apply (or nearly) as in divorce, so you have to prove the same facts.
- There are the same sort of costs as in divorce

If you are the one who does not want the marriage to be ended formally, there is a danger that these procedures might be amended or changed into divorce proceedings by your spouse.

Separation

There is no such thing as a “Legal Separation”. You are either living together or you are not. Simply living apart may be better than divorcing. Financially there can also be advantages in not divorcing – especially if one of you dies and in respect of pensions. There are also tax differences to think about. The difference is that you do not have a Court to help you to sort out the issues and move things along. Some cases need that – usually when one person is not agreeing to give financial details or when the basic issues cannot be resolved. Increasingly many couples prefer to sort things out constructively, without running up legal bills. They may ask their solicitors to run the discussions or they may go to mediation. Some couples talk things through themselves, but we do recommend that each person finds out what the legal position is first. Otherwise it is easy to think things are sorted when in fact they are either unfair or impractical.

When the financial or other issues have been sorted out, it is possible to have a Separation Agreement which sets out in writing what has been agreed.

Mediation

Why Chose Mediation?

Mediation is voluntary. It does not suit everybody. It involves a high degree of commitment on the part of all involved. It is not an easy process. It is often emotional and it requires tolerance and willingness to compromise on both sides if matters are to move forward.

The success of mediation will be based on:

- a willingness to co-operate (however minimal)
- competence – both parties need to feel able, with the advice of a solicitor behind the scenes, to negotiate with the other
- relative equality of bargaining power, although mediators are trained to redress imbalances.

Advantages of Mediation

Control

In mediation, it should be easier for you to control the course of your separation or divorce and avoid the need for Court proceedings where the Courts will impose their own timetable. Both of you are given the facts simultaneously and fully, using language which is familiar.

Acceptance

Acceptance of what you have negotiated should come more easily. Something that you participated in, working out the best solution. Negotiation involves compromise; although you may not feel wholly satisfied at the outcome, you will have rejected the alternatives in choosing a plan or plans.

Cost

Mediation is not free but mediators do not usually have the same level of overheads as solicitors. The expense is likely to be less than that of two solicitors handling a divorce from the start to finish. Even if not all the issues can be agreed in mediation, much of the preparatory work will have been done, thus saving on solicitors' fees. Discussing issues directly can sometimes save couples great amounts of time and money, rather than if they instruct solicitors to handle everything for them.

Timing

You can control the pace of the mediation in a way that suits you. Divorce proceedings may more easily be postponed while interim arrangements are considered and put in place.

Mediation does not eliminate the need for your own solicitor. Many people have an initial consultation before going into mediation, to help them focus on what the issues are, and to take independent advice upon them. No solicitor can act for both people involved. Any solicitor acting as a mediator cannot act for either one spouse or the other.

Many people use their solicitor as a consultant during the mediation process. This gives each party the opportunity to ensure all necessary information is there and they can then consider its relevance within the discussions.

The information gathered together in mediation is usually disclosed by agreement to solicitors. This is a helpful way of keeping down legal costs, since mediation as a service is substantially cheaper than most legal services.

The discussions that take place in mediation, other than the financial information which is disclosed to solicitors, is "privileged" or private. Those discussions cannot be referred to in a Court room and cannot be mentioned between solicitors unless their correspondence is also "privileged". This enables the couple to talk openly about their concerns and to consider any number of possible solutions, without fear of being "held" to a particular potential solution.

The aim of mediation is to work towards a written Memorandum of Understanding, setting out the points which have been resolved. This document will be prepared by the mediators and will also be private. It would then be shown to each spouse's solicitor so that they can advise upon the outcome of mediation. Following advice, if you and your spouse are happy with the agreement, then one or other solicitor may draft a detailed Deed of Separation or an order of the Court in the terms agreed. If solicitors are used in this consultative way during the mediation process, the legal costs are minimised.

