ThoughtLeaders4 HNW Divorce • February 2023

HNW Divorce MAGAZINE

ISSUE 12

2023 VALENTINE'S SPECIAL

INTRODUCTION

'To live, to err, to triumph, to re-create life out of life!'

James Joyce

Issue 12 of our HNW Divorce Magazine - Valentine's Day Special features articles covering the full spectrum of marriage from prenuptial agreements to financial security after a divorce. There's even a lexicon of useful financial planning terminology.

As always, thank you to our contributors for taking the time to write these articles and share their knowledge with us.

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CONTENTS

60-Seconds with: James Quick 4

The rise of the Pre Nuptial Agreement 5

Will you be attaching a prenup to your proposal this Valentine's Day? 8

Better Together - Collaborative marital agreements 11

Diamonds are Forever 14

With this gift, I thee wed 16

60-Seconds with: Helen Morris 18

Where to be wed (or not to be)? 20

Changes to 'No Gain, No Loss' and PRR Rules for Separating Couples from 6 April 2023 22

Relationship breakdown, the stages of grief and their impact on dispute resolution 24

Divorcing a Lawyer 27

Financial Planning jargon you wish you never needed to know about 29

Five steps to staying financially secure after a divorce 31

60-Seconds with: Ami Sweeney 34

The Effect of Death on Divorce 36

Inflation: navigating the storms ahead 38

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60-SECONDS WITH:

JAMES QUICK, FOUNDER HILTON QUICK GLOBAL SEARCH

Q What do you do?

A I represent family offices looking to link up with legal expertise, recruit partners and teams for law firms who are looking to take their business forward and represent people who want or need a change and want to know the best way to go about it.

Q What is the most rewarding thing about your work?

A When I started recruiting 20 years ago, my focus was on the money, but it's important to recognise how we all change throughout our lives and how that filters into our careers. Now I would say knowing I'd made a positive impact on someone's life.

Q Do you have any career aspirations, and have you achieved any of them so far?

A To set up my own business, and after years of procrastinating 2022 was the year! Just do it would be my advice to anyone struggling with indecision over a prolonged period.

Q What do you see as being the biggest trends of 2023 in your area?

A I suspect a renewed focus and approach in understanding scientific data rather than gut reactions and impressions when deciding someone's "fit". Stress testing attitudes and behaviours, habits and ambitions.

Q What has been your most memorable experience during your career so far?

A Most memorable? Probably procrastinating for years and years before pulling my big boy pants on and setting up my own business. The time wasted, dreaming and not doing!

Q How do you deal with stress in your work life?

A This will seem vanilla, but I'm in the gym a lot, still (for my sins) playing rugby. The one thing that absolutely cures stress for me is a visit to or run along the beach.

Q What is something you think everyone should do at least once in their lives?

A Go swim in the sea on Christmas morning……just push yourself out of your comfort zone, stretch yourself, force yourself to do things you don't enjoy immediately, it builds character and resilience. If only I could get my kids to follow suit!

Q Which three traits define you?

A Tough to answer this one, we all have a perception of ourselves, my better half suggested: caring, generous, competitive

Q Advice to someone who is thinking about leaving their employer?

A Take your time, get advice from someone who knows what they are doing, it is too important to risk, and be clear on your reasons for doing something, and often to understand that fully you need to work with a recruiter who can challenge you in a positive way. Also…. life's too short.

Q What are you looking forward to in 2023?

A At home, really pushing my DIY skills with some mental projects I have planned. In the office, probably working "on" the business, rather than "in" it. Building the brand, hiring, seeing what can be achieved.

Q What would you be doing if you were not a headhunter?

A I wish I had the talent to be a rugby player, but I was never good enough, so in reality, I would probably be learning how to design cars, a secret passion of mine.

Q If you had to sing karaoke right now, which song would you pick?

A Jazzy Jeff and The Fresh Prince, Boom Shake the Room…….but I don't know who would be more embarrassed, me doing it, or someone having to hearing it!

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THE RISE OF THE PRE NUPTIAL AGREEMENT

IS A PRE NUPTIAL AGREEMENT WORTH THE PAPER ITS WRITTEN ON?

Authored by: Charlotte Newman, Senior Associate at Stowe Family Law

Since 2010, following the landmark case of Radmacher v Garantino [2010] UKSC 42, the use of Pre-Nuptial Agreements has become widespread with a steady increase year on year. The Supreme Court determined that the pre-nuptial agreement could have decisive or compelling weight in the context of the Court's duty when considering claims on divorce, under the Section 25 Matrimonial Causes Act.

The case put emphasis on holding parties to their agreement and set the principle that "the Court should give effect to a Nuptial Agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to."

Whilst not strictly binding, a well drafted and fair Pre Nuptial Agreement is likely to be upheld or given considerable weight on divorce.

The courts have indicated that for an agreement to be fair the following matters will be considered:

1. Whether both parties to the agreement had independent legal advice before entering it;
2. Whether there was full financial disclosure—this has generally been interpreted as both parties having sufficient information to make an informed decision on whether to enter into the agreement with a full understanding of its implications;
3. Whether the terms of the agreement are substantially fair, ie does the agreement provide for both party's basic needs to be met in the event of a divorce or dissolution?
4. That neither party felt pressurised by the other party to enter into the agreement, ie that there was no undue influence or duress;
5. Whether there was any fraud or misrepresentation by a party in relation to the agreement; and
6. Whether legal contractual requirements were followed when the agreement was entered into, including a statement in the agreement that you and your partner intend to 'create legal relations' by entering into the agreement, and that the agreement is executed as 'a deed', which includes that it must be witnessed by an independent witness.

It is also good practice to finalise the agreement in good time before the ceremony (ideally a minimum of 21 days).

When looking to enforce the terms of a Pre Nuptial Agreement, the above conditions being met will be of importance. In practice, they are lengthy documents that seek to account for a wide range of scenarios. There is an element of looking into the future when drafting and ensuring that the document is fair in the changing circumstances of a marriage. It is for this reason that many Pre-Nuptial Agreements will have review clauses – particularly when children are born. The comprehensive provisions are included to try and lessen the risk of one party arguing in divorce proceedings, that they were unaware of a position when signing.

For the rich and famous only?

The phrases I usually hear when discussing pre-nuptial agreements are "how unromantic" or "aren't they only for celebrities?" However, what were previously perceived as documents prepared in anticipation of marriage by the wealthiest in society, are now increasingly being used by couples of all financial standings. They are, rightly in my view, being seen as 'safety nets' in the hopefully unlikely event of divorce. Not only can they set out how assets should be divided and aspects of a physical separation, having a Pre-Nuptial Agreement in place can also save parties thousands of pounds in legal fees dealing with contentious financial proceedings.

Over the last 12 months, I have noticed a rise in the number of enquiries being made. The stigma about approaching a family lawyer before arranging the wedding, seems to have started to disappear. An interesting trend has surfaced, with younger client's (in their late 20's/30's) now instructing more regularly. With couples now marrying much later than previous generations, it stands to reason that by the time they come to get engaged, they have likely established themselves in their respective careers and could also already be on the housing ladder. Quite often there has been familial financial support in purchasing a property as well, which results in external pressure to secure those funds. These clients seek to protect what they are bringing to the marriage and there is an emphasis on that being the 'fair' thing to do. An observation I have made, is that 'millennials' are also better informed about the financial risks of marriage than their older counter parts – this could be yet another driver for making what is a pragmatic decision about retention of assets.

Moreover, it is true to say that there has been a positive shift in the attitudes of women, who are now more comfortable to talk about finances. Many women now fill senior positions in the business world, and this has caused an increase in the number of women initiating the process to obtain a PNA, to preserve their financial resources for future use.

Another reason for the sudden influx of enquiries could also be the fact that there is a corresponding influx of marriages owing to the wedding delays caused by the Covid 19 pandemic. Interestingly, April 2022 was the month where "prenup" was most searched on Goggle. The pandemic created a very uncertain and volatile economic climate and as such, asset protection is extremely important to many people. The main aim of a Pre-Nuptial Agreement is to create a degree of certainty within a very discretionary family system. So, whilst people do want to marry again, they want a level of autonomy over their individual finances and their future, in the event of a relationship breakdown.

So what does this mean for the future? I personally think that there will continue to be a rise in the use of Pre Nuptial Agreements. With a staggering 42% of marriages ending in divorce, it makes sense that people want to decide how assets are to be divided on divorce; whether that be to protect businesses, inherited wealth, or that which is brought to a marriage. I also believe that Pre-Nuptial Agreement's will be increasingly accessed by younger parties on their first marriage and seen as standard 'financial planning' and a form of security.

WILL YOU BE ATTACHING A PRENUP TO YOUR PROPOSAL THIS VALENTINE'S DAY?

Authored by: Cerys Sayer, Barrister at Westgate Chambers

While marriage statistics have oscillated throughout covid times, prenuptial agreements (prenups) remain steadily on the increase in the UK.

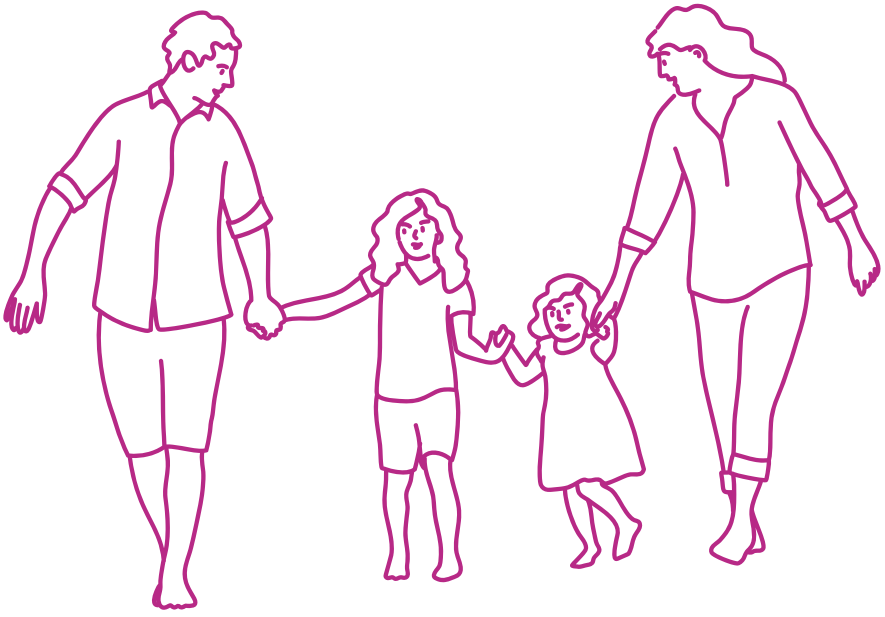
Research from 'The Marriage Foundation' states: "One in 5 UK weddings now involve prenups."

This statistic may surprise some, especially given that prenuptial agreements in the UK are not automatically legally enforceable.

Legal position

As there is not yet any specific legislation in England and Wales to deal with prenuptial agreements, case-law has endeavoured to address the lacuna.

The case of Radmacher v Granatino [2010] UKSC 42 remains the guiding light in this area.



The brief facts of the case being that the appellant husband was a French national. The respondent wife was a German national. They signed the prenuptial agreement in Germany in August 1998, where the document was legally enforceable. This was at the wife's instigation, she was of considerable wealth, the husband, a banker at the time, declined independent legal advice. The pair married in London in November 1998. They had two daughters born 1999 and 2002. They separated in October 2006, 8 years post marriage. The prenup provided that neither would obtain any benefit from the property of the other during the marriage or on it ceasing.

