The Recovery from Separation and Divorce Course

Session 5 Hand-out

Legal Notes

PLEASE NOTE: These notes are intended as general guide for your information. They are **not** intended as substitute for proper legal advice. Each case is different and advice cannot be given without a proper analysis of your own circumstances.

These notes cover the following issues:

1. Different processes for resolving issues on divorce or separation
2. Obtaining a divorce
3. Your children
4. Financial issues
5. Legal issues for cohabiting couples
6. Legal issues for civil partnerships

Different processes for resolving issues on divorce or separation

When a couple decides to separate, there are various choices they can make about the way in which their issues are resolved. Normally, arrangements for the children and a financial division of their assets or liabilities need to be agreed. While it is important to obtain legal advice on relevant matters, this does not mean the couple is automatically locked into an adversarial court process. The marriage or relationship may be over – but that does not mean that they are incapable of finding the best way forward for them and their children, or that any decisions concerning the family should simply be delegated to lawyers and judges. The couple can still make good decisions for their future, usually with some expert help from a variety of professionals.

In resolving issues arising on separation or divorce, there are various different processes for coming to an agreement. The simplest process, which enables the couple to make all the decisions, is mediation. The next option is collaborative law. Beyond that, one could instruct solicitors with the hope that they will negotiate an agreement behalf before any court hearings. The last option is to hand over the case to lawyers to seek a resolution through the court procedures and, ultimately, have a

decision imposed upon the clients by a judge. Needless to say, this final option is most costly in every respect – in time, in money and in stress.

Mediation

Mediation is when a couple sit together with a professionally trained mediator, and reach their own agreement on any issues they have. A mediator is not a marriage counsellor – his or her role is not to try and reconcile the differences in the marriage. Instead, the mediator facilitates discussions between couples to enable them to reach their own agreements on disputed issues. The mediator is not there to advise, but to bring couples to their own agreement.

Mediation works hand in hand with legal advice. The mediator does not represent either of the couple, and is purely there to assist them to come to their own agreement. Having embarked on mediation of financial issues, the mediator will recommend that each client obtain their own independent legal advice. Once aware of what the legal advice is, the couple will return to the mediation, ready to negotiate an agreement. The whole process normally takes 4–6 sessions over a period of 2–3 months.

There are many reasons why it is better to agree matters through mediators rather than solicitors – not only will it be far less costly in time and money, but it restores the couple's confidence in their ability to communicate, and to work things out between them. This has a positive effect on the whole family and allows the parties to concentrate on their future and not dwell on issues from the past.

Collaborative law

There are cases where mediation is not appropriate. If one of the couple is much more dominant or aggressive, or if one has very little confidence in his or her own judgement and ability to negotiate a good agreement, then mediation may not be the best process. For those who would prefer to have their adviser present in the negotiations, there is another process available in the UK called collaborative law.

The way it works is that the clients both have to choose to instruct their lawyers 'collaboratively'. The discussions and negotiations take place with the couple and both their solicitors together, in a series of meetings. The solicitors are there to advise their clients and to negotiate (with their clients present) with the aim of reaching agreement on all matters. However, if the negotiations break down, then

the solicitors are not able to refer any contested matter to court, and the clients have to start again with new lawyers. The disadvantage of this, both in terms of costs and of time wasted, means that there is a huge incentive on both clients to be reasonable in negotiations and agree everything using the collaborative lawyers.

Collaborative law is ideal for clients who do not have the confidence to come to an agreement themselves and who would prefer to have their solicitor conduct the negotiations on their behalf. It is considerably more expensive and timely than mediation, but infinitely less so than litigation.

Instructing solicitors to negotiate

Both mediation and collaborative law can only happen if both members of the couple agree to it. Both are voluntary processes. If one of a couple is resistant to either of these processes and insists on instructing a solicitor, it may still be possible to avoid a lengthy and expensive court case but it is up to the clients to choose lawyers who will put in the time and effort to reach a settlement and not abdicate the process to the judicial system.

