A PRACTICAL GUIDE TO DIVORCE AND FAMILY LAW

YOUR ROADMAP TO A SMOOTH SEPARATION

PAYNE HICKS BEACH

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A Practical Guide to Divorce and Family Law: Your Roadmap to a Smooth Separation

The breakdown of a marriage and the decision to divorce is likely to be one of the most stressful life events that an individual will face. Dealing with practical and financial arrangements in the midst of emotional trauma may seem insurmountable, but the right team of lawyers will guide you through the legal process in a sympathetic, supportive and, above all, objective manner to achieve the best possible outcome for you.

The aim of this guide is to give you some practical advice, right at the start of your journey, so that you feel more equipped and empowered to take the next steps.

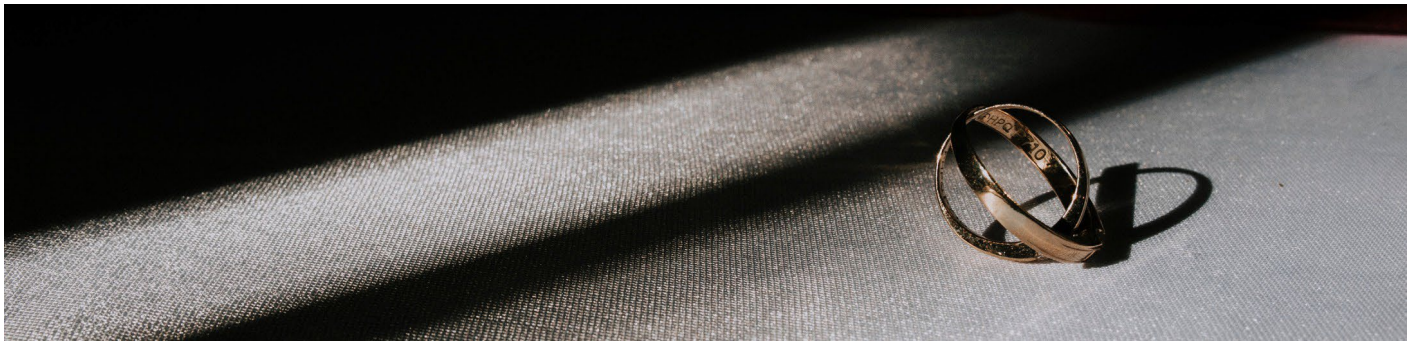
THE DIVORCE PROCESS EXPLAINED

Many people do not realise that the divorce process, or the dissolution of a civil partnership, does not cover a financial settlement or (if required) an agreement on child arrangements. Absent an agreement, these must be dealt with in separate legal proceedings.

It is not possible to file an application for divorce or dissolution until a couple have been married/in a civil partnership for a minimum period of one year. Once, this minimum period has expired here are four steps to the divorce/dissolution process:-

1. Complete a divorce application, either as a single applicant, or, with your husband/wife as joint applicants.
2. Submit the application to a divorce centre online together with an image of your marriage certificate and the court fee.
3. Apply for a conditional order. This can be done only once the application has been acknowledged by your spouse and after a twenty-week cooling-off period.
4. Apply for a final order after six weeks and one day from the conditional order being obtained. However, an application for a final order should not usually be made until the court has made an order dealing with financial matters.

Once an application for divorce has been made, there will then be a minimum twenty-week cooling-off period before the applicant(s) can apply to the court for a conditional order of divorce. This is to give the parties a period of reflection and to endeavour to resolve issues around children and money. It is anticipated that the minimum period to obtain a divorce will be twenty-six weeks but in reality most cases will take much longer due to the need to have financial matters resolved.



MOST COMMON QUESTIONS, ANSWERED:

Can either party file for divorce?

Yes. It is open to either spouse to file an application for divorce. Since 6 April 2022, it is also possible for spouses who agree to file the application on a joint basis

What are the grounds for filing for a divorce?

In England, the sole ground for divorce is that the marriage has irretrievably broken down. Prior to the advent of the Divorce, Dissolution and Separation Act 2020, which came into force on 6 April 2022, it was necessary to rely on one of five facts to evidence that the marriage had broken down: adultery, unreasonable behaviour, desertion, two years separation with consent or five years separation. Since 6 April 2022, the sole basis on which a divorce may be granted is that the marriage has irretrievably broken down. A statement to that effect will suffice and there is no longer any requirement to provide evidence.