The Supreme Court developed the following tripartite considerations, which if adhered to, may increase the weight attached to the prenup, the likelihood it will be upheld, and hopefully limit potentially destructive and damaging litigation:

1. The prenup must be entered into fairly and freely.

It is common sense and in accordance with recognised legal principles that the parties must have entered into the prenuptial agreement voluntarily, without pressure or coercion, being

totally aware of all its terms, having been provided with full, frank, timely disclosure plus independent legal advice.

2. The impact of the foreign element on the prenup, if relevant.

If parties from other jurisdictions get divorced in the UK, the legal standing of the agreement in their home country or where the prenup was drafted may be relevant. If the agreement was binding there at the time it was entered in to, it may be found that the parties intended to be bound by it.

3. Do precipitating events make the prenup unfair?

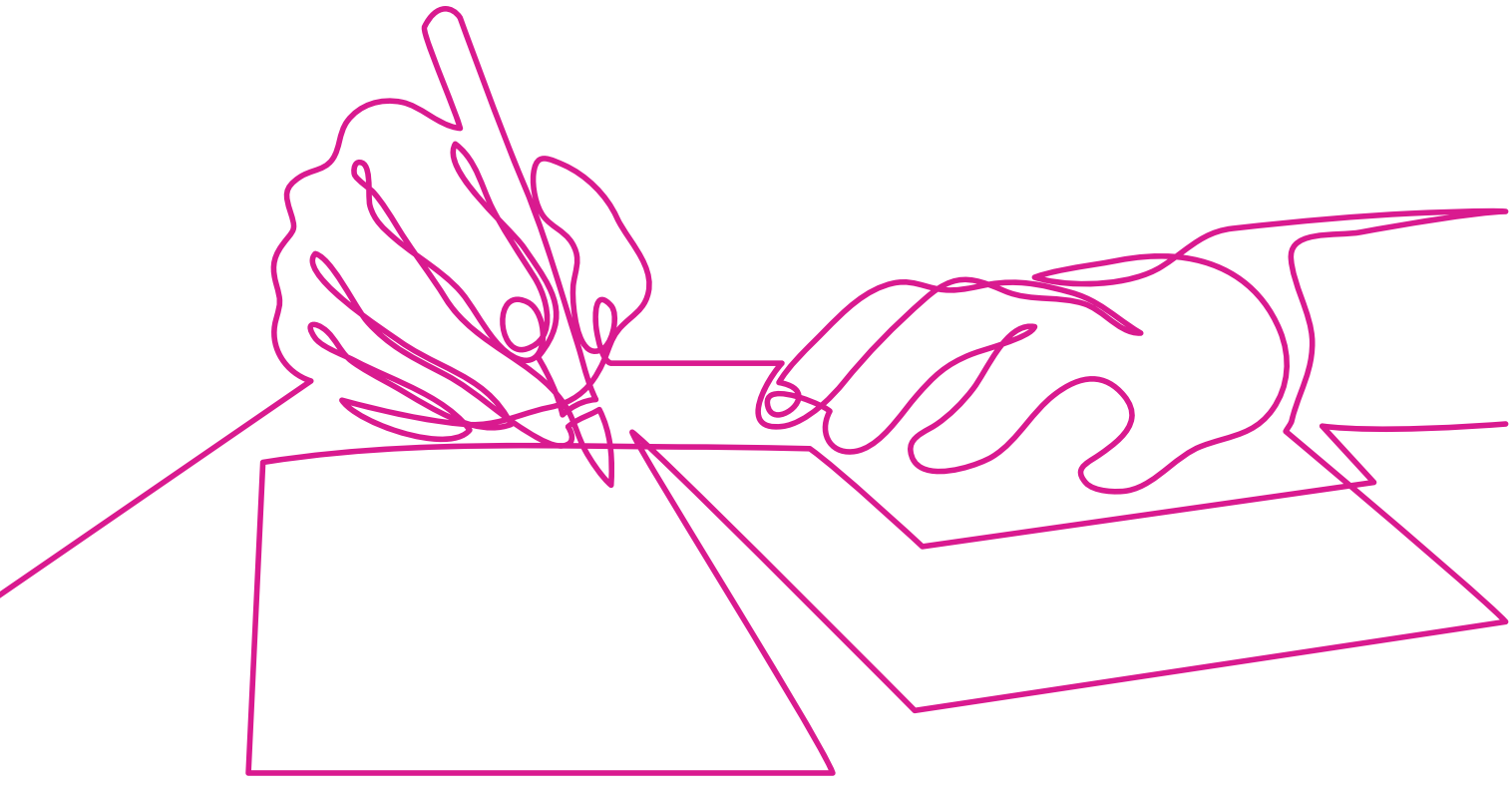
This enshrines the tenet that people should not be bound by an agreement which due to subsequent events and through no fault of their own, then impinges on their legal right to relief. 'A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family' paragraph 77 of Radmacher v Granatino.

How to approach prenups in reality and optimise their future enforceability

The following pointers encapsulate good practice and provide a good starting point:

- Ensure that the prenuptials are prepared, drafted and discussed thoroughly, well ahead of the legal ceremony. Subsequent suggestion of rushing or pressure may undermine the prenup. Consider conclusion of the document 28 days ahead of the marriage as the bare minimum together with Heads of Agreement.
- Ensure that disclosure is comprehensive, clear and flows in both directions. Be transparent about what wealth there is and what you wish to ringfence. Questions can be exchanged if you feel further information is required from the other party.
- Both parties should receive independent legal advice from lawyers experienced in this area.
- The longer the marriage lasts, the less potent and relevant the prenup becomes therefore consider updating the agreement on a rolling basis as the relationship evolves.

So, whilst it is not advised that you ask your future fiancée to sign on the dotted line as you take the knee, do consider a prenup before you tie the knot!



BETTER TOGETHER

COLLABORATIVE MARITAL AGREEMENTS

Authored by: Neil Llewellyn Davies, Partner, and Zoe Culverwell, Associate at Paris Smith

We were delighted to see that after a hiatus of a couple of years due to Covid, Resolution have restarted their collaborative training and now removed the minimum PQE requirement for attendees. With one successful round of training having already taken place, more already in the diary for March 2023 and further dates to follow, it will be great to see a new generation of collaboratively trained lawyers coming through.

However, unless there is major mindshift those enthusiastic new lawyers are likely to ignore what they have learnt and continue with current habits, practicing in a way that often damages rather than helps couples. That begs the question why? Some lawyers consider the collaborative process to be too rigid and fear losing clients if matters cannot be resolved. This should now be less of a concern given the amendments to the rules to allow matters to be resolved via arbitration in the event issues remain at the conclusion of the collaborative process. The combination of this change, new collaborative practitioners coming through and the focus on a "Good Divorce" will hopefully encourage a new wave of collaborative practice in all aspects of family law.

Even if that is too much to hope for, there are at least some obvious areas of practice that, in our view, cry out for a collaborative approach and can perhaps be the default for our new enthusiasts, namely pre- and post-nuptial agreements. Hot on the heels of Valentine's Day there are no doubt many newly engaged couples and we consider why a collaborative approach has to be the starting point when taking on any new clients looking for a marital agreement.

This area of work is obviously very different to the other family work that we undertake, predominantly because we are working with people who still love each other, whether they have already tied the knot or not.

Despite the shift in approach with pre-nuptial agreements in particular becoming an increasingly popular option for couples in the UK, undoubtedly most clients find discussions in relation to marital agreements daunting and tricky to navigate, not wanting to upset their loved one or "rock the boat". The historic perception of a marital agreement clearly does not help, but in an era where more and more people are choosing not to marry, the lack of legal protection for cohabitees is rightly under the spotlight and circa 40% of marriages end in divorce, for couples wanting security and certainty, marital agreements are likely to become more common.

So, where to start? We have always suggested that the obvious way to approach marital agreements is in a constructive and collaborative environment. Surely the couple should know that the lawyers who are helping them will have no interest in conducting future litigation? The focus is on now; helping the couple to negotiate and reach an agreement that gives them both certainty and clarity moving forward- not having one eye on a future case.

In any event who really thinks that it is good practice to act for a client for whom you have negotiated the marital agreement? Reported cases often cause embarrassment to legal teams arguing to uphold agreements that fail to pass the test of fairness at the first hurdle. We have seen a number of novel examples recently where lawyers have attempted to do this; in one instance, even assisting their client to resile from an agreement which they had initiated and drafted for their perceived benefit. This clearly throws up a potential conflict of interest. Surely it is better to limit your involvement to helping the couple at their point of need rather than expecting a return visit some way down the line? Regardless of this particular point, aside from ensuring the legal criteria is met to make the agreement a qualifying nuptial agreement, there should really be no focus on future litigation at all, but rather on providing a supportive service to the couple at that particular time.

There are other advantages from a client perspective. Whilst most lawyers would always encourage their client to speak with their partner before any introductory letter proposing a nuptial agreement is sent, there is still anxiety about how that initial conversation will be received, how the solicitor's letter will be worded and, ultimately, what the contents of it will be. Starting from a mutual position is far more comfortable and likely to lead to fairer outcomes which are ultimately more likely to be upheld. Of course, you will want to do the best for your client but doing so in a way that supports rather than damages the relationship must be the goal. Most of us will have experienced cases whereby the wedding has ultimately been called off, because the expectations of the person seeking the nuptial agreement are too wide of the mark or the process of reaching an agreement is too difficult. How have we helped if that is the outcome?

Of course, not all cases will support a collaborative approach - there will always be the controlling or coercive partner that makes this unworkable - but if that is so then there must be a serious likelihood that an agreement negotiated in an aggressive way will simply fail to achieve its objectives and ultimately be rejected by a court in any event. If the goal is protection of wealth then surely an agreement negotiated collaboratively will carry the greatest weight? After all, it will have been finalised after a number of meetings (if required) with lawyers present and so that in itself must limit the chances of the agreement being challenged, therefore providing greater certainty for the couple.

Under a collaborative approach, there would be no opening letter setting out a position. Rather, it would be a softly worded letter, noting that your client wishes to explore a nuptial agreement but using collaborative law, and perhaps providing the names of a handful of other collaborative practitioners who the other party may wish to approach for some independent advice.

The first meeting would then be arranged, where the participation agreement would be signed and everyone commits to resolving the case constructively. Rather than immediately setting out an opening position, there would be a discussion to give the party seeking the agreement the opportunity to explain to their partner why they seek such an agreement and also encouraging open and frank discussions in a supported setting. The lawyers can then explain the law surrounding pre-nuptial agreements, putting the couple on an equal-footing in terms of their understanding of the same and the requirement to meet someone's needs in the event of the marriage sadly failing.

The process can also be more tailored and flexible. If, as is often the case, the reason for a post-nuptial agreement is pressure from wider family members who wish to make gifts to their child or otherwise protect dynastic assets, consideration can be given to whether or not those family members should be brought into the process, making it more transparent for the other party and, arguably, taking the pressure off the person instigating the agreement. Third party professionals can also be brought in, whether that be financial advisors, pension experts or therapeutic practitioners as is widely practiced in mediation. Put simply, the process is far more satisfying for everyone and by the time opening positions are being discussed, the parties should be on a much more comfortable footing. Certainly, in cases we have worked on recently (a pre-nuptial and a post-nuptial) the clients were always at ease knowing we were helping them and working through a number of scenarios in a sensible and realistic manner rather than simply issuing demands or ignoring potential need.

Once an agreement is reached, consideration can then be given to who drafts the agreement. A decision may be made to instruct counsel to do so, again enabling the agreement to be drafted neutrally. Having recently adopted this approach, it is apparent that very few members of the bar have kept up with their collaborative training and whilst that may not strictly be a barrier to an instruction, there is, in our view, an opportunity for those interested in this area of work to carve out a specialist collaborative practice in this area. Indeed, we have recently found counsel from both 1 Hare Court and 29 Bedford Row extremely helpful; counsel on both occasions were willing to sign the participation agreement and accept a joint instruction without seeking to interfere with the outcome. In one instance, counsel acknowledged that the fairness test had been met which was helpful.

