

# Surviving Family Conflict and Divorce

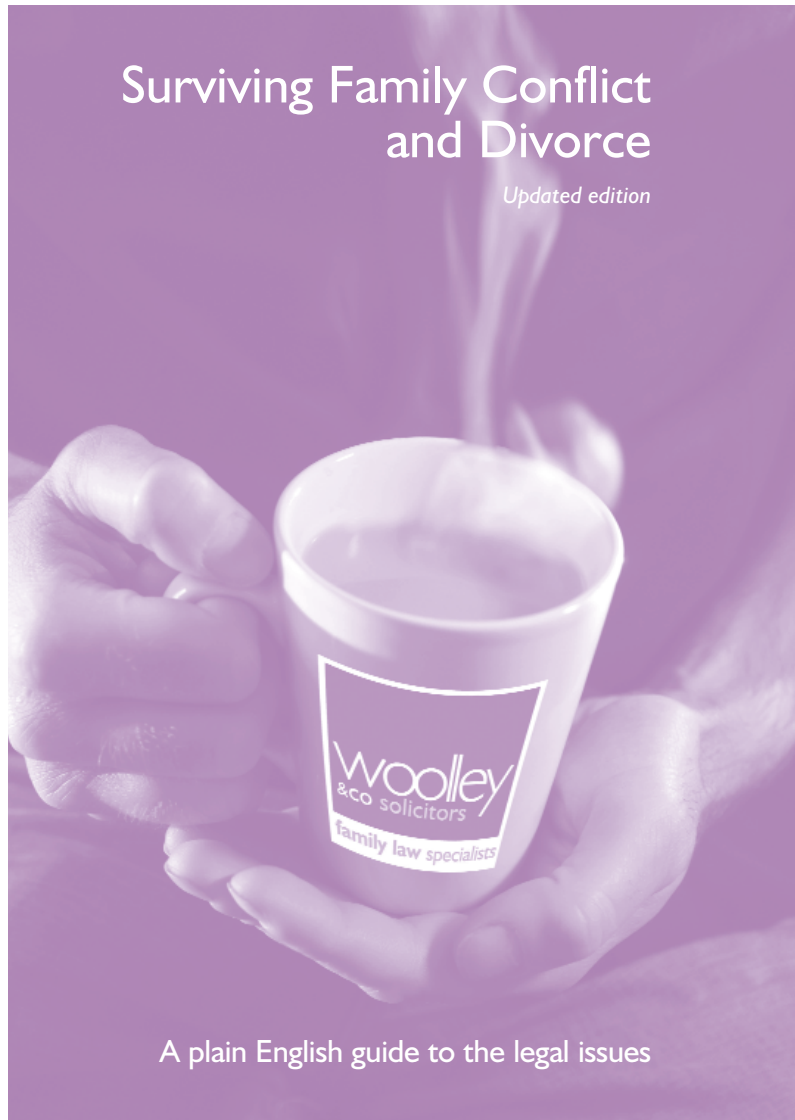
*Updated edition*



A plain English guide to the legal issues

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Surviving Family Conflict and Divorce (Updated edition)

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## Introduction

This booklet draws on a wealth of experience from partner-level lawyers who deal specifically with relationships, divorce and family conflict on a daily basis.

It has been split into clear sections to give useful information to help you make informed decisions and ask the right questions of your lawyer.

The law surrounding relationships, family finances and children is very complicated and it is essential that you take advice before acting on any of the information that you read.

Woolley & Co offers a free half-hour telephone assessment for this purpose. Call us on 0800 321 3832 or email: [info@family-lawfirm.co.uk](mailto:info@family-lawfirm.co.uk). You can also find out more from our website: [www.family-lawfirm.co.uk](http://www.family-lawfirm.co.uk).

Woolley & Co is an unusual law firm. We operate throughout the UK with a team of family law specialists based in home offices. All our legal experts are fully qualified and have many years' experience in handling complex and demanding family cases. Our lawyers act for clients throughout England and Wales, and English ex-pats throughout the world.



Woolley & Co is a member of the Law Society of England and Wales and is regulated by the Solicitors' Regulation Authority (SRA).

## Separation and Divorce

The break-up of a relationship is one of the most traumatic things that a person can go through.

Whether a couple actually got married or have simply been living together, there can be many things to sort out, from matters involving any children to dividing up property and possessions.

To many, the most daunting thing can be where to start. What are your rights? What are you entitled to? What are your responsibilities?

The following pages look at some of the main issues that you may face.

### How to make a separation legal

Often, couples decide to go their own ways but do not feel the need immediately to push for a divorce. This could be for any number of reasons and each case is unique. But it does leave both parties in limbo somewhat, unless steps are taken to make the legal standing of the relationship clear.

Not doing this can lead to quarrels over household bills, possessions, how best to deal with joint assets and to help any children involved. However much couples trust each other and part on good terms, inevitably, doubts and problems will come up.

In other cases, couples are sure that they want to push straight ahead to a divorce but are unsure of the procedure.

With the increasing popularity of civil partnerships and same-sex unions, other issues need to be considered and again, the rules on who is responsible for what can be slightly different.