Resolution



Resolution's 5000 members are family lawyers committed to the constructive resolution of family disputes. Our members follow a Code of Practice that promotes a non-confrontational approach to family problems. Our members encourage solutions that consider the needs of the whole family – and in particular the best interests of children.

Code of practice

Membership of Resolution commits family lawyers to resolving disputes in a non-confrontational way. We believe that family law disputes should be dealt with in a constructive way designed to preserve people's dignity and to encourage agreements.

Members of Resolution are required to:

- Conduct matters in a constructive and non-confrontational way
- Avoid use of inflammatory language both written and spoken
- Retain professional objectivity and respect for everyone involved
- Take into account the long term consequences of actions and communications as well as the short term implications
- Encourage clients to put the best interests of the children first
- Emphasise to clients the importance of being open and honest in all dealings
- Make clients aware of the benefits of behaving in a civilised way
- Keep financial and children issues separate
- Ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional
- Inform clients of the options e.g. counselling, family therapy, round table negotiations, mediation, collaborative law and court proceedings
- Abide by the Resolution Guides to Good Practice

This Code should be read in conjunction with the Law Society's Family Law Protocol. All solicitors are subject to the Solicitors Practice Rules.

Glossary of Legal Terms



Access

This is the old term for Contact. See Contact.

Acknowledgement of Service form

This is a form sent by the court to the Respondent (and Co-respondent if any) together with the divorce petition. The form asks questions in respect of the divorce petition and must be returned to the court to establish service of the petition.

Adultery

Sexual intercourse that takes place while you are married, at any time before a Decree Absolute, with someone of the opposite sex who is not your husband or wife.

Affidavit

A formal statement, sworn on oath to be true by the person making it.

Ancillary relief

This is the old term for financial remedy. A general term for the possible financial orders that a court can make in addition to a petition for divorce or Judicial Separation.

Answer

The formal defence to a divorce petition.

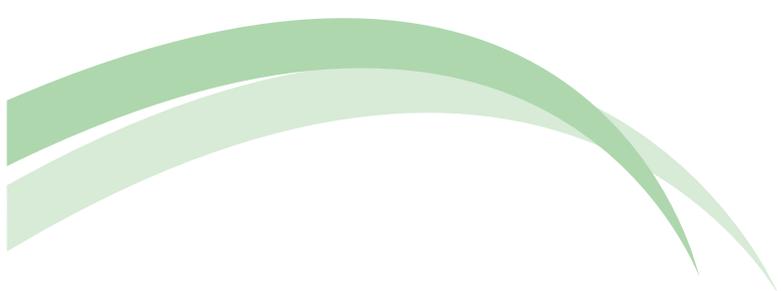
Arrangement Order

The current term for an order in Children Act proceedings setting out who the child/children live with and the arrangements for the other parent or relative to see the child/children.

CAFCASS

The Children And Family Court Advisory And Support Services for England and Wales. You will meet a CAFCASS officer if you apply to the court for any order affecting your child, for example an Arrangement Order.

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Glossary of Legal Terms



In chambers

This term is when the District Judge or Judge considers an application in private. This is less formal than open court.

Charge

A charge on a property is like an additional mortgage. It gives the holder of the charge security as he/she has to be paid out of the proceeds of the eventual sale of the house.

Child Abduction

The illegal removal of a child from its home, in particular removal from one country to another. A removal may be illegal even if it is by a parent who lives with the child, if someone with the right to help make decisions about the child, such as the other parent, has not given their permission.

Civil Partnership

The Civil Partnership Act 2004 came into operation on 5 December 2005 and enables a same-sex couple to register as civil partners of each other. It provides same-sex couples who form a civil partnership with an equality of treatment in a wide range of legal matters with those opposite-sex couples who enter into a civil marriage.

Clean break

A one-off order that deals with all the finances between a husband and wife. There can be no subsequent claim for any maintenance even if circumstances change.

Collaborative Law

A new approach built on mutual problem-solving where both parties and their lawyers pledge to work together to negotiate an agreement without going to court.