Of course, with nuptial agreements the story does not end there and the collaborative process enables any further discussions in line with review clauses to again take place in an amicable and non-confrontational way.

Put simply, we would like to see this approach being the default with practitioners starting by asking the question, why would you consider any other way of dealing with a new nuptial agreement instruction? We must support our clients in both achieving and preserving a well-balanced, successful relationship and the collaborative process enables us to be part of that couple's love story, rather than the villain in it. Let's hope that when we look back in 10 years the newly trained (and the already trained - but needing to dust off some bad habits) will all be working in this way.

DIAMONDS ARE FOREVER

Authored by: Laura Jennings, Director at A City Law Firm

Valentines Day is statistically a popular day for marriage proposals. The traditional proposal of course featuring the coveted diamond or (insert sparkly of choice) engagement ring. These can vary in value and style but quite often lead into the same question from clients; who keeps the ring if they divorce or don't make it to the big day after all?

The short answer is….

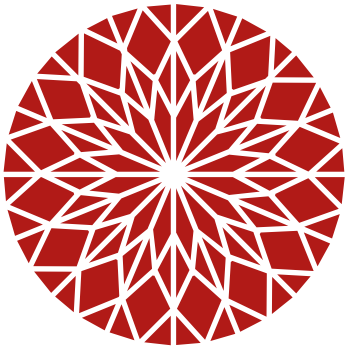
Unless the ring was expressly intended to be returned, then the premis is that the recipient keeps the engagement ring as a gift. The basis for this is contained in the Law Reform (Miscellaneous Provisions) Act 1970 which states:

"The gift of an engagement ring shall be presumed to be an absolute gift; this presumption may be rebutted by proving that the ring was given on the condition, express or implied, that it should be returned if the marriage did not take place for any reason."

There are not many proposals that attach the 'well if we divorce in two years time, I will expect it back' follow up speech. Therefore the general position is that an engagement ring, regardless of value, is an absolute gift.

Can keeping the ring leave a sting?

The more expensive the ring, the more the impact on the settlement it can make. The court as we know, will look at the value of all the assets to be divided between the couple in order to achieve a fair division.



The Form E obliges the parties to list all personal belongings with a value over £500.00, which in most cases is likely to include the engagement ring. The ES2 and the Form E therefore are likely to include the rings as an asset for the party holding them. The value is then either evidenced or can be interpreted as the reasonable resale value of the item, as opposed to an insurance valuation.

Sarah Ferguson's engagement ring from Prince Andrew, with its £70,000.00 value would clearly make a dent in any asset schedule and therefore be given consideration when viewing the overall positions.

In the event that high value engagement rings get 'mislaid' it and the court have reason to believe that it may be 're-discovered', then clearly the other party could be financially compensated with a greater share of the assets. A client who tried to change the diamonds for cubic zirconia when ordered by the court to return the ring to his former wife was caught out and after a valuation ordered to pay compensation or return the diamonds. The court can investigate and details orders to this extent.

Grandma's gems

Sometimes of course the engagement ring can be a family heirloom and may have been in the family for many, many years. In those cases, the protection for the giving party could be addressed by a prenuptial agreement, which can identify the gift being intended to be returned on permanent breakdown of the marriage and ensure that great granny's gem does not get 'gifted' away. Such an agreement would certainly be more conducive to the overall marital starting position, that adding a postscript to the proposal about the circumstances in which the ring should be returned.

This does however beg the (less romantic) question, as to whether the 1970 legislation should still be the primary position in the absence of a prenuptial agreement, when it comes to family heirlooms as engagement rings?

Should the origin of a valuable ring be considered under the Matrimonial Causes Act 1973 when the court is considering the overall financial positions? In the interests of fairness, arguably they should and if so, where does that fit with the presumption of absolute gift under the Law of Property (Miscellaneous Provisions) Act 1970? The most straightforward redress therefore is to incorporate the engagement ring within a prenuptial agreement as part of protecting family wealth of the proposer and making specific provision for return.

Nearlyweds?

What if the couple break up and it all falls through before the big day? Well again, unless there was an agreement to return the engagement ring if the wedding was cancelled, then there is no obligation to return the ring. However if there was a condition whether expressed or implied, that the ring would be returned if the engagement was broken off, then the ring should really be returned.

If an engagement is broken by say infedelity of the recipient, would it not be fair for the ring to be returned? The engagement ring, despite the implied position of intention to be married, requiring faithfulness, would still effectively be legislatively, a gift. Giving due consideration to these factors does not often take place when you are swept away in romantic gestures.

Happy Ending

The engagement ring is therefore under the current law, a gift, which is great news for the recipient and food for thought for the pro poser. There can be some solace to the gifter in knowing that the small fortune expended on the engagement ring, can be ''re-couped' or at least considered when the finances are looked at on divorce. The family items can be protected and don't necessarily have to be given away if the marriage does not succeed. They can form part of the prenuptial agreement and be specifically returned under the terms of such.

The starting point however, will be the ring is a gift and therefore for the recipient diamonds, really can be forever.

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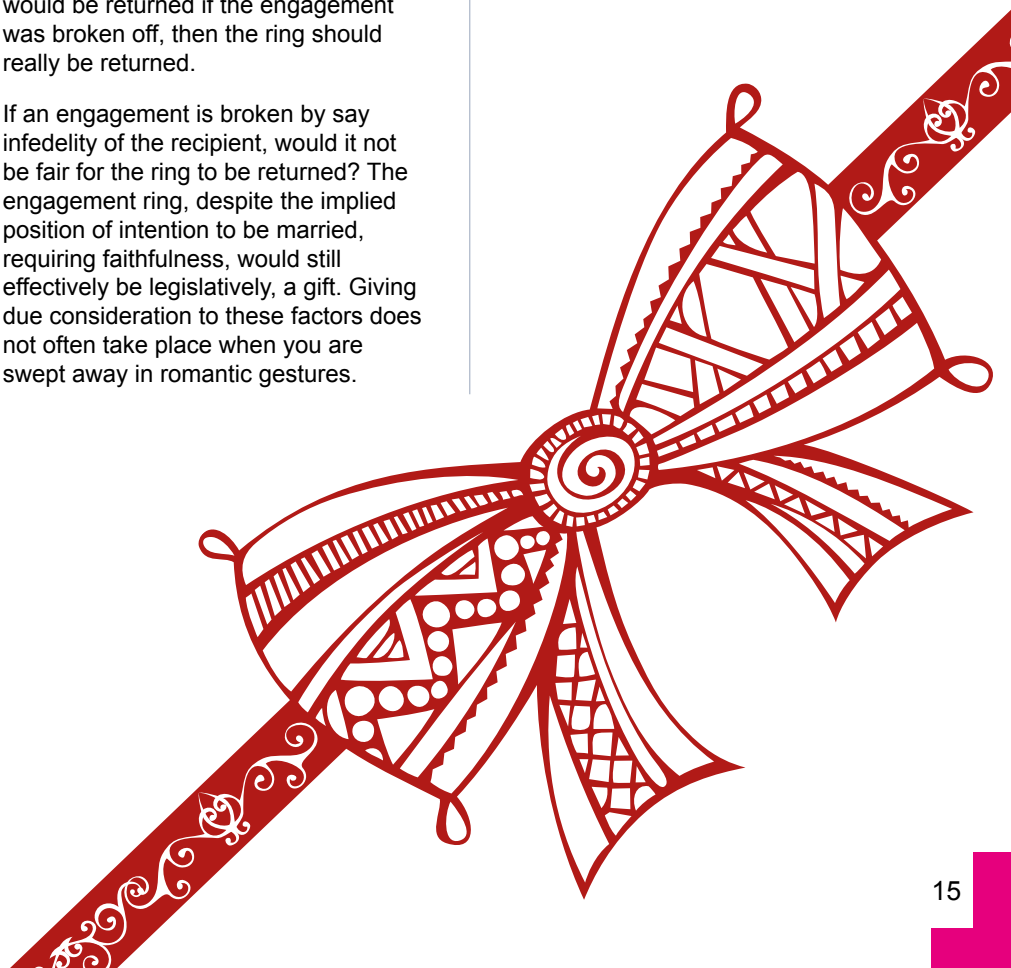
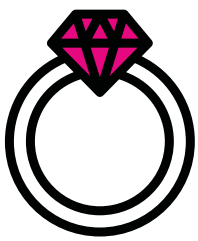


WITH THIS GIFT, I THEE WED...

Authored by: Harriet Collins, Associate Solicitor, and James Carroll, Joint Managing Partner, Russell Cooke

It's almost impossible to ignore the annual Valentine's Day marketing machine. Whether or not you view it as commoditising romance or as a heartfelt gesture, 14th February is awash with the giving of gifts to express whatever emotions abound. When though is a gift, not a gift? As family lawyers, we often see situations where gifts are given that may be of a significant value: whether financial or sentimental. We also see gifts not only between a couple but given to one or the other by friends or family members. So what happens to these gifts on separation and what can be done to protect them in the first place?

Taking scenarios that may be encountered as a relationship progresses in turn:

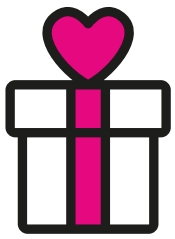


Who keeps the ring?

One of the key questions clients often ask is what happens to the engagement ring. Looking back almost 150 years ago and prior to the introduction of the Married Women's Property Act 1882, the position was stark - wives had to return jewellery to their soon to be ex-husband's and this included engagement rings.

The law is now set out at section 3(2) of the Law Reform (Miscellaneous Provisions) Act 1970. The giving of an engagement ring is presumed to be an absolute gift unless it can be shown that the ring was given on condition (express or implied) that it should be returned if the marriage did not take place. That makes for quite a romantic proposal… I give you this ring but will take it back if we don't make it down the aisle!

Where an engagement ring is a family heirloom and this can be demonstrated, there is arguably an implied condition that the giving of the ring was conditional on the marriage actually taking place and indeed, being returned if the marriage were to come to an end. That's a difficult debate to be had after the event though. Acknowledging that this is an incredibly sensitive conversation, this is a classic situation of 'if in doubt, write it down'.



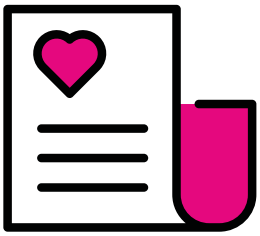
What about wedding gifts or gifts during a marriage?

Where couples have gifted items to one another throughout their relationship, similar to engagement rings, those gifts are viewed as unconditional unless a contrary intention can be demonstrated.

When it comes to wedding gifts, the usual principle is that the party whose family member/friend made the gift, will keep it unless it can be shown to be a joint gift in which case division will need to be agreed. This is perhaps more of a convention than a legal principle. It is

again worth bearing in mind that family heirlooms can be treated as more akin to an inheritance (though as is well known, inheritances are certainly not 'ring-fenced' or protected as of right). The key is to look at the nature and source of the gift, how it has been used and if of financial value, whether that value is needed.

When it comes to a divorce, parties are required in Forms E to disclose all personal belongings worth in excess of £500. That includes any gifts between or received by them – regardless of source or personal value. It is worth bearing mind that a Court can look to those assets when determining what a fair division is applying the well-known principles of sharing, compensation and needs. Whilst personal belongings or gifts can often be disregarded when looking at outcomes, where items are of a greater value, there always remains the risk that the asset may be called up. Again, if in doubt, write it down.

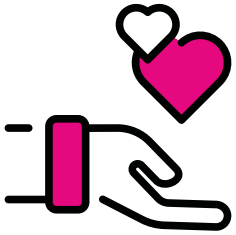


If it is important, document it!