#### **Separation agreement**

A separation agreement is also known as a Deed of Separation. It records from the start who is to have what, and what the parties' responsibilities are. It can help to avoid the need for court proceedings at a later stage.

When preparing to draft the separation agreement, each party must produce full and frank financial disclosure, showing documentary evidence of their assets and liabilities. Each party exchanges this information with the other. Then a discussion takes place, and hopefully an explicit separation agreement can be drawn up.

Although lawyers do need to be involved, if a couple can agree things between themselves, their involvement – and so the cost – can be minimal. This is true of both a separation agreement and a divorce.

When a lawyer receives instructions from a client asking for a separation agreement, he or she will draft a legally worded agreement.



The separation agreement includes information on age, employment and accommodation. It also contains details about you and your partner, where you intend to live, how you intend to split your monies and who will have control of the sale of any property. Also, it may dictate who will pay for what and contain information relating to the arrangements for any children.

An agreement of this kind is not a court order and the court is not involved in preparing it. In other words, it's a "gentleman's agreement" which the parties would feel morally bound to keep but, unfortunately, there is no legal penalty initially for failing to do so. However, it can be incredibly helpful in getting a quicker agreement on the division of assets, should a divorce follow the separation. The separation agreement can be shown to the court for its opinion on whether there was an agreement, and whether the agreement has been broken.

If a couple have successfully agreed to a division of their family assets and the agreement has worked well for a period of two or so years, this could form the basis of a Consent Order to a district judge, as part of the process of filing for divorce.

The time it takes to finalise financial affairs at the end of a marriage can be reduced significantly when a separation agreement has been drawn up beforehand.

## Divorce

Sometimes there is a misunderstanding about what actually is involved in a divorce case, in legal terms. Put simply, a divorce is just the ending of the legal contract between a husband and wife.

A divorce case and the costs involved do not automatically include the costs of sorting out matters in relation to children, for example, getting agreement on contact and residence, or the thorny issue of finances. These are extra issues (“ancillary cases”) which will be dealt with by separate court cases, unless an agreement is reached amicably between the two parties.

To apply for a divorce, you must have been married for at least 12 months and be living permanently (“domiciled”) in the UK (see information for ex-pats further on in this section). It can be a fairly straightforward and simple process legally where there is agreement by both parties to the grounds for divorce. It is the matters around children and dividing assets which can take time and lead to higher costs.

There is really only one ground for divorce – the irretrievable breakdown of a marriage. This is proved by establishing one or more of the following “facts”:

- adultery
- unreasonable behaviour

- you have been separated for two years or more and both of you agree to a divorce
- you have been deserted for two years (this is very complex and best not used if you have any other grounds)
- you have been separated for five years or more.

Whichever party is instigating the divorce must complete a petition form and send it to the local court office. Your lawyer will normally do this for you. The other party needs to complete a receipt, agreeing that a divorce should be granted.

Then a second document is prepared and sent to the court, which is called a Request for Direction for Trial. The district judge will check that all the paperwork is in order and that grounds for divorce have been proved, and give a date when the divorce will be announced initially. This is the Decree Nisi.

Six weeks and one day later, provided there are no problems, you can obtain the Decree Absolute, the document proving the final end to the marriage.

In a straightforward case where both parties agree the grounds for divorce and complete and return paperwork quickly, a case takes around 16 weeks, and neither party has to appear in court at any stage. If the parties cannot agree or delays are made in completing and returning papers to the

courts, this can extend the time that it takes to complete a divorce.

For more advice, visit the Woolley & Co website at: [www.family-lawfirm.co.uk](http://www.family-lawfirm.co.uk) or call us on: 0800 321 3832.

### **Divorce rights**

As mentioned previously, getting a divorce is fairly straightforward. It is the issues surrounding this, such as sorting out finances, dividing property, matters involving children and other factors, which can take time to sort out.

Married couples have certain rights in law, but the specifics of a case will need to be looked at by an experienced family lawyer to assess any claims or liabilities, if an amicable agreement cannot be reached.

Some of the common rights which may crop up during any separation are outlined briefly below.

### **Property**

Much here will depend on whether you are married and whether the property is in joint names. Also, it can be affected by any prenuptial or cohabiting arrangement drawn up when you first acquired the property.

Basically, if you are married, you have a right of occupation. Whether or not your name is on the deeds, this means that you have the right to live there and are not to be excluded,

for example, by the other party changing the locks. If you are living together and your name is on the deeds, your right of occupation is not the same as a married householder. The other party can force the sale of the house even if you have the care of minor children, but you will be entitled to a share of the equity – quite possibly 50 per cent.

If you are living together and your name is not on the deeds, things can be very different. If you have paid towards the property, you may be able to show that you are entitled to a share of the equity, but these are complex issues and you should take expert advice from a family lawyer.

If you are married and have children living with you, you may be able to secure the right to live in the property until the children have left school.

In any situation, if your partner is trying to force you out of the house, you should take legal advice straightaway.

### **Finances**

There are no hard-and-fast rules about your financial rights in the breakdown of a relationship.