Does it matter if I make the application for divorce or my spouse makes the application or we apply together?

Very rarely. It will usually make no difference if you are the applicant, your spouse applies, or you make a joint application. However, if there is more than one jurisdiction where the divorce might take place then it may be a consideration.

Is it possible to defend a divorce?

It is no longer possible to defend a divorce application. The only grounds upon which a divorce or dissolution may be disputed are if a challenge is made to the validity or subsistence of the marriage/civil partnership or if a challenge is made to the jurisdiction of the court to hear the application.

Will I have to go to court?

No. There is usually no need for either party to attend court in connection with the divorce.

What happens if I change my mind?

Until a Final Order of divorce is granted by the Court, the marriage continues to subsist. Up until that point, it is possible to invite the court to dismiss the divorce application if both parties want the marriage to continue.

HOW TO CHOOSE A DIVORCE SOLICITOR

Choosing a divorce solicitor is one of the most important decisions you will have to make throughout the divorce process. A good solicitor will be able to explain the nature of proceedings where necessary and handle administration where possible, reducing stress for you. In addition, your solicitor will advise you on how the court will approach the resolution of any financial issues, the factors the Court is likely to regard as relevant and therefore take into account and the likely outcome. Hiring a solicitor is highly recommended even if you and your partner are coming to an agreement outside of court. It is important that no procedural steps are missed that could lead to claims being inadvertently left open. This could result in serious financial consequences, potentially even many years down the line.

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Top 5 things to consider when choosing a solicitor for your divorce

1. **Does the law firm specialise in divorce?**

- It is always advisable to work with a firm that has a dedicated Family department with experienced, specialist solicitors accustomed to advising clients in connection with relationship breakdown and the many practical issues arising as a consequence.

2. **Does the solicitor have the right experience for your situation?**

- Whether there is an international dimension, a nuptial agreement (pre or post, English or foreign), high value assets, complicated financial structures such as businesses and trusts or specific child considerations, always make sure the solicitor can cite similar cases they have worked on, successfully, relevant to your situation.

3. **Do they offer an initial consultation?**

- This will give you the opportunity to decide if you feel comfortable with the solicitor in question, and whether this is someone with whom you could develop a good rapport. Clear communication with your solicitor will be essential during the entire divorce process.

4. **Do they offer transparency on their fee process?**

- There are many horror stories of warring couples spending all their available assets on legal fees and ending up with little to divide between them Talk with your lawyer about how they structure their fees – their hourly rates, the level of their firm's retainer, how frequently bills are rendered - so you feel in control of the process and can budget accordingly. It is important that your solicitor appreciates the need for proportionality.

- The costs of the divorce process are usually shared between the parties and are relatively modest. The substantial legal costs are usually associated with sorting out financial arrangements and arrangements for children.

- Who pays the legal fees? In financial remedy proceedings, the usual rule is "no order as to costs" unless one party has behaved badly within the litigation. Each party is usually therefore liable to meet their own costs. Where one party holds the purse strings, a request may be made for them to meet the costs of the financially weaker party (and of course, all of the costs ultimately will come from the pot available for distribution). In the event that the party with greater wealth is not minded to make provision for the financially weaker parties' costs there are other sources of funding available, depending on your specific circumstances. Outside of your own bankers and friends and family who may be prepared to assist financially, a number of organisations offer litigation funding specific to a financial remedy claim (please make sure you do your own research into any firm you are recommended before signing any loan contract). It is also possible to make an application to the court for a Legal Services Payment Order ("LSPO") in certain circumstances. Some solicitors might be prepared to offer a Sears Tooth Agreement whereby they wait to collect their fees until an overall resolution has been achieved, whether as a result of a negotiated settlement or an Order imposed by the Court.

5. Set Out Your Strategy

- No two divorces are the same and every family is different. Do not be guided by what you hear from friends and family, as each case is determined on its own specific facts. Early discussions with your solicitor are essential to identify your key objectives and how realistic they are. Consider in advance whether you believe alternative methods of resolving matters are likely to be successful or whether there is likely to be no alternative to taking your claims to court.