Where there are family heirlooms or items that a party would want to retain if their relationship came to an end, the safest option is to document it. A nuptial agreement can be used for this purpose – and could even address ownership of a discrete item.

Family lawyers will all be familiar with the standard clauses on offer. This includes confirming that wedding gifts will be retained by the party whose family member/friend gave the gift and that any other joint gifts will be divided equally with one party taking the first choice.

There are a range of options but the key is, if something is important to a party or their family, it is worth documenting and making clear how it will be treated in the event of separation.



What about money from parents?

A few different scenarios come to mind here.

Before we even get to the stage of a couple deciding to wed, we often see cohabitating couples moving into a house owned in the sole name of one party.

With cohabitating couples fast becoming the most common type of family arrangement this is now a very common occurrence. It is also a common occurrence for a family member or parent to have helped that party onto the property ladder with financial support. Clarity on whether that support is a loan or a gift is vital

though perhaps the topic of another article. If a gift though, to give protection to the owning party's interest in the property, they should consider asking their partner moving in to sign a Declaration of No Interest. This is particularly so if, for example, the party moving in is going to be contributing towards some of the household expenses, and more so the mortgage.

What if that couple then decide to get married, sell the property and buy a family home together? How is that original gift to be treated or indeed any further assistance provided by family members? The gift v loan debate is very familiar to us all. We have all experienced cases where the crux of the matter relates to the family home and whether money put in by one of the party's parents or family members is to be treated as a loan which needs to be repaid or a gift adding to the pot to be distributed. The lack of any formal written agreement setting out how the monies are to be treated often leads to parents intervening or being joined to proceedings – the costs of which dwarf the costs of properly documenting ownership of a home at the outset.

Couples moving in together, getting married or receiving help from parents and family should always consider that if in doubt, write it down. For the parents or family member, they may well want a Declaration of Trust put in place or a formal loan agreement. Such a document is legally binding and survives a marriage as the ownership of the asset sits outside of the couple themselves. A Declaration between the spouses will likewise still remain valid, but the discretionary nature of the distribution of assets on divorce means that ownership can though be redistributed thereby in effect nullifying the intention of such a Declaration. The betrothed may therefore want to progress their documents from a Declaration of Trust to a nuptial agreement as their relationship itself progresses.

The key message – whether it be a loan, a gift, a ring or a house – if in doubt, write it down.

60-SECONDS WITH:

HELEN MORRIS PARTNER KINGSLEY NAPLEY

Q What do you like most about your job?

A As a media lawyer, my job is to protect the privacy and reputations of my clients. People who the media are interested in often have unusual and interesting lives and I am lucky to have an insight into this and to advise them on how to navigate such interest.

Q What would you be doing if you weren't in this profession?

A Journalist or therapist. I'm interested in the stories of people's lives.

Q What's the strangest, most exciting thing you have done in your career?

A When I was studying for the LPC, I worked a day a week at Warner Brothers. One of the inhouse lawyers would regularly go to Leavesden studios where they were making the Harry Potter films to advise on the array of legal issues that arose. I spent the morning having the most incredible tour of the whole film set – the Forbidden Forest, Diagon Alley and all the art departments. But the day was quickly cut short as the date was 9/11 and by early afternoon, the magical film set filled with Americans had turned entirely tragic.

Q What is one of your greatest work-related achievements?

A Very early in my career I did a libel case for a young immigrant who was accused by the News of the World of being part of a gang who were plotting to kidnap Victoria Beckham. The story was very serious as he was charged and remanded in custody for almost a year before the criminal case collapsed. We subsequently did a libel case which we lost at first instance. A central part of the case against the gang was a gun that appeared in a video that was alleged to be used in the kidnapping. I established that the owner of the gun was actually the News of the World's paid informant and we were granted an appeal. The News of the World settled pretty quickly after that!

Q What has been the most interesting case you have seen in 2022?

A I think the appeal that Kingsley Napley's immigration team is doing in seeking to overturn the UK decision to deny entry to a senior female Afghan judge. The refusal to let her enter the country is incomprehensible.

Q What do you see as the most significant trend in your practice in a year's time?

A We will continue to see significant levels of blackmail and harassment as there is an unfortunate and greater risk in conducting relationships online with people not being who they claim to be. In the sphere of family law, as the push for open justice continues, providing increasing advice to best protect clients' reputations and privacy.

Q What personality trait do you most attribute to your success?

A I come from a farming family where hard work, unsociable hours and having no demarcation between your working life and home life is the norm – all traits that you need as a reputation management lawyer!

Q Who has been your biggest role model in the industry?

A When I was starting out, I didn't know anybody who worked in law. I was given my first break by Siobhain Butterworth, the former head of legal at the Guardian with whom I did work experience. Through her, I became aware of the solicitor advocate David Price QC, with whom I subsequently trained and worked for many years and did some incredible high-profile media cases.

Q What is something you think everyone should do at least once in their lives?

A I would recommend driving through Jordan, experiencing the beauty of Petra and sleeping in the desert at Wadi Rum.

Q You've been granted a one-way ticket to another country of your choice. Where are you going and why?

A It would take quite a lot to tempt me away from the music, art and culture of London and not have a return ticket but a Greek island would probably do it.

Q What is a book you think everyone should read and why?

A 'The Examined Life – How We Lose and Find Ourselves' by the psychoanalyst Stephen Grosz which contains over thirty stories of unidentifiable patients that he has treated over the past 25 years. It is an immensely readable and insightful account of the hidden feelings behind his clients' most baffling and inexplicable behaviour.

Q Reflecting on 2022, what three words would you use to sum up the year?

A Political, economic, rollercoaster.

KINGSLEY NAPLEY

WHEN IT MATTERS MOST

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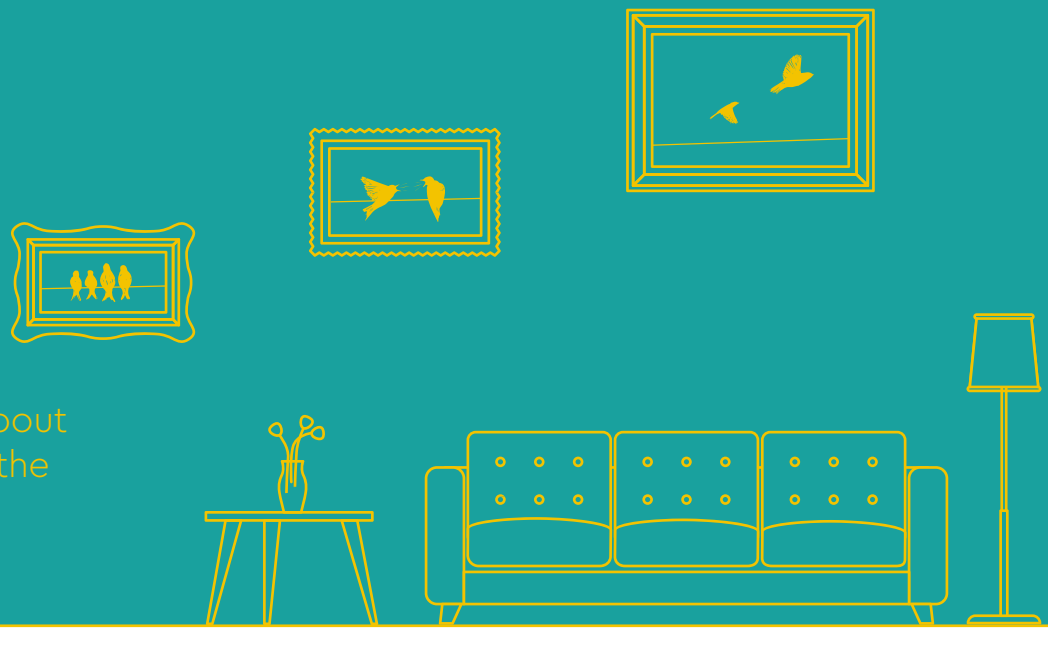
We are recognised nationally and internationally as a dynamic and strategic team of family lawyers, known for our expertise in both complex finance and high profile children cases.

We assist clients at all stages of their lives, whether at the beginning of a relationship and planning a future (for example before a wedding or when relocating to the UK) or at the end. Many of our clients or their spouses have international connections, are high net worth individuals and city professionals, or individuals with a public profile.



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WHERE TO BE WED (OR NOT TO BE)?

Authored by: Tessa Bray, Partner and Family Mediator, and Emma Reynolds, Associate at Simons Muirhead Burton

The English legal system could be set for a significant shake-up to its laws surrounding where and how couples can be wed. For many, choosing the perfect wedding venue is a key part of their big day. Such choice is often centred around the style of venue, proximity to family and friends and, of course, the costs involved in it all, which can be extortionate. Some couples see marriage as a practical choice, but for most it is an opportunity to celebrate their love, by hosting the picture-perfect ceremony in a place that is meaningful to them.

Many couples will be blind to the fact that their choice of wedding venue is currently governed by archaic rules that are increasingly unfit for the 21st century (the current legal framework is contained in the Marriage Act 1949, with its origins from the Clandestine Marriages Act 1753, and its fundamental structure from the Marriage Act 1836). Rules that were put in place at a time when family history, money and social standing played a significant role; much more so than the choices and wishes of the couple themselves.

On 19 July 2022, the Law Commission of England and Wales published its report which, if implemented in law, will give couples more choice over where and how their ceremony can take place. The Law Commission are recommending an officiant centric, rather than a building focused, approach which can be held behind closed doors out of respect to those individuals and religious groups who seek a private setting.

The ideal dream wedding venue will hopefully be able to become a reality for plenty of newly-weds without being shackled by several archaic legal restrictions.

Modernisation of the law

Prior to the COVID-19 pandemic, legally binding civil wedding ceremonies were permitted to take place in a registry office or approved premises, in an approved room or permanent structure, such as stately homes and hotels. The introduction of the restrictions during the COVID-19 pandemic meant that many couples were unable to get legally married within the COVID-19 restrictions imposed at the time, without risking the health of their wedding party or being in breach of COVID-19 restrictions. The pandemic also caused significant strain on wedding providers, due to the compliance measures that were required.

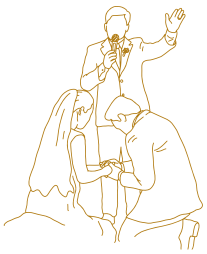
In an attempt to reduce the risks of COVID-19 transmission and reduce the burdens placed on the wedding industry, the Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021 (SI 2021 No 775) were introduced and took effect on 1st July 2021. The amendments were a much-needed modernisation to the ancient rules on choice of venue, many of which were based on beliefs dating back to the 19th century. Positively, it expanded the choice for couples on where they could hold their civil ceremony, allowing outdoor ceremonies in the grounds of approved premises. Although the temporary measures did not permit weddings to be held in any location, and the premises still had to meet the requirement for a wedding to be held with open doors to be enable others to object to a marriage if required (despite the reality being that this is rarely utilised outside of TV dramas). The modernisation in 2021 was a positive step forward, however, it did not extend to religious ceremonies, and it was only a temporary modernisation to the law, originally set to expire on 5 April 2022.

Where to be wed today?

Currently, couples continue to be faced with a complex set of rules when choosing where and how to be wed. A further statutory instrument similar to the temporary measures and put in place during the pandemic has been implemented: the Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2022 (SI 2022 No 295). However, many restrictions remain in place, meaning if a couple wish to have total autonomy over where to have their ceremony, their marriage may not be legally binding. Added to this are the complexities between the rules for civil or religious ceremonies, with differing rules depending on the religious group, and the red tape that inevitably adds to the ever-mounting costs involved. In the current economic climate, for some, a wedding may simply be off the cards all together.