If you are better equipped to “regenerate” your finances than the other party, you may well receive less than they do. It can appear that you are losing out because you have worked hard, but this is the way that a court is likely to deal with things.

Often, there will be a range of possible solutions to dividing assets, and it is important that you explain fully to your lawyer your own preferences within that range. It may be that you can come to an amicable agreement with your partner. If you can't agree, you have the right to invite the court to decide on dividing the assets with your partner.

Your lawyer will guide you through the factors that the court may take into account, such as the age of the parties, the length of the relationship, jointly and individually held assets (including property), and your income and pension provisions. But sorting out these arrangements with your former partner outside the bounds of the court will save time, money and extra heartache.

If there are children from the relationship, generally speaking, the court will give priority to whoever is caring for them, and will try to address the reasonable needs of the parties for things such as housing.

Sometimes it can seem as though men have fewer rights than women. Often, this is a result of children living with their mother, who earns less, has a lower mortgage capacity and less pension provision than the other partner.

(More details on how finances can be sorted out are contained further on in this booklet.)

### **Children**

The law is based very clearly on the rights of the children, rather than those of the parents. In broad terms, they are considered to have the right to a relationship with both parents.

If you were married, you will have parental responsibility for the children and this will give you the right to access information and make decisions on their behalf, for example, about their health and education.

If you were not married, only the mother has automatic parental responsibility in all cases. (Full details of this are included in the section further on in this booklet: "Looking after the children".)

It is perceived that fathers do not really have any rights, and it can be very difficult sometimes for the courts to intervene in an effective way if the parent that the child is living with is determined to resist any contact.

But the courts can and do take steps, such as changing residence arrangements. They can even send a disobedient parent with care of the child to prison if they believe that the parent is not acting in the best interests of the child.

### **Personal safety**

Everyone has the right to live without fear for their safety. No one has the right to cause you harm or threaten you. You

have the right to complain to the police, as such behaviour may be a criminal offence.

Harassment is also a criminal offence, and you should report any such incidents so that the police are aware if there is an ongoing problem. You may have the right to seek an order or injunction to keep your ex away, or maybe to make them leave the property.

### Ex-pats

Just because someone is not currently a UK resident does not mean that they cannot use the English courts to get divorced. In most circumstances, anyone originally from England or Wales\* can use the English courts, on the basis that you are 'domiciled' in the UK. This legal technicality means that you have a legal connection with the English courts, so they have jurisdiction.

The process is much the same as that detailed previously for a straightforward divorce, and can be completed in around 16 weeks with the Decree Absolute.

Problems can come up when children are involved and have been taken abroad. This is an area for a dedicated specialist within family law, and you should seek expert advice. Woolley & Co has a number of lawyers who have significant experience in these matters and they will be happy to advise you.

*\*Those who fall under Scottish law are subject to different rules and should consult a Scottish solicitor.*



Another potential hurdle for ex-pats is that the English courts cannot make orders in respect of overseas assets, except by consent, so for example, they cannot order a house in France to be transferred to one particular party. This would have to be dealt with by a lawyer in the relevant country.

### Civil partnership dissolution

The Civil Partnerships Act became law in December 2005, allowing gay and lesbian couples to have their relationship recognised legally.

A civil partnership gives gay and lesbian couples the same legal rights as their married heterosexual counterparts and if the relationship ends, it requires formal legal proceedings to end the legal agreement between the couple.

To do this, one of the parties must file a petition with the court, requesting civil partnership dissolution. This is a process very similar to divorce, as detailed in the previous section.

To get dissolution, you must have been in a civil partnership for more than one year. One person needs to start the ball rolling. They are known as the petitioner. This person is responsible for proving that the civil partnership has irretrievably broken down.

The petitioner is required to complete a petition, which contains details including the date you entered into the civil partnership, the last address where you lived together

as a couple, and whether or not there are any children in the family.

It then follows the same course as a divorce, typically taking between three and five months to complete.

The court is able to deal with dividing the assets of the partnership, such as the house and pension funds, to make maintenance orders, and orders in respect of children, such as residence and contact. Again, these are separate cases beyond the dissolution of the marriage.

## Sorting out the Finances

On top of dealing with the emotional trauma of a relationship breakdown, figuring out who gets what financially is often the biggest stumbling block.

Arguments over who owns what, who has contributed the most and how family members are provided for in the future can rumble on forever – and this is what can contribute to the spiralling cost of a break-up for some couples.

In the following pages, we look at the main issues that can come up and how they can best be tackled. We also look at how problems can be avoided from the start by having some sort of legal agreement drawn up, as well as other more technical areas, such as pension rights and bankruptcy.

## Getting together: protecting your assets

### Legal implications of marriage

Many people can forget that as well as being an emotional union of a couple, marriage is also a legally-binding contract. This means that once a couple say “I do”, they are bound to each other under English law as well as in the eyes of their family and friends.

It is important to remember this when considering dissolving a marriage, to be sure that you are fully aware of all the implications and issues that may need to be addressed.

When a couple get married, their assets are considered to be joint assets or liabilities. Once married, a partner can take on some responsibility for, or relinquish some control over, many things. These can include:

- bank accounts
- property
- savings
- pension funds
- debts.