Conciliation

This is a type of mediation usually in court which helps couples to sort out arrangements for children. If it is outside of the court process, it is usually known as mediation.

Consent order

An order made by a court in terms agreed by both husband and wife.



Glossary of Legal Terms



Contact

(previously known as Access). The arrangement for the child or children to visit or stay with the parent who no longer lives with them. Indirect contact means the exchange of letters, telephone calls or presents. Contact orders can also be made in favour of others, for example grandparents.

Co-respondent

The person with whom your spouse (the respondent) has committed adultery. It is no longer legally required for this person to be named.

Counsel

Another name for a Barrister.

Cross-petition

This is when the Respondent argues different grounds for the divorce from those of the Petitioner.

Custody

The old term for Residence. See Residence.

Decree Nisi

A provisional order showing that the court is satisfied that the grounds for divorce have been established.

Decree Absolute

This is the final court order bringing the marriage to an end.

Decree Nisi Application

A time in the divorce proceedings when the judge considers the petition and the affidavit in support of the petition. The Judge can ask for further information to be provided before a decree nisi is pronounced. This is also the stage in children's applications when the District judge considers the Statement of Arrangements for Children and can ask for further evidence before making any order.

Disclosure

This is the process of providing full and frank financial details about a person's capital, income, assets and liabilities. This is either done voluntarily, or the court can order it.



Glossary of Legal Terms



District Judge

A county court judge responsible for dealing with most aspects of divorce including the financial matters.

Domicile

The domicile of origin is normally where you are born unless a new domicile of choice is adopted by taking up permanent residence in another country.

Equity

Refers to the net value of a property after mortgages or other charges are paid off.

Financial Dispute Resolution (FDR)

This is usually the second court appointment within financial remedy proceedings where the judge considers all offers made including those on a without prejudice basis.

Financial Remedy Application

An application to resolve the financial issues arising from a marriage breakdown.

First Appointment (FA)

This is the first court appointment within Ancillary Relief proceedings where the judge considers what other information is needed to determine financial matters.

Form E

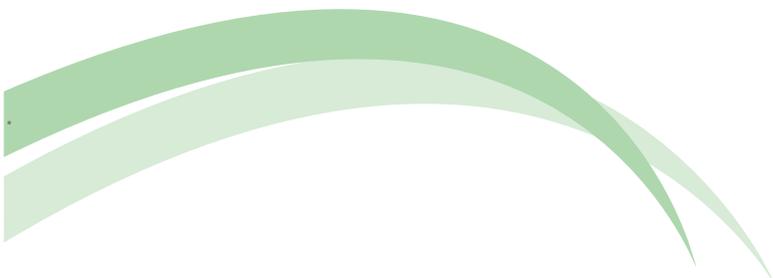
This is a sworn financial statement which contains details about your capital, income, assets and liabilities. Form E's can either be exchanged voluntarily or as part of Ancillary Relief proceedings.

Injunction

A court order which tells someone to refrain from doing something. Penalties for not abiding by the order can include a fine or imprisonment in some cases.

Joint Tenancy

A form of joint ownership of land in which both parties share the whole title to the property. If one party dies the survivor will own the entire property.



Glossary of Legal Terms



Judicial Separation

This involves a court procedure which is virtually identical to divorce. The essential difference is that the court pronounces a decree of Judicial Separation rather than a divorce. This means that you and your spouse would remain married.

Lump sum

A payment of a capital amount of money.

Maintenance

Money one spouse pays to the other for ongoing financial support on a regular basis, either just for the spouse or for children too.

Maintenance pending suit

If the divorce may take some time, temporary maintenance can be requested pending the end of the divorce.

Matrimonial home

A property where the married couple lives or have lived together. It can either be rented or owned.

Mediation

A process in which an impartial third person assists those involved in a family breakdown to reach their own agreed and informed decisions about some or all of the issues relating to or arising from the separation, divorce, children, finance or property.