Couples wishing to take an alternative approach, such as beach weddings, humanist ceremonies, or even a wedding in a private setting, must later legalise their wedding in an approved venue or deny their celebration legal status. The idea of saying “I do”, and then having to go through an additional process to formalise their marriage, is (at best) an outdated practice, diminishing the significance of a wedding ceremony to something akin to a party. Despite the recent changes, the current law lacks the level of choice that we would expect from a diverse society. It disregards the fact that many couples come together from different backgrounds and would (if permitted) wish to have a wedding that captures their two faiths coming together.

The Law Commission



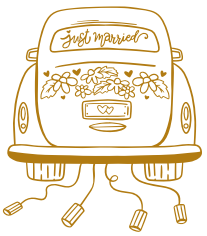
On 19 July 2022, the Law Commission of England and Wales published its report, recommending that the existing rules take a step away from the current building centric system, and instead recommending that the officiant should be the focus. An officiant led system would mean that couples could hold their ceremony at a meaningful place of their choosing (if agreed by the officiant) and would allow couples to regain autonomy in their choice of venue. The Law Commission are also recommending that the open-door policy be removed, with information about a wedding being published online at the preliminary stages, rather than allowing access to the public on the big day itself. This would further expand the types of venue that couples could choose, including family homes and other private settings.

A further recommendation is to expand the types of officiants who would be able to conduct ceremonies by law. This could allow officiants who are part of non-religious belief organisations, such as humanists and independent celebrants (who are currently not able to perform legal ceremonies in England and Wales) to be nominated by their organisation, if permitted by Parliament.

The recommendations would also give greater freedoms to couples and officiants over the content of their wedding ceremony, including the option to have religious elements within their civil ceremony, so that it can be unique and tailored to them.

If the Law Commission’s recommendations are implemented by Parliament, couples will have a much wider choice over the location and content of their wedding. Sitting on long waiting lists to be able to marry at a limited set of wedding venues across the country (many at an eye-wateringly high price tag) may no longer be necessary. Picturesque outdoor weddings or even beach weddings could be a thing of the future, and weddings at home could become possible. Perhaps we could see a snow filled winter wedding, replicating the iconic wedding of Phoebe and Mike in the well-known Friends episode - time will tell.

The validity of marriage



Although we are yet to receive the Government’s response to the Law Commission’s report, if and until any of the Law Commission’s recommendations are implemented, it remains vital that couples conduct their ceremony in a way that is recognised by law.

A marriage is important, not just in the sense of personal significance through showing commitment to one another, but legally too. Marriage allows spouses to create a binding legal relationship between them, with legal duties and responsibilities. It confers inheritance rights under the rules of intestacy, it has an impact on parental responsibility and ultimately, should things go wrong, marriage has a key role in the ability for parties to distribute assets on separation. Until a marriage breaks down, parties may be wholly unaware that their marriage was not legally binding, which can have significant and sometimes devastating financial consequences. Therefore, ensuring a marriage will be validly conducted under the laws of England and Wales is a vital first step for future brides and grooms to take. Imagine spending tens of thousands of pounds on getting married, only to find out you never got married at all.

CHANGES TO 'NO GAIN, NO LOSS' AND PRR RULES FOR SEPARATING COUPLES FROM 6 APRIL 2023

Authored by: Michael Finnegan, Associate at Burges Salmon LLP

In November 2021 the government published its responses to the Office of Tax Simplification's (OTS) reviews and recommendations in relation to Inheritance Tax and Capital Gains tax. Particularly noteworthy for family lawyers amongst these responses was the recommendation regarding a change to the 'no gain, no loss' window. These recommendations are now set to be introduced and implemented under the Spring Finance Bill 2023, draft legislation for which was published on 20 July 2022.

This is not to be confused with the Autumn Finance Bill 2022, which was implemented into law as part of the Finance Act 2023, for which Royal Assent was given on 10 January 2023. That deals with the more straightforward elements such as rate, threshold and allowance changes, whereas the more detailed and comprehensive Spring Finance Bill is expected to be published in early 2023, and the new CGT rules are set to apply to disposals of assets occurring after 6 April 2023.

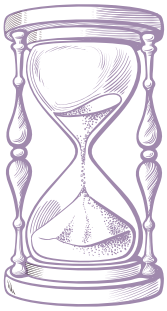
Current 'No Gain, No Loss' Rules (Pre-April 2023)

Although married couples and civil partners are separate individuals for tax purposes, if they live together they are able to take advantage of the 'no gain, no loss' rule, which allows them to transfer assets between one another at a value which, for CGT purposes, does not give rise to a gain or a loss. This does not avoid CGT entirely, as the recipient will essentially be acquiring the asset at the transferor's base cost, meaning if they were to sell the asset at a later date the CGT would then be payable at the point of sale.

What this rule does mean though is that the parties' will not be liable to pay CGT on these transfers at the point of (or shortly after) a divorce, when assets

are being divided and there may be limited cash available to meet any tax liabilities. The parties will be treated as a tax unit rather than individuals for the purpose of CGT. This rule continues to apply once the spouses separate permanently, as long as these transfers take place during the remainder of the tax year of their separation.

Difficulties with the Current Rules



In reality, when a couple separates they may not seek legal advice for some time, which may mean they do not reach an agreement regarding the division of assets (and make the relevant transfers) in the tax year of separation. This means they cannot benefit from this rule. After something as life-altering as the breakdown of a marriage, especially where there are young children involved, the timing and tax implications of any eventual settlement may not be the spouses' initial concern. Even for those individuals who happen to separate early in the tax year, a year is often not enough time to go through the process of disclosure, negotiations and/or court proceedings, and agreeing the terms of a consent order, especially if they have complex finances. Where a couple happens to separate towards the end of the tax year, it becomes significantly more difficult for them to take advantage of this rule. For example, under the current rules spouses separating in mid-March would only have a two or three weeks to transfer assets between them without attracting CGT.

Reform Under the Anticipated New Law

The recommendation of the OTS was that the government should extend this window so that such transfers between spouses will not incur CGT as long as they are made by the later of either the end of the tax year at least two years after separation, or, any reasonable time set for the transfer of assets in accordance with a financial agreement approved by a court.

The government accepted this recommendation in November 2021 and as a result of this the key changes to the law expected to be implemented from 6 April 2023 are as follows:

1. **The 'no gain, no loss' period will be extended for up to three tax years after the end of the tax year of separation (a year longer than recommended) or such other date as may be ordered by the court as part of a formal divorce agreement;**
2. **There will no longer be a time limit on the 'no gain, no loss' period where the assets are being transferred as part of a formal divorce agreement;**

The government is also proposing to change the application of Private Residence Relief (PRR) in relation to the sale of the family home so that:

3. **In the event a spouse retains a financial interest in the former matrimonial home following separation, they will be given an option to claim PRR upon the eventual sale, in the event certain conditions are met;**
4. **Where an agreement provides for individuals to transfer their interest in the former matrimonial home to their ex spouse/civil partner and they are entitled to receive a percentage of the future sale proceeds, upon the eventual sale of the property the individual who previously transferred their share will be able to apply to same tax treatment to those proceeds upon receipt that would have applied when they originally transferred their interest in the property to their ex spouse/civil partner.**

Implications of the New Rules

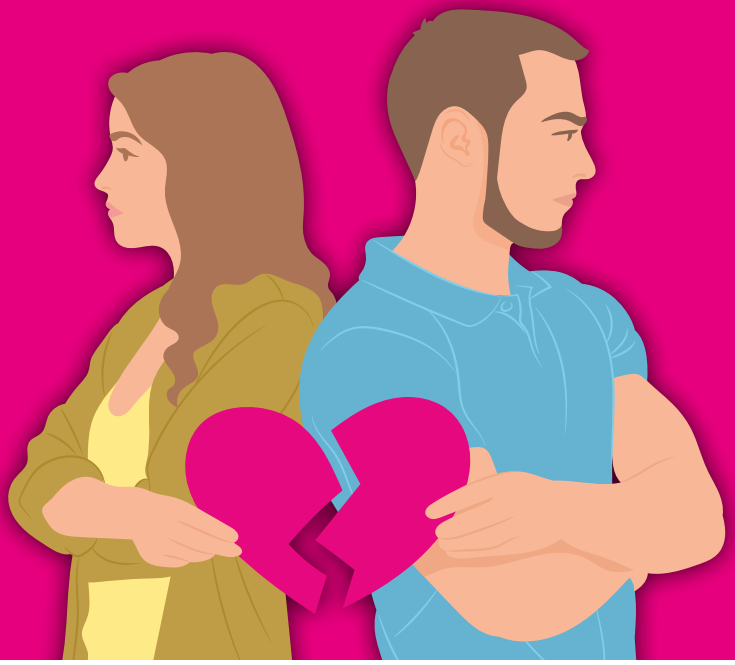
This will be a welcome change for separating couples and will mean that those separating earlier in the tax year will no longer be arbitrarily favoured by having longer to arrange for the tax-free transfer of assets between them. It will allow spouses more time to take advice and agree upon the division of their assets, and will alleviate the pressure of having to make decisions regarding the transfer of assets in the short period before CGT becomes payable at the end of the current tax year. For example, under the old rules a couple separating on 31 December 2022 would have only had until 5 April 2023 to transfer assets between them without attracting CGT. Under the new rules however, spouses or civil partners separating on, say, 31 December 2023 would have until 5 April 2027 to transfer assets between them without attracting CGT, as long as they have not received their final divorce order (i.e they are still married at the time of transfer).

In addition to the removal of looming threat of CGT as a motivating factor in reaching an agreement on finances post-separation, this will also mean marital assets will not be depleted by immediate tax bills, so they can be made available to contribute to the parties' respective needs.

The change to the rules on the ability to claim PRR also represent a major improvement on the current position. Under the old rules, if a co-owner were to move out of the family home then after nine months they would lose PRR and CGT would be charged in the event of a sale or transfer. The new rules however will mean a departing spouse in many cases will still be able to claim this exemption regardless of the length of time between them moving out and the property being sold. Again, this ensures one spouse is not arbitrarily penalised due to practical or financial decisions the parties make on divorce, such as which spouse should move out of the property.

RELATIONSHIP BREAKDOWN

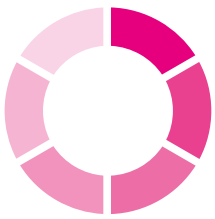
THE STAGES OF GRIEF AND THEIR IMPACT ON DISPUTE RESOLUTION



Authored by: Claire Filer, Family Partner and Mediator, and Vicky Lambert, Counsellor at Irwin Mitchell

In the modern era there are many ways of resolving family disputes ranging from discussing matters around the kitchen table to solicitor led negotiation to mediation and, ultimately, if nothing else is appropriate or has worked to court proceedings. All practitioners in this field need to be well-versed in these options (how they work practically, how effective they might be) to advise our clients strategically whether as lawyers or family mediators, but how often do we step back and consider the emotions and feelings of our clients (and the other participants in the process) and how this might impact on resolution? When we intervene may determine whether the process works or does not.

The stages of grief



The 5 stages of grief were originally identified by Elisabeth Kubler-Ross in her 1969 book "On Death and Dying". Although they have been explored and developed by others over the decades since then, the traditional stages are denial, anger, bargaining, depression, and acceptance.

Grief can be felt not just at the death of a loved one, but any loss such as the ending of a relationship. The griever may feel not just the actual loss of the person who is no longer their romantic partner, but the loss of the future they will no longer have.

Relationships can break down in many ways, however often one person has initiated the process by deciding to leave. They may barely experience the loss moving quickly to acceptance having made the decision to end the relationship. The "left" person will however often feel the loss more acutely, particularly if the decision is sudden or appears to come out of the blue.