If a couple decides to divorce at a later stage – or dissolve a civil partnership, in the case of same-sex couples – these are the areas where, more often than not, conflict can occur and where it takes longer to sort out a split.

It is possible to address such problems in advance if a prenuptial or living together agreement is drawn up before a couple tie the knot or move in together. These are still seen as unromantic and, to some, the preserve of the rich and famous. But Woolly & Co saw the number of enquiries about such arrangements leap by around 30 per cent between 2006 and 2007, and such agreements are seen increasingly as an acceptable and cost-effective way to protect both parties against the unknown.

### Role of prenuptial and living together agreements

You might not have a multi-million pound fortune to protect, but you could have property and other assets that you are taking into a new relationship, which you should protect in case something unforeseen goes wrong further down the line.

A prenuptial agreement is a document in which a couple sets out their rights in relation to any property, debts, income and other assets purchased together or acquired individually (e.g. through inheritance), or that they have brought into a relationship.

As mentioned previously, once you are married, all assets become matrimonial assets and, unless they are specifically protected, legally they are thrown into a single financial pot.

Often, the primary purpose of a “prenup” will be to limit the potential claims on the wealth of one of the parties to the marriage.

Prenuptial agreements are flexible and can be written to take account of changes in circumstances, in particular the birth of a child, and length of the relationship.

The validity of prenuptial agreements in the UK was strengthened significantly in 2004 when the courts upheld a prenuptial agreement and a wife lost a substantial claim. The courts now take them seriously, but will consider these questions carefully:

- 1) Did the party with the most to lose understand the nature of the prenuptial agreement?
- 2) Did he or she have independent legal advice?
- 3) Was he or she under pressure to sign?
- 4) Was there full financial disclosure?
- 5) Would an injustice be done if the prenuptial agreement were upheld?

A significant percentage of marriages now end in divorce, so it is natural that mature adults might want to agree what should happen in the event of relationship breakdown. Prenuptial agreements can provide certainty and the means of protecting pre-marriage assets, inheritance and existing family commitments, such as children from a previous marriage.

For those couples not getting married but setting up home together, a living together agreement can perform a similar function as a prenuptial agreement.

A living together agreement gives the framework for couples to record their intentions and their respective contributions. This can help set aside any fears they may have prior to living together, leaving them feeling safe in the knowledge that if the relationship was to break down, they would be protected financially.

### **How to get a prenuptial agreement or living together agreement**

Both parties must seek independent legal advice, so as to protect the other party against the allegation of undue pressure to sign any such agreement. This is taken into account by the courts, should an agreement need to be called on, so it's important to get it right from the start.

Prenuptial agreements cannot take away the discretionary powers of the court in deciding what is fair, but a well-drafted agreement will be of significant value in any decision made.

As a living together agreement can include details about property, paying the mortgage, outgoings, ownership of contents, liability for credit and ownership of bank accounts, it is also incredibly useful in the event of a break-up.

The agreement will need to be precise, detailed and enforceable. The parties may be advised in relation to a Deed of Trust being drafted, which sets out the ownership and respective beneficial interests in the home.

A lawyer is needed to draw up any such agreement. Woolley & Co has extensive experience and expertise in these matters and can offer a simple, fixed-fee service.

### Understanding the costs of divorce

From a legal perspective, divorce is simply the ending of a contract in law. It involves completing certain items of paperwork which have to be filed with the courts. The courts levy a fee for handling this paperwork (£340 at the date of publication). Also, there will be the cost of any advice you obtain from a lawyer and his or her help in completing the divorce paperwork.

Very often, if a husband and wife are in agreement, a divorce can be completed amicably and quite quickly, although this will depend on the speed of the courts.

A lawyer should be able to give you a clear estimate on the cost of carrying out this work for you. (For examples of fixed fee packages, visit: [www.family-lawfirm.co.uk](http://www.family-lawfirm.co.uk).) Most people have to pay these costs themselves, although some couples choose to split the costs between them.

However, very few cases involve only the divorce paperwork. In most marriages there is a marital home, money in a joint account or savings scheme, pensions held by one or both parties and other issues which need to be agreed. These can include division of household furniture, who will keep the family car, pets and so on.

In a marriage in which children are involved, there is likely to be agreement needed on which parent the children will live



with, and contact arrangements with the other parent. (For more details on this, see the section in this booklet: “Looking After the Children”.)

If both parties can agree on how to split finances and/or arrangements for the children, a case can be very simple and may not require the parties to attend court. In these circumstances, your lawyer will ensure that your agreement is a legally-binding document that both parties can sign.

Most people will need advice from an experienced divorce lawyer to help them know what to negotiate for. In some cases, a couple cannot agree even with the help of their lawyer and decide to let the court deal with things. This is when costs can begin to escalate.