Alternative Dispute Resolution ("ADR") vs Litigation

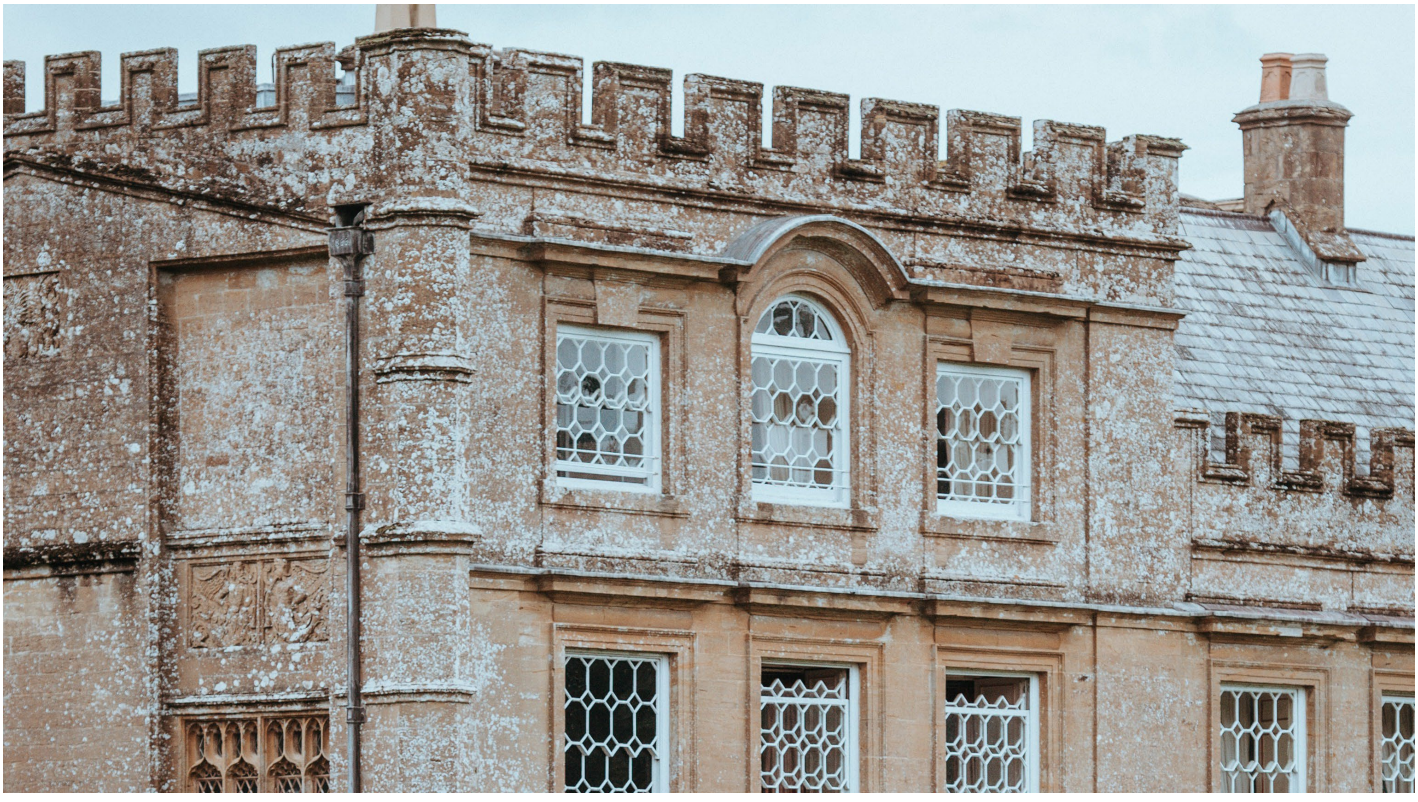
Following changes to the Family Proceedings Rules that came into effect in April 2024, the courts are now taking an active role in encouraging parties to explore other options to resolve their differences. Non Court Dispute Resolution ("NCDR") is a global term used to incorporate alternate methods of dispute resolution including, but not limited to, arbitration, mediation, early neutral evaluation ("ENE"), private FDRs and collaborative law approaches. It is now a requirement to actively participate in exploring NCDR. Prior to any court hearing it will be necessary to tell the court what NCDR avenues have been explored. Failure to engage in NCDR may result in proceedings being adjourned to enable NCDR to take place. The court also has the ability to make costs orders if one party has failed to engage in NCDR unreasonably.