Denial

In the denial phase, the denial may be that the relationship has ended at all – we often hear clients tell us that their partner is having a mid-life crisis, they just need to come to their senses, and they will return – or denial of their own feelings; a numbness and disbelief. Starting a dispute resolution process at this stage may be ineffective because the participant is not ready to negotiate or deal with difficult financial issues.

Anger

Anger may be at the leaver (who has actively made the decision to leave often in contrast to someone who has died) but may also be taken out on those around them for example their lawyer. Sometimes anger can be internalised and not let out. Recognising that, naming it, and normalising it may be what that person needs.

Bargaining

Bargaining can be similar to denial – if I just tried harder or was a better partner, they wouldn't have left. As with denial, a person in this emotional state, may find it difficult to reach decisions and their lack of emotional readiness may be a barrier to dispute resolution.

Depression

Professionals working in the field of family law are usually not trained psychologists or psychiatrists and cannot diagnose clinical or deep depression, however it is important for us to try to recognise when someone might be at the very depths of grief at the end of the relationship. At this stage they may be very distressed or filled with despair. Their feelings can consume them and make it extremely difficult to make the decisions that they need to. More support may be needed at this stage.

Acceptance

Once the participant has accepted that the relationship has ended, they are likely to be more emotionally ready to process information and make decisions.

Recognising what stage of grief a client or dispute resolution participant may be at, can be invaluable. By way of example, in assessing whether a couple are both ready for mediation, a mediator should consider where each participant is in the grieving process. A leaver who has had often many months of deciding whether to leave a relationship may be very ready whereas the left behind may in some cases be so emotionally affected that decisions will be impossible. That can lead to impasse and entrenchment and the breakdown of mediation which, had both participants been emotionally ready, may not have occurred. The leaver can also become frustrated with the speed of the process and what they may perceive as the other person's inability to accept the reality of the relationship breakdown.

The role of counselling and therapy

Counselling can make a difference with any significant life changes, none more so than with dispute resolution. Lawyers offering a more holistic approach to their clients support not only the client but the legal process too.

Counselling can help the client identify the root cause of why they are experiencing a whole range of emotions. Being listened to and understood can help ease this stressful time and help regain emotional balance.

It can be useful for the client to understand any fixed patterns of behaviour that may be informing their thinking and decision making. All relationships are co-created. Helping someone understand the role they play in the relationship; can help them make more informed choices.

The grief model is not linear and clients can experience any of the stages and move back and forth between them before they reach acceptance. Depending on the individual, they may need support throughout the dispute resolution or at any of the stages. Counselling can be flexible and dependent on the client's needs. If an impasse occurs, counselling could provide a separate space for the client to identify why they feel so stuck, what keeps them in that place; and then how they can move forward.

For some individuals it is important to mourn the loss of their old self/life. At the end of the process, some clients benefit in therapeutic support adjusting to their new norm, achieving their potential and creating a new life path.

As lawyers, we can help our clients by recognising where they or the other party may be in the grieving process. Stepping back whilst, for example, someone participates in counselling or therapy may actually help the dispute resolution process. We should ask ourselves, what might that person need to move past this?

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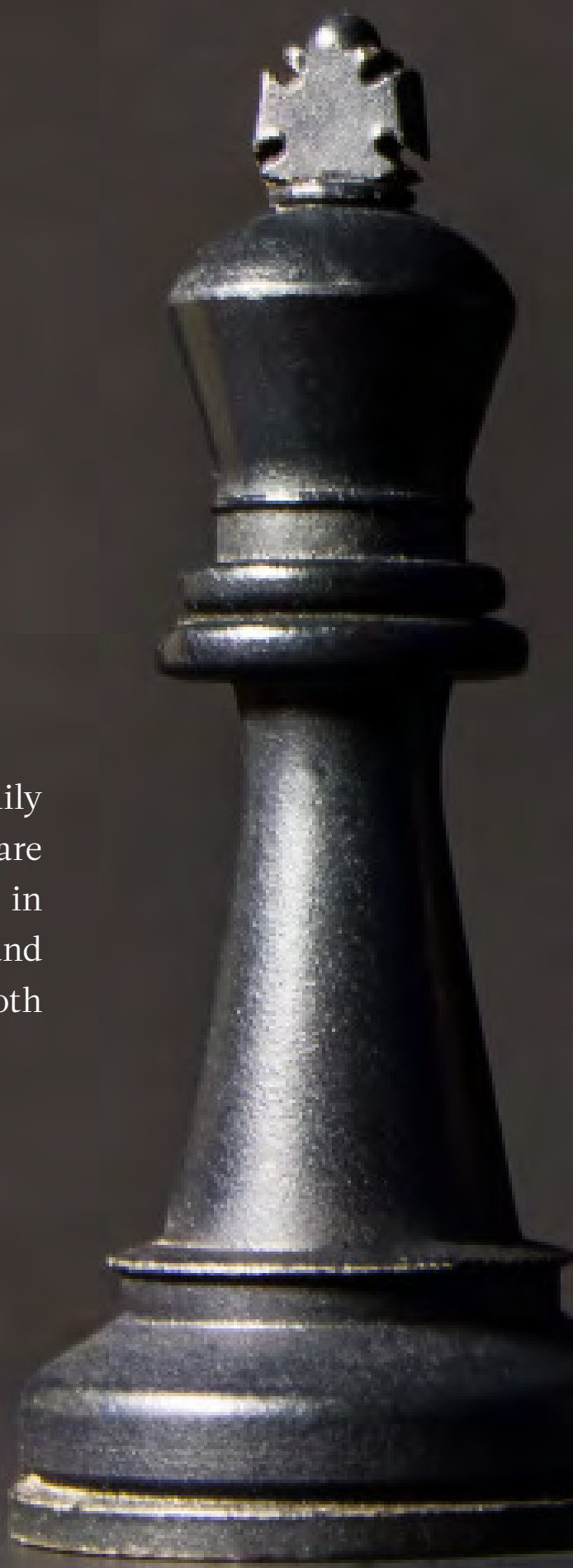
"They are as strong on money as they are on children and they've got strength and depth in both silks and juniors." - Chambers & Partners, 2020



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DIVORCING A LAWYER

Authored by: Olivia Stiles, Senior Associate at Kingsley Napley

It is generally not good form to start by telling the reader what an article is not, however, despite what the title might suggest, this is not a guide to consciously uncoupling from your divorce lawyer. What it is, is a collection of practical tips which I hope will be useful in situations where your lay client or lay opponent is a legal professional.

For clients on the receiving end of a legal professional spouse, it can feel daunting and uncomfortable to be entering the legal arena with someone who seemingly has the upper hand or inside knowledge that you may feel you lack. Even in situations where a spouse is a lawyer in a completely different area of practice it can still feel disarming to know that one of you may have a better idea of practice and protocols by virtue of working in the legal industry.

A word of comfort, I hope; family law and practice in England and Wales is hugely different to almost all other areas of specialism and therefore unless a spouse works in a practice area which is family law centric, the knowledge and experience they have from their day job is unlikely to be transferable, nor will they have the 'inside track' an opponent may think they do.

The old adage goes "a little bit of knowledge is a dangerous thing" and this can be particularly true for lawyers as clients in their own disputes or litigation. Although doctors often make the worst patients, this is not my experience of representing lawyers in their family law disputes. Rather, the myth that a lay client's status as a lawyer somehow gives them an advantage is often something that needs to be debunked.

I set out below some issues to look out for which I have come across in cases where I act for or against legal professionals:

What is their role and employment status?

Solicitors are usually divided into Associates and Partners. Associates are employed members of the firm and will usually have a straightforward income structure of a salary plus bonus with tax paid via PAYE.

There are a few different categories of Partners, some of which are set out below:

- Equity Partners – self-employed, will have rights to share in the profits of the partnership in a certain proportion. The share will vary depending on the firm's profitability during any particular year.
- Fixed Share Partners – self-employed and usually an entitlement to a fixed amount of the partnership profits. They will likely be a party to the firm's partnership agreement.
- Salaried Partners – Partners by title, but subject to an employment contract and therefore employed members of the firm, usually receiving a salary plus bonus in the same way as Associates.

Partners may also have a capital account which holds the funds they have invested in the Partnership and/or any undistributed drawings or profit. It is not unusual for the funds invested in the Partnership to be funded by way of an interest-free (or low interest) loan in the same amount.

Barristers are either self-employed (usually working in chambers) or at the employed bar, working for an organisation as employees and subject to an employment contract.

Barristers at the self-employed bar generate fees by working for lay and professional clients either on an hourly rate basis or in charging a brief fee (for their work considering papers and preparing a case for a court hearing or a conference and attending) and daily refreshers (daily payments made for additional days in court in multi-day hearings).

Self-employed barristers will need to cover certain work-related outgoings such as the rent for their room in chambers and other chambers expenses, clerks' fees, as well as other usual business expenditure such as IT equipment, travel costs and professional memberships for example. A great number of these will be tax deductible, albeit barristers will be responsible for the initial outlay.

Self-employed barristers will also need to make allowances and put money aside for income tax and VAT. Depending on how quickly a barrister's fees are paid, they may need to pay tax on fees which have been billed, but not yet received. For barristers, work which has been completed and billed to the client but not yet paid is referred to as 'Aged Debt' and should appear as an asset on an asset schedule.

What does their income look like?

Focussing on self-employed lawyers, the starting point for assessing their income will be to look at their detailed tax returns, however, there are other documents you will need to see, particularly for Partners, in order to piece together an accurate picture of their income.

- The firm's accounts
- Partnership agreement/Deeds to confirm entitlement to profits or profit share
- Confirmation as to whether they receive a fixed share of the profits (i.e. an amount) or is it a percentage? Or is there a 'points-based' system in place, whereby the number of points held determines the share of the profits. How and when are points accrued?
- Does the firm withhold drawings or profit share for tax? Or is that the individual Partner's responsibility?
- Is there any income that is deferred or otherwise withheld for a certain period of time?
- Are there any contingency fee cases on which a Partner or barrister may be entitled to a large profit at a later date, albeit the work was done during the marriage and the date of separation (and any run-off) will become more relevant there.
- Where income/distributions received or earned during the marriage is over and above that needed to meet the family expenditure, should it be treated as income or as accumulated capital which ought to be shared?

Career progression and retirement

Depending on the age of the spouse, you might also be looking at any potential or expected career progression (and enhanced income) or future retirement, if that is in the foreseeable future. In relation to the former, enquiries about applications for promotion to the partnership or to the equity partnership and maybe even to see copies of recent appraisals in which this may have been discussed may be appropriate.

Similarly with barristers, you could ask questions about applications for Silk and whether this is forthcoming, albeit, it is not uncommon for counsel to see their income take a dip in the couple of years after taking Silk. This is because they can often find that the work available to them as an experienced and well-regarded Senior-Junior is no longer on offer and they must re-establish themselves as a KC.

Retirement can be a little trickier, although a good place to start is to look at the Partnership Agreement, where there may well be a pre-determined age at which Partners must leave the Partnership and retire. Likewise, some roles will be more intense and demanding than others and require Partners to perform at a high level which is not sustainable over a long period of time. The Court may well have sympathy with a spouse who works in a high pressure environment saying they will retire earlier than the Partnership Agreement expects them to, particularly if it has the potential or reality of impacting their health. Some Partners formally retire from the Partnership but continue to work as Consultants thereafter.

Barristers may experience a slowing down or change in their work as they reach retirement age, whether by design or otherwise. Some barristers will make a move towards either private judging or arbitrator work or becoming a full-time salaried judge sitting in courts or tribunals.

Although much will depend on the specific detail of the case, these are a few basic issues to be thinking about as starting points in lawyer-as-client cases. As with all financial remedy cases, the devil will be in the disclosure and therefore questionnaires and a thorough investigation of the resulting documents will be key.