It is worthwhile understanding at the outset that, in addition to lawyers’ fees, you will need to budget anything between £3,000 to £4,000 for:

- court fees
- valuer’s fees in respect of the matrimonial home, other properties, policies and assets
- fees paid to pension fund managers for transfer value figures and other calculations
- fees paid to banks and credit card companies for copies of statements, if these are not available
- fees paid to HM Revenue & Customs for copies of

tax documents, if these are not available

- fees paid to independent financial advisers for advice on how to manage your financial affairs
- fees paid to actuaries to calculate pension sharing figures
- fees for a barrister to represent you at any final hearing.

### **Controlling the cost**

If you begin a divorce or civil partnership dissolution process having looked into the facts, it can help you to limit significantly how much your costs will escalate. A few inside tips on how to keep a lid on your divorce bills are listed below.

#### *Agree a fixed fee*

At each stage of your case, ask your lawyer how much it will cost. Make sure you are clear about what is included in that cost. Be sure to ask about any extra charges, for example, court fees and bills for things such as photocopying large documents, travel costs, car parking and petrol and barristers' fees.

#### *Understand who is working on your case*

Your lawyer's charges will depend on their level of experience and expertise in family law. Often, lower hourly rates are charged by junior or unqualified lawyers, but they may not have the experience or expertise to best make your case.

Wherever possible, it is best to employ the services of a specialist family lawyer. They have greater experience in dealing with such cases exclusively, so will get to the heart of the issues quickly. It is likely that they will be a higher “grade” of lawyer than if using a general High Street firm of solicitors.

*Give clear instructions*

From the start, make sure your lawyer is clear on what it is you want to achieve, and stick to it. Changing your mind after discussions have started with the other party can result in extra work and delays.

*Establish a protocol for correspondence*

If you do not want your solicitor to acknowledge correspondence or respond without authorisation from you, specify this in writing.

*Try not to let emotional issues cloud the facts*

Avoid using your solicitor as a source of emotional support. If you need someone to talk to, Woolley & Co can recommend highly skilled and qualified divorce counsellors who are trained to help people through the emotional trauma of relationship breakdown. They also charge by the hour, but normally at a much lower rate than a fully-qualified lawyer.

### **What if we can't agree a financial settlement?**

Despite the best intentions of both parties, sometimes it is not possible to reach an amicable agreement over who gets what without taking the matter further.

There simply could be one issue that is a sticking point, you could be coming at things from different directions, or you could be disputing a basic issue, such as who owned a specific item at the start of the relationship.

This is not unusual, but it does mean you will need a court hearing to help decide the issue. This inevitably leads to a significant rise in how much the process will cost you both, so you should make every effort to agree a settlement before this stage.

As an example, if this type of case (known as an ancillary case) goes all the way to the third stage, detailed below, you should budget around £10,000 to cover extra costs. With an ancillary case, you will have to attend court on two or three occasions.

#### **First step**

A formal application (Form A) is filed with the court. This tells the court that you want a district judge to decide how to divide the matrimonial assets. A fee of £210 must be paid to the court.

The court will issue a timetable to both parties requiring them to prepare and file certain documents. The most important of these is Form E. This is a 26-page financial and assets statement, which must be sworn. It includes full details of all personal assets anywhere in the world. In addition, both parties must obtain and file numerous other documents, such as a year's worth of bank statements, building society statements, tax documents, savings and investment documents, and credit card and loan statements.

Your lawyer can complete this for you, but you will have to provide all the necessary records.

#### **The first court hearing**

This is a fairly short hearing where the judge will want brief details from both sides as to what the case is about. The judge will then issue an Order for Directions, which tells the parties what they must do next and by what dates.

For example, the judge will direct that properties must be valued and that the valuer's report must be filed at court, or that further bank statements must be obtained and filed.

The Financial Dispute Resolution (FDR) hearing follows eight to ten weeks later.

#### **The Financial Dispute Resolution hearing**

You must attend this informal hearing, and can be in court for around a couple of hours.

No actual evidence is given, and you will not be cross-examined by anyone. The judge will hear legal submissions from both party's lawyers. The judge will effectively hint as to what sort of order they would make if the case went to a full, final hearing. For example: "I hope the parties can agree something today, as I would think at a final hearing everything would be split on a 50/50 basis," or "I would probably order the house to be sold".

Everyone will be sent out of the courtroom to try and negotiate a settlement.

If agreement is reached, the lawyers will inform the judge and provide him or her with full details of the terms of settlement. The judge then draws up and issues an agreed final order. This is known as a Consent Order. It is an official court order and can be enforced if either party defaults.

If no agreement can be reached at the FDR hearing, the judge will order that the case must be listed for a full final hearing.

#### **The final hearing**

This hearing usually takes a whole day (sometimes two) and is formal. Both parties have to give evidence on oath, and are cross-examined by the other party's barrister. You will be asked at length about your personal and domestic circumstances, your financial affairs, your earning capacity,

why you are not working (if you are not), what qualifications or work experience you have, and your household bills. Also, you can be asked questions about any new partner and their finances.

At the end of the hearing, the judge will make a final order, and this is usually not the order that either party ideally would have liked.

The judge will make an order that he or she thinks is fair based on what he or she has heard. Effectively, the judge will be imposing a compromise settlement on both of you, and will rarely give either party what they actually want. It is for this reason that we do everything we can to avoid it, and urge clients to try and agree some sort of compromise settlement before or at the FDR hearing.