Court proceedings

The last option has been the most common in the past – which is simply to instruct independent solicitors to represent you in bringing the case to court, hoping that you might find an agreement along the way. This is the most timely, costly and acrimonious route. The time taken between starting the case and reaching a final hearing is approximately 12–18 months. It costs many thousands of pounds and, depending on the case, can cost many tens of thousands of pounds. The worst aspect of family litigation is the unquantifiable emotional damage done to the whole family.

Conclusion

It is a failure on the part of the family law system to see so many cases end up in court. Couples who separate need to be given a proper understanding of the options available to them to reach their own agreement – whether through mediation, collaborative law, or negotiation through solicitors. Then we may begin to see a trend away from the adversarial process. The saving to the families involved, in time, money and stress, will be immense.

Obtaining a Divorce

Obtaining a divorce is usually very straightforward. The law states that a divorce can be obtained if the marriage has 'irretrievably broken down'. 'Irretrievable breakdown' can be established by proving one of five facts:

1. One spouse has committed adultery and the other finds it impossible to live with him/her
2. One spouse has behaved in such a way that the other cannot reasonably be expected to live with him/her (loosely called the 'unreasonable behaviour' ground)
3. One spouse has deserted the other for a period of at least two years
4. The couple have lived apart for a period of at least two years and both consent to a divorce being obtained
5. The couple have lived apart for a period of five years

Although the first three grounds imply some degree of fault (adultery, behaviour or desertion), in practice in England we have a 'no fault' system of divorce. While fault may be relied on to obtain the court's recognition that the marriage has irretrievably broken down, no moral judgements are made and the 'fault' is irrelevant to any other issues between the couple. The ground for divorce has no bearing on the financial outcome, nor to the arrangements for the children. The only exception to this is if the behaviour has been extreme – sustained violence leading to serious injury to the victim spouse. In all but the most extreme cases, the conduct of a spouse is irrelevant to other issues.

The Procedure is Simple:

The person who initiates the divorce proceedings is called 'the petitioner'. The petitioner files a petition – a standard form in which the ground for divorce is stated. If the ground is unreasonable behaviour, details of the behaviour will need to be provided. The behaviour does not have to be extreme – instead a few examples need to be shown why the petitioner cannot reasonably be expected to live with his/her spouse. In many cases, it may be possible for the couple to agree between them in advance what is to be said in the petition about the respondent's behaviour. If there are children, the petitioner will also file a 'Statement of Arrangements' for the children, setting out the existing arrangements and any changes. This is not a binding document, but is important to show the court that the arrangements for any children of the family have been considered.
These two documents are filed at court with the marriage certificate and the court fee.

The court sends the documents to the other spouse, called the respondent, together with a form called ‘Acknowledgment of Service’. The respondent has twenty-eight days in which to return it to court, saying whether or not he/she intends to defend the petition.

The petitioner will then need to file at court a short sworn statement, called an affidavit, to confirm that everything in the petition is true and that he/she still wants a divorce.

The papers come before a judge, usually about six to eight weeks later. The judge will consider if there are grounds to establish that the marriage has irretrievably broken down and will check that the arrangements for any children have been considered. If so, the judge will grant a Decree Nisi of divorce. There is no need to attend court.

The Decree Nisi is not a divorce, but instead is the court’s recognition that the marriage has irretrievably broken down. There is then a mandatory period of six weeks before the petitioner is allowed to apply for the final decree of divorce, called a Decree Absolute.

Once six weeks have passed since the grant of the Decree Nisi, the petitioner can apply for the Decree Absolute. This is done very simply at court by filing a standard form plus the court fee.

The Decree Nisi is usually made Absolute two to three weeks after filing the application for the Decree Absolute. The couple will be sent the Decree Absolute through the post. That is the final decree of divorce and, as from the date of the Decree Absolute, the marriage is dissolved and they are no longer husband and wife.

If the petitioner fails to apply for the Decree Nisi to be made ‘absolute’, the respondent can do so after a further three months has passed. If there are financial concerns about making the divorce final, a form can be filed at court to stop this happening until such time as the court has satisfied itself that nobody will be financially disadvantaged by the Decree Absolute.