FINANCIAL PLANNING JARGON YOU WISH YOU NEVER NEEDED TO KNOW ABOUT...

Authoured by: Jonathan Drysch, Associate Director at Killik & Co.

Divorce is a time for learning a lot about yourself, your partner and inevitably financial services jargon - perfect for adding unnecessary stress during uncertain times. In an attempt to bring some clarity for those not living and breathing the industry, I have summarised some examples of jargon likely to be encountered when assessing financial assets throughout a divorce.

Firstly, equities are likely to be found on a statement from a financial adviser or stockbroker. Equities is simply another name for company shares, where an individual can own a part of a company and therefore benefit from dividends and hopefully be able to sell their shares at a later date for a greater amount than originally purchased.

Corporate Bonds are another type of investment likely to be found on a statement. Unlike equities, the bond holder does not own a share in the company, they have essentially loaned an amount to the underlying company in return for regular coupon payments (interest) followed by the principal being repaid on a certain date. Bonds are traditionally viewed as less risky/volatile compared to equities, however they can still be traded on the bond market and their value can fluctuate. Bonds issued by the UK Government are referred to as Gilts.

As an alternative to investing in equities and corporate bonds directly, it is also possible to invest in Collective Schemes, otherwise referred to as Funds, where individuals are pooled with thousands of other investors and professionally managed.

A fund's investments may typically include equities, gilts, bonds, etc. Investors with smaller sums of money available are able to reduce risk by spreading their investments more widely than may have been possible if they were investing in the underlying investments directly.

All of the above investments can be found within General Investment Accounts, ISAs, Investment Bonds and Pensions (defined contribution).

A **General Investment Account (GIA)** is simply a standard investment account which provides no tax sheltering. Although investment income and gains are taxable, individuals can benefit from using tax-free allowances, e.g. Personal Allowance, Dividend Personal Allowance and Capital Gains Tax Annual Exempt Amount, although such allowances are set to fall over the next few years. During a divorce process tax advice should be sought when splitting assets within GIAs as there could be tax implications.

An **Individual Savings Account (ISA)** is a tax-free means of saving/investing, therefore investments can be sold/withdrawn as part of the divorce process tax free without any worry about tax implications.

Investment Bonds are not to be confused with corporate bonds, they are simply a type of investment account which provides certain tax advantages. Broadly speaking, underlying investment returns do not need to be included on an individual's tax return until funds are withdrawn from the investment bond. Therefore, tax advice should be short when investment bonds are being considered.

A **Defined Contribution Pension** is a type of pension where an induvial and their employer make contributions into their fund, which is usually invested in the stock market. The future pension at retirement is ultimately based on the level of contributions and performance of the stock market. During the divorce process the current fund/transfer value is used for the purpose of valuing their pension.

A **Defined Benefit Pension** is a scheme from an employer which promises to pay a guaranteed regular income from a certain age, usually 60 or 65, regardless of contributions and stock market performance. It is possible to request a Cash Equivalent Transfer Value (CETV), which is a one-off lump sum figure quoted by the pension scheme trustees to transfer into a defined contribution pension and sacrifice the future guaranteed income. During the divorce process spouses with defined benefit pensions will usually request CETVs for the purpose of valuing their pension benefits.

Pension sharing is one of the options available on divorce. It provides a clean break between parties as the pension assets are split immediately. This means that each party can decide what to do with their share independently. The Court will issue a Pension Sharing Order (PSO) which states how much of the pension, the ex-spouse or ex-partner is entitled to receive. The amount is expressed as a percentage of the transfer value of the pension that is to be split.

Pension offsetting is the second option available and it also provides a clean break between parties, as the value of any pensions is offset against other assets of the same or similar value.

As an alternative to pension sharing and offsetting, a pension earmarking order redirects part or all of an individual's pension to the ex-spouse or civil partner upon the scheme's normal retirement age. The pension still belongs to the original member, but the scheme must make some form of payment to the ex-spouse when the member's pension is payable. This does not provide a clean break, as an ongoing link with the ex-spouse will remain.

These are just some examples of jargon which are likely to be encountered throughout the divorce process when assessing assets as part of a settlement. Therefore, it is vital to have a good financial adviser able to explain everything clearly and assess the different tax implications, of which there are many – good luck!

FIVE STEPS TO STAYING FINANCIALLY SECURE AFTER A DIVORCE

Authored by: Jenny Judd, Executive Director at London & Capital

Divorce is not something that anyone plans to go through. Most people would choose a long and happy marriage over a painful separation, but with the UK divorce rate estimated at around 42%, a considerable amount of couples find themselves going their separate ways. While divorce will always be difficult on an emotional level, the practical problems it presents are often underestimated, particularly when it comes to dealing with the separation of finances. Couples will typically have joint financial arrangements with one person in the partnership taking a lead role. The ending of a marriage may therefore present a daunting challenge for someone that suddenly finds themselves financially independent but without the necessary knowledge to manage their assets successfully.

At London & Capital, we have come up with five steps for the newly divorced to put themselves on the road to financial self-sufficiency:

Don't make rash decisions

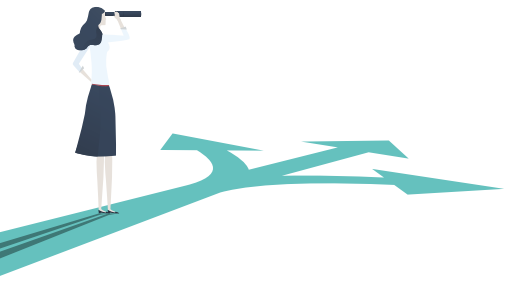
The big decisions you make early on once you become financially independent will be some of the most important.

Deciding on your living arrangements or how to invest your funds are choices that need to be given careful consideration. Taking some time to mull these things over before moving ahead will be valuable in the long run. You may find that all kinds of advice comes your way from friends or family members who will have your best interests at heart, but resisting the temptation to make quick decisions will ensure you make the right ones.

Embrace long-term thinking

Financial planning is essential for the newly divorced. The joint plan you had with your former partner will now have to be replaced with a plan that is tailored to your own needs. Creating a cashflow model will be useful. This will involve taking an overall view of your finances, looking at your income and expenditure plus your assets and debt. Projections

can then be made on your future finances. If you have commitments to meet such as the funding of a child's education or a mortgage, financial planning will be essential to ensure these are taken care of.



Improve your financial literacy

The financial world can be full of jargon, but it is important that you now get to grips with the basics. Investing is an important part of securing your financial future and understanding how it works is very useful. Everyone is familiar with cash, it's flexible and can be easily accessed through a personal bank account, however, if the rate of return is lower than inflation the value of your capital will be eroded in real terms. Investment portfolios designed to grow over the longer term will typically include a blend of stocks and bonds and can be tailored to your personal risk profile. We suggest working with professionals who will take the time to explain the terminology, so you feel empowered to make the right decisions. You shouldn't feel intimidated by your advisers.

Take advice from a wealth manager

Engaging a wealth manager early on is a good way to make sure your wealth is in safe hands. A good wealth management firm can provide sound advice on decisions relating to property and investments and can connect you to experts in areas such as taxation and estate planning. Sitting down with your adviser and exploring what's most important to you and what you want to achieve over the coming years will ensure your plan is tailored to your new situation.

International considerations

The complexities and planning of a divorce are increased when you have assets in more than one jurisdiction. It is important that a joined-up approach is taken, working with a team of professionals and ensuring the many potential tax pitfalls when managing worldwide assets are taken into consideration. You will need to consider currency and tax in more detail and ensure the right people are managing your assets so your goals can be achieved without the stress of an unexpected tax bill.

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A FRESH START: WEALTH MANAGEMENT POST-DIVORCE

For someone who has gone through a divorce and finds themselves managing their finances independently, the risks associated with financial decision-making can be a real concern.

We provide guidance on how to manage and sustain a settlement in the longer term, making it work for a lifetime. Our role is to guide our clients during this pivotal time, unravelling the complexities to ensure that their financial position can be understood, and the right decisions are made.

To arrange an introduction, please call 020 7396 3388 or, email us: invest@londonandcapital.com

JENNY JUDD
Director

JESSICA CRANE
Executive Director

60-SECONDS WITH:

AMI SWEENEY DIRECTOR GRANT THORNTON

Q What is your area of practice?

A I am in the Insolvency and asset recovery (IAR) team at Grant Thornton UK LLP and specialise in matters that come into our Contentious Estates and Family Disputes team.

Q What motivated you to pursue this specialisation?

A You will rarely meet anyone who says it was their childhood dream to be an accountant and work in Insolvency so I would be lying if I said that... in reality it was really by chance I started working in the IAR team and what motivates me are the people.

We are fortunate that the work we do is collaborative in nature and means we get to work with amazing experts around the world, both within the GT network and our external contacts… there is never a dull moment, and you never stop learning.

Q What is the most rewarding thing about your work?

A I love a challenge and the disputes that we work on are often emotionally charged and messy. There is usually an injured party who is in a financially weaker position and has been wronged, so being able to help recover assets for them is very rewarding.

I am also really inquisitive (some might say nosey) and persistent (some might say stubborn) so being able to trace and identify assets that have been hidden or concealed is very exciting.

Q Do you have any career aspirations, and have you achieved any of them so far?

A I have always aspired to be happy and fulfilled at work rather than working towards a specific level or role….so far so good!

My recent promotion to Director in the IAR team is something I am particularly proud of achieving and I am currently studying for my JIEB exam so my future aspiration to be an appointment taker within the team is well underway!

Q What do you see as being the biggest trends of 2023 in your practice area?

A Given my area of specialism, it will be no surprise to hear that I think disputes within HNW families and divorcing spouses will continue to be a trend throughout 2023 (and beyond).

I expect to continue to see a rise in these types of cases as solicitors and their HNW clients are becoming more open to the added value of having an asset recovery specialist being involved from the early stage of a dispute, to input on the strategy to ensure a recovery for the client at the end of the dispute.

Q What has been your most memorable experience during your career so far?

A I worked over in the BVI for 3 years just after I qualified as an accountant… so the realisation that my new "networking" would take place on catamarans whilst island hopping was a pretty memorable experience.

Q How do you deal with stress in your work life?

A I do go to the gym regularly… I find it helps to burn off a bit of steam if you are having a particularly stressful day. But a glass of wine also helps…!

Q What is your ideal holiday?

A Somewhere hot with beautiful, quiet beaches and a bar.

Q What was the last book you read?

A Girls just want to have funds – it is a feminist guide to investing. I've come to realise that if I want to make my millions, I am going to need a backup plan and I thought investing would be a good place to start, so watch this space!

Q Do you have a favourite food?

A I love all food – I wouldn't call myself a foodie as such, just someone who enjoys eating! However, if I were pushed to pick my favourite I would say sushi.

Q What cause are you passionate about?

A My passion for animal rights, which was sparked by my rescue dog from the BVI… Cleo. I was never an animal person growing up but she has converted me by being the sweetest, kindest and most affectionate dog.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A The usual…eat less, drink less, workout more, sleep more. But January is a pretty long month with early sunsets so I can't be too hard on myself for already breaking all of them.

Q What are you looking forward to in 2023?

A Getting some holidays planned with my family and creating some nice memories.

I have two young boys (4 and 1 years old) so life has been really busy, but I am hoping for a more normal year in 2023 where we can do some more travelling as a family.

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THE EFFECT OF DEATH ON DIVORCE

Authoured by: Alison Regan, Partner at Russell Cooke

Divorce is stressful and complicated enough. Aside from the emotional impact, dividing up hard won assets in a civilised manner is fraught with difficulty. Add in the effect of the death of one of the spouses and that adds a further layer of complication due to the impact (practical and legal) of probate, succession and inheritance tax.