#### **Questions about finances**

The hardest decision to make may be that the relationship is over, but there will be many other things to sort out as a result. Having a prenuptial agreement or living together agreement in place will make this journey easier.

Here is a taste of some of the frequently asked questions by separating couples who have no agreement on managing their assets.

*What if my partner won't leave our shared property?*

If you have not entered into a living together agreement,

then much will depend on how the property is owned or rented. If it is in joint names, the chances are that you won't be able to force them to go easily in the short term. If things have deteriorated badly, and there is any aggression from your estranged partner, this makes the situation very different. You should contact an experienced family lawyer immediately to discuss possible emergency remedies.

*We're not married. Am I entitled to anything?*

Contrary to popular belief, there is no such thing as a "common law" spouse, and the laws protecting cohabiting couples are not currently as comprehensive as matrimonial laws.

Normally, the most significant asset is the house. The starting point is always to consider whose names are on the deeds to the property, but this is only the starting point. There are some circumstances which may allow you to claim an interest in, or possibly a right to occupy, your former partner's home, for example, if you have paid money towards it or if it has been occupied by you as a home for the children of the family. This is a complicated area of law and it is very important that you seek professional advice.

If you are married and the home is owned in your former partner's name, you can register your legal interest at the



Land Registry and protect your rights. Registering an interest in this way will prevent your spouse from selling the house, or raising large secured loans on it.

You cannot register such an interest at the Land Registry if you are living together and the house is in your partner's name only.

*What if my partner leaves, but stops paying the bills?*

If your partner has left and taken their name off the utility bills, you will be able to pursue them for maintenance to help pay these only if you were married to each other. The only other maintenance which will be available, regardless of whether or not you were married, is for children. This is worked out according to a national calculation, which has no relevance to how much the bills are.

For more information on any of the issues above, please visit: [www.family-lawfirm.co.uk](http://www.family-lawfirm.co.uk) or call: 0800 321 3832.

### **Bankruptcy**

When a marriage breaks down, the assets of each party form the pot of matrimonial assets that are divided between them, as part of the financial settlement. But what if one party is bankrupt?

In bankruptcy, almost all of the assets of the bankrupt person are no longer theirs. They are owned instead by the Trustee in Bankruptcy. This is likely to have serious implications for

the bankrupt's spouse, as the pot of matrimonial assets is potentially left much smaller.

For example, if the matrimonial home was jointly owned by the bankrupt and his or her spouse, the house cannot be transferred into the spouse's sole name without the Trustee in Bankruptcy's consent. This is likely to be given only if the spouse can buy the bankrupt's share at a reasonable market value.

Similarly, the bankrupt is unlikely to be able to pay any lump sum or maintenance to the spouse, as the bankrupt's savings and much of their income will be the Trustee's instead, to be used to discharge their debts.

The effects of bankruptcy can be so serious that some people choose to make themselves bankrupt in order to frustrate or delay their spouse's claims in relation to the financial settlement.

The best thing is to sort out as much as possible before the bankruptcy starts, as it is often threatened before any action is taken. A prompt application to the family court may allow appropriate orders for financial settlement to be made before a bankruptcy takes effect.

Even if the bankruptcy is already in effect, the bankrupt's spouse may be able to apply to the court to annul the bankruptcy if the bankrupt is not in fact insolvent.

In some cases, bankruptcy can work in the other spouse's favour. Until recently, a person owed money as part of a divorce settlement could apply to make their former spouse bankrupt, but could not have that debt proved in that bankruptcy. But in 2005, the law changed to allow such a debt, plus an award of costs in family proceedings, to be paid by the bankrupt as part of his or her bankruptcy.

Still, bankruptcy can have serious implications for the financial settlement on divorce, and you should seek legal advice in circumstances where the bankruptcy of one of the parties is a real or possible risk.

### **Pensions**

A pension is usually the second most significant capital asset in a marriage or civil partnership. As such, it is usual for pensions to be included in financial arrangements if a couple decides to divorce or dissolve their civil partnership.

Pensions can be complex and confusing at the best of times, but the details need to be addressed carefully by a specialist lawyer helped by an experienced independent financial adviser (IFA) if you and your lawyer think that this is necessary.

Often, one person has a substantial pension and the other might have none or a very limited pension provision because, for example, he or she has given up their job to look after the children. You and your lawyer need to

consider if that pension should be shared or if you should receive more of another asset, such as the home, instead.

It is normally the wife who has the lowest (if any) pension provision, as the couple assumes that she will benefit from the husband's pension when he retires. There is no automatic entitlement to a spouse's pension but the court will look at all the facts and figures in each case.

Divorce courts prefer to share a pension if possible between the divorcing parties. Another option is "offsetting", where the pension fund value is offset against other matrimonial assets, such as the house. To offset a pension or part of a pension against another capital asset has to be done carefully, because of the different nature of capital assets and pensions. Pensions are not liquid assets, they can be turned only into cash at retirement.

It is important to note that when a pension is divided or shared, this does not mean that you will receive a cash lump sum. A pension or part of a pension that is ordered from one party to another still remains a pension, and has to be invested in a pension plan. Woolley & Co can help you to find specialist advice if this is necessary.