The financial arrangements are dealt with separately, while the divorce proceedings are underway. If clients reach an agreement on the finances, they can send in their agreement to the court to have it turned into a formal ‘Consent Order’. This can be made by the court at any stage, from the Decree Nisi onwards. If the clients are unable to reach agreement on the finances, there is a separate court process,

alongside the divorce proceedings, which addresses the finances. Details of this are set out below.

Costs

The costs of obtaining a divorce are not substantial in comparison with the legal costs that can be incurred for resolving finances or arrangements for children. If the petitioner has relied on a 'fault' ground (ie adultery, behaviour or desertion) he/she can apply for an order that the respondent pays the costs of the divorce process. That order applies only to the legal costs of obtaining a divorce and not to any other legal costs, such as those incurred in resolving finances or arrangements for children.

Your Children

The Law

The Children Act 1989 (which came into force in October 1991) made big changes to the law on the upbringing of children. The Act affects all families and is very important when parents separate or when a parent dies. It sets down in law four very important principles:

1. In all issues about children, the child's welfare is first and paramount
2. Parents are responsible for their children, rather than having rights over them (this is explained below)
3. Parents are usually the best people to know what is best for their children and should always be encouraged to work together to reach agreements
4. Courts should only intervene and make orders when it is absolutely necessary and there are no other ways of resolving the issue

The Act provides a new set of court orders, explained below. Children are given more right to be listened to in court cases about them. The law encourages parents who do not live with their children to keep in touch and stay involved in their children's lives.

Under the old law, when parents divorced, custody and access orders were usually made about the children. However, these gave the impression that one parent was being shut out or had less of a say. Parents are now encouraged to decide together

what is best for their children. The court will no longer make any order about a child unless the parents cannot agree and the court is forced to decide for them. Help is available. Mediation services and solicitors promote children's welfare by settling disputes away from court. Court is seen as a last resort.

What is parental responsibility?

Parental responsibility enables a person to make decisions about a child's upbringing, for example where the child should live, what he/she should be called, or which school to attend. It continues until a child is eighteen, although children can make more decisions for themselves as they get older.

Parents who were married keep their parental responsibility if they separate or divorce, even if they do not live with the child.

Who has parental responsibility?

Parents share parental responsibility if:

- They were married to each other when their child was born
- They marry each other later

If the parents are not married, only the mother has parental responsibility unless the father is named on the birth certificate. If he is not on the birth certificate and if the mother will not agree to let him have parental responsibility, the father can ask the court to make a parental responsibility order.

When are court orders made?

Anyone who is concerned about a child can apply to court at any time.

The court can make one of a range of practical orders to deal with any question about the child – about where they should live, how time should be shared between the parents, where a child should go to school, holiday details, or any other specific issue concerning a child. The court will decide what is best for the child. It will only make an order if one is needed.

How does a court decide?

The Children Act 1989 provides the court with a checklist to help it decide what is best for a child.

This includes:

- The child's own wishes and feelings in the light of his/her age and understanding
- The child's age, sex and background
- The child's physical, emotional and educational needs
- The ability of those concerned to meet those needs
- The likely affect of any change in circumstances

The court will usually be informed of these by the Children and Family Court Advisory and Support Service (CAFCASS) in a written report. The CAFCASS officer will have been asked by the court to work with the parents to see if agreement is possible – another reason to have tried mediation first. It is very unusual for the court to make any order that is different from what the CAFCASS officer recommends.

Financial issues

When a couple decides to divorce, there are often financial issues that need to be resolved. In mediation or negotiations between solicitors, people are free to make whatever agreement they consider fair between them. It is sometimes helpful for the couple to understand the legal framework that governs financial issues arising on divorce to help them in their negotiations, as it can be useful to understand how a judge would approach their situation if it were referred to court.

What financial orders can be made by the family court?