Minutes of order

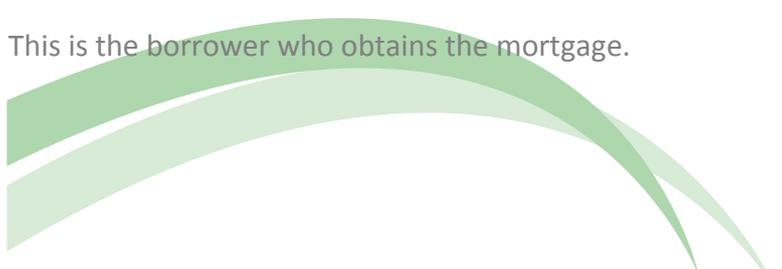
This is when draft terms of agreement go before the court with a request that a consent order be made in the same terms.

Mortgagee

This is usually a bank or building society, but it can be anyone, that lends you money to buy a property on the security of the property.

Mortgagor

This is the borrower who obtains the mortgage.



Glossary of Legal Terms



Non-molestation Order

This order is to prohibit someone using or threatening violence against you or intimidating, harassing or pestering you.

Occupation Order

An order which regulates occupation rights to the matrimonial home. A spouse can be excluded from the home or from a certain part of it.

Parental Responsibility

This means the rights and responsibilities that mothers and married fathers have to their children. Non-married fathers can acquire Parental Responsibility through marriage to the child's mother, by entering into a Parental Responsibility agreement with the child's mother, by being named as the father on the child's birth certificate after 1st December 2003 or by applying to the court for a Parental Responsibility Order.

Pension Sharing

The division of a pension fund between two spouses.

Periodical payments

Another term for maintenance which can be paid weekly, monthly or annually.

Petition

This is the document requesting a divorce or a Judicial Separation.

Petitioner

The person who starts the divorce proceedings by filing a divorce petition at court.

Prayer

The part of the Petition or Answer which asks the court to make orders in favour of the Petitioner or Respondent.



Glossary of Legal Terms



Premarital Agreement

A Premarital Agreement (also referred to as a Prenuptial Agreement) is a formal written agreement entered into by a couple before marriage. Its purpose is to record the parties' intentions as to the division of assets in the event that the marriage breaks down. The courts are not obliged to enforce such agreements although they now seem to be moving towards acceptance of them.

Prohibited steps order

This is a court order used to prohibit something being done to a child, for example removing a child out of the country.

Proof of Identification

it is a Law Society requirement that you supply us with copies of two of the following documents:

Either:

- A valid UK or European Community passport or:

A full UK or EC driving licence.

Plus: Proof of address that is no more than 3 months old (this can include a utility bill, Council Tax demand (in your name) or a bank/credit card statement).

Property adjustment order

An order that a spouse should transfer a property to the other.

Relevant child

A child of the marriage under 16 at the time of the decree nisi or between 16 and 18 if in full-time education or training for a trade. A disabled and dependant child of any age is considered.

Residence order

A old court order which set out where a child or children would live.

Respondent

The spouse who receives and responds to the petition for divorce or Judicial Separation.

Separation agreement

A document which sets out the agreement reached in financial matters arising out of a separation without involving the court at all.

Glossary of Legal Terms



Service

The process by which court documents are formally sent to one spouse.

Specific issue order

An order to resolve a particular issue in dispute relating to a child, for example when parents cannot agree about schooling or medical treatment.

Spouse

A husband or wife you are married to.

Statement of Arrangements for Children

This form is sent to the court along with the divorce petition if there are any children. It sets out proposed arrangements for the children. If possible, this form should be agreed by the parents and signed.

Tenancy-in-common

A form of property ownership in which separate shares are agreed (usually when the property is purchased). If one of the owners dies their share will form part of their estate and will not automatically belong to the survivor unlike Joint Tenants.

Undefended divorce

Proceedings by agreement or when there is no answer.

Without prejudice

This is a way of preventing the court at the final hearing from knowing about any negotiations which did not result in an agreement. You may see this term at the start of a letter.