In the event of a death before Decree Absolute, the matrimonial proceedings immediately come to an end. The logic is that there is no longer a marriage to dissolve and therefore the matrimonial proceedings simply fall away.

This has long been the case since Sugden v Sugden [1957] P120. In the case of Hasan v Ul Hasan (deceased) and Anor [2021] EWHC 1791 Mr Justice Mostyn expressed the view that a matrimonial claim was a cause of action that should survive death (as do most civil claims) bearing in mind that such claims were likely to be much less speculative than other civil claims. However he acknowledged that Sugden was binding on him and the matrimonial claim came to an end.

In England and Wales there is freedom of testamentary expression and the starting position is that the will of the deceased spouse (or the intestacy rules if there is no will) governs the devolution of their assets. This position can be varied by a claim pursuant to the Inheritance (Provision for Family and Dependents Act) 1975 ("IHA") which allows certain categories of people to bring claims for financial provision and for the estate assets to be distributed as per any agreement or order under the IHA.

The surviving spouse is the strongest claimant under the IHA. The court will want to ensure that they receive what is "reasonable" with their housing and income needs met as a minimum. In this regard the court will consider the surviving spouse's needs and resources and what they may have received if the marriage had been terminated on divorce instead of death (the notional divorce fiction). In this context the duration of the marriage and contribution made to the family are taken into account as they would in matrimonial proceedings.

However in an IHA context the court also considers the needs and resources of the beneficiaries of the will or on intestacy as well as any other applicant (including anyone who was maintained by/dependent on the deceased immediately before death). The IHA is therefore an entirely different arena in that the proceedings are no longer confined to the spouses. This introduces a whole new dynamic which can, particularly in the case of second families, become fraught with difficulty.

In addition to this, the asset base is likely to change substantially on death.

Assets may pass by survivorship to other parties. Some life insurance policies may come into effect and fall into the estate (becoming available for redistribution under the IHA), but others may well be written in trust for specific individuals and fall outside of the estate.

Likewise pension provisions will change. A pension may have been compared as a capital asset in a divorce, but on death the lump sum and income provisions are likely to be different.

The most significant impact is inheritance tax. To the extent assets fall to non- exempt beneficiaries (the spouse or charities) inheritance tax arises and must be dealt with. It is possible to enter into post-death tax planning, perhaps by making use of the spouse exemption and giving the spouse assets or an interest in some of the assets for a period of time, but that can be unpalatable to beneficiaries and potentially the surviving spouse doesn't want to be beholden to other family members. Often families turn

themselves inside out trying to save inheritance tax but don't give enough thought to the practicalities of living with such an arrangement.

It should of course also be noted that IHA claims are governed by the Civil Procedure Rules and that the usual adverse costs rules apply. This in itself adds complications to negotiations.

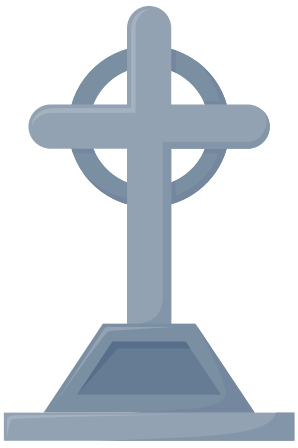
Where a spouse dies **after a financial order is made, but before it is put into effect** then it can be dealt with as a debt of the estate. The executors of the estate are responsible for administering the estate and settling debts and will acknowledge and deal with this.

The only problem in this scenario is that there is likely to be a delay. The executors are unlikely to countenance the payment of any sums pending receipt of the grant of probate. It may well take a significant amount of time to obtain a grant and so potentially the surviving spouse could well be waiting a substantial period of time.

In the event of a death **after a financial order is put into effect,** unless the possibility of an IHA claim has been excluded in the financial order altogether, the ex-spouse is still an eligible claimant; albeit the claim is for what is reasonable for maintenance, as opposed to what is just "reasonable", i.e. a less generous standard. (Note the case of Chekov v Fryer [2015] EWHC 1642 (Ch) in which a financial order had excluded an application under the IHA but where the ex-spouse was permitted to bring a claim as a cohabitant -on the basis that the parties had begun living together again after the order.)

With regards to joint life maintenance orders, they clearly end on death. The obligation of the paying spouse does not survive death and fall onto the executors. The survivor would potentially have to bring an IHA claim (if it is not excluded) as an ex-spouse or dependent of the deceased. It is noted that a precedent family order clause can permit an IHA claim limited to only what is necessary to compensate a party for the loss of maintenance. This appears to be a compromise between honouring the financial order, and re-opening the whole negotiation again.

Divorce does not revoke a will so a divorcing party would be advised to make a new will once the decision to divorce is made. It may not be set in stone, and it is subject to an IHA claim that would at the least meet the surviving spouse's needs, but it may well help protect the beneficiaries to a degree. The deceased's wishes are, after all, still a factor to take into account.



INFLATION

NAVIGATING THE STORMS AHEAD

Authored by: Alex Cooke, CEO at Schneider Financial Solutions

UK interest rates are (at the time of writing) at 3.5%, the highest level in 14 years. For many reading this article, this will be the highest interest rate experienced in their adult lives. Nevertheless, by the time this article is published, we expect interest rates to have risen yet further, to 4.0%. Alex Cooke, CEO of litigation finance provider Schneider Financial Solutions considers what lies ahead for inflation and interest rates and what this will likely mean for the litigation lending industry over the next 18 months.

On 15 December 2022, the Bank of England made the decision to raise interest rates a further 50bps. This took the UK base rate to 3.5%, the highest it has been for 14 years. Whilst this was a lower increase than November's 75bps uplift, this was still a wholly unprecedented ninth increase in a year.

For those of you wondering why interest rates continue to rise, this is a direct attempt to increase most households' core costs (such as mortgages, or rents), resulting in reduced spending and consequently lowering demand, reducing pricing and overall reducing inflation. Simple, isn't it?

Therefore, the Monetary Policy Committee (MPC) has driven interest rates up in its attempt to tackle soaring inflation, which, whilst falling by more than the market expected in November, remains at 10.5% (December 2022), significantly higher than the target rate of 2%. Whilst this provides little consolation, the continued decrease (in November and December 22) was the first consecutive monthly decline in inflation since the early days of the Covid-19 pandemic.

Sadly for the MPC, they can't take too much of the credit. It is believed that this inflationary slowdown was, instead, mainly driven by energy prices collapsing after they had surged to record highs following Russia's invasion of Ukraine (as opposed to the MPC's interest rate hikes). The reduction of energy prices is expected to continue throughout 2023, with gas prices already lower than they were before the invasion.

In terms of putting a figure on interest rates, the Office of Budgetary Responsibility (OBR) predicts that rates will continue to rise to 4.8% by Q3 2023, before potentially falling back a little in 2024. But don't get too excited: the OBR's interest rate prediction for Q3 of 2024 remains a whopping 4.5%.

It is, however, interesting to note that the MPC's vote to increase rates by 50bps in December 2022 was not unanimous. There is clear disagreement between MPC members as to where interest rates should ultimately lie. While six of the nine members voted in favour of the 50bps increase, one voted for a 75bps hike, and the other two members voted to maintain interest rates at the previous level of 3.0%.

So, why the differing views? For starters, recent economic data has been mixed, with higher than expected wage growth, and continuing inflationary pressures. However, there are signs that the MPC's strategy of increasing interest rates is taking effect, with a rapidly slowing housing market and business data pointing to a recession.

Inflation

By definition, inflation is the increase in price of something over time, expressed as a percentage over 12 months. Inflation can be measured in various ways, however the most recognised measure is CPI, the Consumer Price Index. To calculate CPI, the Office for National Statistics (ONS) tracks the prices of hundreds of everyday items in an imaginary basket of goods. The basket itself is ever evolving, in line with market trends. For example, the BBC notes that the sports bra was added to the basket in 2022. Simply put, if an item costs £1 today and inflation is 10%, then, in one year's time, that same item will cost £1.10.

Inflation may have peaked in October at 11.1%, however the markets expect it will remain fairly high throughout 2023, potentially dropping to around 4.5% by the end of the year. The theory is that energy prices are unlikely to rise as rapidly in 2023, supply-chain disruption should lessen and the MPC's continued push for higher interest rates will reduce spending and overall demand, hence bringing inflation back down to a manageable rate, albeit not the 2% target rate.

As such, predicting peak interest rates is a process of discovery rather than identifying a pre-determined level. The key drivers will be the persistence of inflation, and wage pressures, over the next six to twelve months.

Outlook

Whichever way you look at it, 2023 is likely to be a challenging year, with global economic growth expected to slow to around 2%, and the US and Eurozone joining the UK in recession.

Current evidence suggests that equity markets anticipate only a mild recession in the US and reduced cost pressures. This would allow the US Federal Reserve to begin to loosen monetary policy by the end of 2023, and the UK should, accordingly, keep an eye to this too. As we know, where the Fed goes, the UK generally follows.

However, the general consensus is that the risks are skewed in favour of inflation remaining more pervasive. If that is the case, it will prevent the major central banks from cutting interest rates for the whole of next year – and the economic landing will then be that much harder.

It is generally believed that the economy will contract during 2023, before recovering very slowly in 2024. Notably, the cost of living crisis is likely to continue to weigh on household disposable income as pay rises fail to keep up with inflation. Any rises made to pay , however, will almost certainly mean reduced corporate profits over 2023. Conversely, this could then lead to a drop in labour demand, in turn increasing unemployment levels. Neither scenario bodes well for the worker.

So, what does this mean generally for family lawyers? Well;

1. Business valuations will need to be carefully considered, noting the expectation of a shallow but potentially extended recession. Those involved in the insolvency markets are watching carefully for "cheap deals";
2. Cashflow for businesses is likely to be tighter than usual, resulting in reduced abilities to extract monies to pay settlements etc;
3. The MPC increasing interest rates will, as it has done already, have a direct effect on mortgage rates. The increased cost of debt will then invariably impact property values.
4. The volatility in interest rates is already causing havoc in terms of the timescales involved in selling properties, with mortgages being withdrawn as interest rate hikes are announced. This volatility looks set to continue for some time, and therefore the surety of these 'copper-bottomed assets' should be held in check.

How is the litigation lending market going to be impacted?

Whilst it is unlikely that family lawyer fees and disbursements, let alone litigation lenders' interest, have made it into the ONS' "basket of goods", it does not make either of us immune to an uplift in costs, especially litigation lenders.

Most litigation lenders (if not all) have a cost of capital directly or indirectly associated with BoE base rates, LIBOR (as was), SONIA etc. As such, maintaining loan pricing at mid-2022 levels will ultimately lead to (assuming no previously excessive levels of greed on pricing) margins being reduced significantly. This is likely: a) a high risk strategy (noting 1 above); or b) will result in a need to reduce staff costs (noting in particular that the funding sector is already pretty lean), which could result in increased underwriting/ case monitoring risk. This is an unrealistic position for a responsible lender to take, especially noting current issues in the public domain that lenders past and present continue to face.

For new clients, the inevitably likely result is an increased cost of capital across the board from lenders.

Clients with existing loans in place should be protected against increases prior to their loan end dates. However, this safeguard will fall away, and such customers may be exposed to increased rates, should they need to extend their loans in some way.

The economic theory may be that increasing interest rates sucks the demand out of an economy by making it more attractive for consumers to save, and more expensive to borrow. However, for those engaged (or soon to be so) in matrimonial litigation, matters are unlikely to be so simple. Therefore, now more than ever, it is important for clients and their advisers clearly to understand the long-term gains for clients in their litigation and funding strategies.

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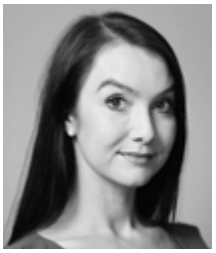

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