The Matrimonial Causes Act 1973 sets out the various financial orders that a court can make in divorce proceedings. In summary these are:

A. A lump sum order – this is a one-off payment of a set amount from one spouse to the other.

B. Property adjustment order – this is the transfer of property between spouses.

C. Periodical payments orders – more commonly known as maintenance.

D. Maintenance payments are for a spouse. They can also be for a child if the parents have agreed the amount to be paid. In the event of disagreement, maintenance for a child can no longer be fixed by the courts and requires an application to the Child Support Agency. See www.csa.gov.uk

E. Maintenance pending suit – this is an order for maintenance that is made before divorce is granted, simply to meet the needs of a spouse while the divorce proceedings are underway.

F. Pension sharing orders – the court has the ability to share a pension between spouses by requiring a portion of one spouse's pension to be paid to the other when the first one starts to draw the pension, or to offset a greater share of the joint assets to one spouse to make up for leaving a greater share of the pension with the other. The important point is that, even though a pension is an asset that has no cash value at the time of the divorce, it is treated as a relevant asset in any financial proceedings.

G. Costs orders. In most cases, there are no costs orders made. The costs are deducted from the family assets before they are apportioned. If a case goes all the way to a court hearing, the costs can run to tens of thousands of pounds.

What principles would a judge apply if asked to make an order in a particular case?

The judge is required to take a number of factors into account when considering the financial issues in divorce proceedings. (These factors are called 'Section 25 factors'.) They are:

A. The income, earning capacity, property and other financial resources currently available or likely to be available in the foreseeable future of both spouses.

B. The current and future needs, obligations and responsibilities of both spouses and any children of the family.

C. The standard of living enjoyed before the breakdown of the marriage. (Recent rulings have substantially reduced the weight given to this factor.)

D. The ages of the spouses and the length of the marriage or relationship.

E. Any physical or mental disability of either spouse or any child of the family.

F. Contributions made or likely to be made to the welfare of the family by the spouses, including any contribution by looking after the home or caring for the family.

G. Conduct, if it is such that it would be inequitable to disregard it. (Conduct must be 'very serious' and is hardly ever considered to be a relevant factor.)

H. Any benefit that might be lost on divorce.

By far and away the most important factor in most cases is (B) – the current and future needs, obligations and responsibilities. First consideration should always be given to the welfare of any child under eighteen. This means that in families with children, their needs are the priority. In many cases, the settlement is driven by the housing needs of the parent with whom the children will be living most of the time.

The judge has total discretion to order what he/she considers to be fair in all the circumstances. It is therefore impossible to predict with certainty the outcome of any particular case. Both spouses will need to ask their solicitors to advise them of the bracket, upper and lower, within which an order is likely to be made. That gives them helpful information to enable them to negotiate a settlement within that bracket. For many marriages, the starting position will be a fifty per cent split of all the assets, including pensions.

What is the court process and how long will it take?

Once a divorce case has been started, either spouse can invite the court to make orders regarding the family finances. It is hoped that couples will resolve their issues in mediation or collaborative law, but in cases where those processes are not appropriate or have been unsuccessful, the other option is to bring the case to court. Before they can do so, it is a requirement in most cases that they attend a 'mediation information and assessment meeting', to consider whether court proceedings are the best way to resolve the financial issues. If it is decided to press ahead with court proceedings, two forms will need to be filed at court: one is an FM1 signed by the mediator who took the mediation information and assessment meeting, and the second is a form asking the court for financial orders which are to be considered alongside the divorce proceedings.

When the court receives these forms, it will send both spouses the date of the 'first appointment'. This is a thirty minute appointment, at which solicitors and often barristers attend. It is usually about three months after filing the forms at court.

Both spouses must file a comprehensive statement of their financial positions, with supporting documents, not less than thirty-five days before the first appointment. The form on which they do this is Form E. It is a lengthy and detailed form that can take a while to complete. Only when the Form E is filed, will the court and the legal advisers begin to consider options for settlement. The process of completing Form E is called 'disclosure'.