Offsetting or sharing a pension is more common than "earmarking", another approach that is used sometimes. With earmarking, the court awards a percentage of the

income that the other spouse gets from the pension to the former spouse. There are disadvantages to this solution, such as the income ceasing on the death of the pension holder and the pension entitlement ceasing if the recipient of the earmarking order remarries.

Woolley & Co advise that the process on considering pensions in a financial settlement should be as follows:

- Find out what pension provision there is.
- Decide with your lawyer if the amount of the pension and the facts of your case make further investigation justifiable (i.e. cost versus benefit).  
There are at least one hundred different ways to value a pension. Further investigation can mean a drastic increase or reduction in the pension asset, often seen with final salary pensions and Government and Civil Service pensions, such as those that teachers and members of the Armed Forces have.
- If you wish to push ahead, investigate fully, ideally helped by a specialist IFA or pension actuary (your lawyer will be able to recommend someone).
- Decide how to adjust the settlement in the light of this knowledge.

As mentioned above, pensions are a very complex area and a specialist lawyer should be employed to look into what you might be entitled to or liable for.

## Looking After the Children

In any relationship break-up, it is the children who suffer more than anyone. The life they have known is changed forever; there is often upheaval at home and it can have a lasting effect on them.

Deciding how best to look after any children should be one of the overriding priorities for any couple going their separate ways. This involves reducing the impact on the child's daily life where possible, ensuring they are provided for financially and making sure that they continue to benefit from being with both parents wherever possible.

As mentioned earlier in this booklet, the law is based very clearly on the rights of the children rather than those of the parents.

If you were married, each party has parental responsibility and is entitled to certain things, such as knowing where the child is living. Also, they can apply to the court over issues of contact or residence for their children.

If a couple split up and were not married, only the mother has automatic parental responsibility. The father may have parental responsibility also, depending on when the child was born and whether his name is on the birth certificate.

The following sections outline some of the major considerations involving children in any relationship break-

up, but it is important to remember this is not intended to be a comprehensive guide. In all cases involving children, expert legal advice should be taken to ensure that your children are provided for as best as possible.

### **Child contact and residence**

#### **Coming to an agreement**

It is usual to try and keep the children settled in the family home wherever possible, to minimise disruption to their daily lives. Parents should take account of both of their accommodation arrangements to ensure that the children are in safe, secure and suitable surroundings when they are with the absent parent. If the children stay in the family home as their main residence with one parent, that parent may have to prove that they can cover the costs of living there.

A good first step is to find out about Child Support and other available benefits, such as Family Tax Credit. This varies depending on the needs of the children and the family's financial situation.

When a divorce petition is filed at court, there must be a statement filed at the same time setting out what has been agreed about where the children will live, contact with the absent parent, who will be looking after them during school holidays, educational arrangements and any special health needs. Provided that both parents agree, normally the courts will not interfere.

Ideally, a couple should put the needs of the children foremost and be able to put their own differences aside to agree where they should live, etc.

At this early stage, a dedicated family lawyer or one specialising in the Children Act should be consulted. They will be able to help parents come to an agreement if there are disagreements, and give detailed information on the rights of both parents.

The old ideas of custody and access no longer exist in law. Instead they have been replaced by a number of orders.

- Residence Order – this says where a child should live. In rare circumstances, the court can make such an order in favour of more than one person, stipulating how long the child should spend with each parent.
- Contact Order – this regulates telephone calls, visits, night stopovers, weekends or holidays with the absent parent.
- Prohibited Steps Order – this is called into play when one parent objects to something that the other parent is doing concerning their child. That parent can apply to the court for the other person to stop doing it.
- The court can consider a specific issue order if parents are unable to agree on a specific aspect of their child's upbringing.



In all of the above cases, an order must be applied for and granted by the court. You will need to instruct a lawyer to act on your behalf and enter the relevant documentation.

### **Child Support Agency**

When the Government introduced the Child Support Agency (CSA) in the early 1990s in a bid to ensure that absent parents financially supported their children, the courts lost their powers to deal with maintenance for children.

Now, the courts can make maintenance orders for children only in a limited number of cases:

- where the parents both apply to the court for an order by consent
- where a child is in full-time education and there are school fees to pay
- where a child is undergoing vocational training or an apprenticeship and there are expenses to pay
- where a child is disabled and there are care costs
- where the other parent lives abroad on a permanent basis.

In cases where the parties have agreed not to divorce just yet but to enter into a formal, written separation agreement, child maintenance can be incorporated into this and the terms and provisions of that agreement can be converted into a Consent Order in a subsequent divorce.

### **How much financial support will the children get?**

The amount of financial support that an absent parent, normally the father, should contribute to the welfare of any children varies widely, as it relies on so many different factors. These include income, assets, age of the child, levels of savings, pension contributions, any special health needs that the child has and any additional support already being given to the home where the child lives.

It is only where you cannot reach an agreement between yourselves that the CSA would be called upon to sort out the case for you.