At the first appointment, the judge decides what information each side should produce and timetables the case. He also considers whether further evidence is required, such as independent valuations of property. At the end of the first appointment, a date is set for the next appointment, which is the 'financial dispute resolution' appointment (FDR). It is usually a further three months until the FDR.

The FDR is a longer appointment at which both spouses are represented by barristers. The judge will ask if any offers for settlement have been made, which are then discussed and reviewed by the judge. The judge may give a view about the

likely outcome and encourage the spouses to settle. This appointment gives the clients a taste of what is to come and encourages them to think realistically about their claims and settlement options. Many cases settle at the FDR.

Those that do not settle are then listed for a final hearing, which will be heard by a different judge. The final hearing will be in at least another six months, often longer.

Shortly before the final hearing, the disclosure of financial information will all need to be updated.

The final hearing then takes place. Both spouses give evidence and are cross-examined. Any other evidence is also considered and any expert witnesses give evidence. The hearing usually takes at least half a day and often longer. At the end, the judge will make a final order. By the time of the final order, it will be twelve to eighteen months since the financial proceedings began.

At any stage along the way, from the initial filing of Form A, right up until the moment when judgment is delivered at a final hearing, it is open to a couple to come to a settlement and present that agreement as a 'consent order' to the court.

Mediation can be used at any stage along the way. An agreement reached in mediation becomes legally binding as soon as it is turned into a consent order. The procedure in obtaining a consent order is very simple: the solicitors file at court a brief summary of the clients' financial positions and a draft of the consent order setting out the terms agreed. The court issues the consent order within a few days. No attendance at court is necessary.

Costs

The costs of resolving finances in court proceedings will run to many thousands of pounds. The level costs will be dependant on the hourly rate of the solicitor you use and on how far down the case goes before it settles. As a very rough guide, the costs double at each stage. From the first appointment to the FDR they double, and then from the FDR to the final hearing they will double again. There are some cases that go all the way to a final hearing where the costs run to six figures but most cases are settled much earlier, often at the FDR, and with a cheaper solicitor the costs could be under £10,000.

Either way, the court process will cost the couple many thousands of pounds and take up a great deal of time. The real cost, however, is in the stress to the couple – and therefore the family as a whole.

Legal issues for cohabiting couples

For those who were never married, the legal position is different. First, and most obviously, there is no marriage to dissolve and so the question of divorce proceedings does not arise. However, in some cases there are still issues concerning finances and children that do need to be resolved.

The law is under review but the current position is that no automatic rights for financial provision arise out of cohabitation, regardless of the length of the relationship. There is no such thing as a 'common-law wife'! This means that there is no obligation to pay maintenance to a partner if the relationship breaks down. There are rules that apply if you own property or have a registered interest in it, but otherwise you will have no automatic claim against any capital or property. However, if you are looking after children, claims may be made on their behalf both for housing and financial support. Clearly, each case has to be assessed individually and, if any of this applies to you, you should seek legal advice as the law is complicated.

As far as children are concerned, the major difference is that unmarried fathers will not automatically have 'parental responsibility' for any child as he would if married to the mother. It will depend upon when the child was born and whether the father is named on the birth certificate. If he does not automatically have 'parental responsibility', he will have to apply for it. This can be done very simply if the mother consents but, if she withholds her consent, an application must be made to the court and they will decide whether it is in the child's interests for the father to be given parental responsibility.

If an unmarried father has 'parental responsibility' (whether from birth or whether acquired later), he is in exactly the same position as a father who was married to the mother, and all the same principles then apply.

Legal issues for civil partnerships

Couples who have entered into a civil partnership will enjoy the same legal status as a spouse who is married. They can obtain a dissolution of the civil partnership on the same grounds as for obtaining a divorce, and the finances are resolved in exactly the same way as in the case of a divorce.

Useful contact details:

The Family Mediators' Association can supply names of mediators.
Visit **www.thefma.co.uk** to learn more.

Resolution can provide names of collaborative lawyers in your area.
Visit **www.resolution.org.uk** to learn more.