### **Fathers' and step-parents' rights**

In most instances absent parents – most commonly fathers – have the right to see their children regularly, know where they are living and have access to certain information about their upbringing, such as how they are doing at school.

Step-parents also have a certain expectation of being involved in the lives of the children of their new partners. Their rights and responsibilities are limited, though.

### **Parental responsibility**

Parental responsibility 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 their property”.

This means that if you have parental responsibility, you are recognised in the eyes of the law as having all the legal powers to make appropriate decisions in relation to the upbringing of your child.

On a practical level it will allow you, among other things, to contact your child's GP to obtain or discuss medical treatment for your child, and to play an active role in your child's education, giving you access to school reports and parents' evenings.

A mother automatically has parental responsibility for her child, as does a married father, irrespective of whether the marriage to the mother occurred before or after the birth of the child.

From 1 December 2003 unmarried fathers of children born after this date, provided they are named on the child's birth certificate, also have parental responsibility.

The fathers of children born before 1 December 2003, who have not acquired parental responsibility by marriage, or the unmarried fathers of children born after 1 December 2003 who are not named on the child's birth certificate, do not automatically have parental responsibility. They must apply for it in the same way that step-parents must.

### **How to obtain parental responsibility**

Many people are shocked and hurt to find that, if the parents are unmarried, it is only the mother who has automatic rights with regard to their children.

A father without parental responsibility can obtain it if they make a Parental Responsibility Agreement with the mother, or by obtaining a Parental Responsibility Order from the court. Without parental responsibility, a father has no right, for example, to consent to medical treatment or be involved in the child's education.

So, if the couple split up, the mother automatically has the right to have the children with her where she wishes and the father has no say at all, unless he has an agreement or court order.

Parental responsibility can be gained by:

- marrying the mother of your child
- entering into a voluntary Parental Responsibility Agreement with the mother
- obtaining a Parental Responsibility Order from the court.

Before the court makes an order granting parental responsibility, a father needs to establish that there is a degree of commitment to the child, a degree of attachment exists between the child and the father and that the application is being made purely in the interests of the child's welfare.

Once you have parental responsibility, it must be exercised appropriately and jointly with the mother of the child.

Parental responsibility comes to an end when the child reaches the age of 18 years, or earlier if a court order is made.

### **Rights and responsibilities of step-parents**

It is commonplace for estranged couples to set up home with a new partner. In most cases, this is beneficial for the child – once they have got used to the changes – and helps to provide a settled family home.

But no matter how closely a step-parent becomes involved in the lives of their partner's children, or how much they contribute to their upbringing, financially or otherwise, they will not gain parental responsibility automatically.

This is particularly relevant when it comes to looking after step-children. For example, if a step-parent is looking after a child during school holidays and they have an accident needing serious and urgent medical treatment, a step-parent cannot give consent for this to be carried out. This can only come from someone who has parental responsibility.

Since 5 December 2005, step-parents have been able to acquire parental responsibility through a formal agreement or court order, in a similar way to those detailed in the previous section of this booklet.

However, step-parents will not have parental responsibility until each person who already has that responsibility – normally the natural parents – have signed the agreement.

On acquiring parental responsibility, a step-parent has the same duties and responsibilities as a natural parent.

### **For the grandparents**

Often, grandparents can be the forgotten victims of the breakdown of their children's marriage or long-term relationship. They can lose contact with the children involved as the estranged partner moves to a new area or strained relationships with ex-partners make contact difficult. This denies the grandparent the joy of watching the children grow up and means that children miss out on the valuable nurturing that older generations can bring to their development.

No real precedent has been set that gives grandparents access rights, so it is still difficult to try and safeguard that contact in law. It relies largely on the goodwill of the parties involved.

The first step for a grandparent who fears losing contact should be to approach the child's mother or father to explain that, no matter what the problems are between the parents, you as a grandparent do not intend to take sides, you only wish to maintain contact with your grandchildren.

If that is not successful, you can try mediation. For this to take place, both sides have to agree to mediate. It is not a compulsory process, although some courts are now attempting to make it so.

The final resort is an application to the court. Here, grandparents are at a disadvantage compared to parents, since there is no presumption of contact and it is necessary to apply for leave to make an application. This is the first hurdle. The parent may object, in which case the court must be persuaded, usually by way of a full hearing, that the grandparent had a meaningful and ongoing relationship with the child and that it is in his or her best interests for this relationship to continue.

If that hurdle is crossed, your application will then be considered. More often than not, there will be welfare issues to be determined and the court will appoint a Children and Family Court Advisory and Support Service (CAFCASS) officer to prepare a report, which will be presented to the court. These take between 12 and 16 weeks to complete.

If the report is favourable, the mother or father may still not agree, which will mean a full hearing with both sides having to give evidence.

If the court finally makes an order but the mother or father refuses access, it is unfortunately very difficult to enforce the

order. This could be because taking action against someone who refuses to adhere to an order ultimately could lead to the parent going to prison, which is not in the best interests of the child.

It is important when there are problems, that you seek legal advice about the options available. Early advice will allow you to understand your options and act in an appropriate way so as not to unsettle what could be a very delicate situation.



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