DIVISION OF FINANCES IN ENGLAND & WALES

Unlike many European jurisdictions which tend to redistribute wealth on divorce by reference to a standard matrimonial property regime which the spouses will have entered into at the time of their marriage (very often, either a separate property or a community of property regime), financial remedy law in England and Wales operates on a bespoke, discretionary basis.

Not only is each case decided upon by reference to its own particular facts but the Court has a very wide discretion when considering the various (non-hierarchical) factors it is obliged to consider under section 25 of the Matrimonial Causes Act 1973 ("MCA") ("the section 25 factors"). Whilst the MCA does not state in express terms the aim of the Courts when exercising these wide powers, case law has made clear that the objective is to produce an outcome that is fair. Fairness requires the Court to take account of all the circumstances of the case and, in seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles and the contributions they have made. In its search for fairness the court will give first consideration to the welfare of any minor children and will be guided by three key principles distilled from the section 25 factors by the family Court judges over the years. These principles are:-

- The desirability of meeting the parties' reasonable future (i.e. post separation/divorce) housing and income needs ("needs");
- Providing compensation to redress significant economic disparity arising out of the manner in which the parties organised their affairs during the marriage ("compensation"); and
- A right to share in the financial fruits of the marriage partnership ("sharing").



How are 'matrimonial assets' defined?

In pursuing a financial remedy application, there are three separate and distinct stages:-

Stage one – the identification of the financial resources (the assets (including any asset likely to be received in the foreseeable future), income, pensions, trust interests (including, interests under a discretionary trust) and inheritance prospects);

Stage two – computation. Often with the assistance of valuation and forensic experts, the evaluation of the available resources; and

Stage three – distribution. Having regard to the section 25 factors detailed above, how to re-distribute the available resources with a view to achieving an outcome which is "fair"

In relation to stages one and two, each party is required to complete a standardised disclosure statement known as "Form E" which is a document setting out that party's assets, income, debts and (put simply) what that party considers they will need post-divorce to satisfy their reasonable future housing and income needs. A great deal of information is gathered to complete this document and it is essential to ensure that assets are attributed with a proper current market valuation. It is necessary therefore to obtain estate agents appraisals of property and to obtain up-to-date valuations in repsect of pensions and so on. There is a duty on each party to give full and frank disclosure and the document must be verified by a Statement of Truth.

In the event that there are issues regarding the valuation of assets, whether consensually or with the assistance of a specific direction from the Court, it may be necessary to instruct an expert to prepare a valuation report with a view to addressing such "valuation" issues.

Once the court is satisfied that stages one and two have been properly addressed (together often referred to as the computation stage), it is possible to proceed to stage three – distribution.

The section 25 factors the Court is required to consider are as follows:-

1. The income, earning capacity, property and other financial resources each party has or is likely to have in the foreseeable future;
2. The financial needs, obligations and responsibilities each has or is likely to have in the foreseeable future;
3. The standard of living enjoyed prior to the breakdown of the marriage;
4. The age of each party and the length of the marriage;
5. Any physical/ mental disability;
6. The contributions made by each party to the welfare of the family;
7. The conduct of each party – only if it would be inequitable to disregard it; and
8. The value of any benefit they will lose by divorce.

With the benefit of the parties' Forms E and any relevant valuation evidence the Court ought then to be in a position to answer the following questions:-

- What is the value of the parties' net assets?
- Do the net assets represent wealth generated during the course of the parties' relationship by dint of their joint efforts and therefore should be treated as matrimonial property?
- Should any part of the net assets be treated as non-matrimonial property, being wealth acquired by one of the parties before the marriage or coming from an extraneous source during the marriage or post-separation?
- What is the value of the parties' sharing claims; specifically, are there any reasons why the Court should depart from 50:50 (examples of which might be the existence of non-matrimonial property or the illiquid nature of one of the assets)?
- What is the value of the parties' needs-based claims?

Equipped with the answers to these questions the Court ought then to be in a position to evaluate what might amount to a fair, reasonable and practicable determination of the parties' financial remedy claims. In this regard, it is often said that when a result suggested by the needs principle produces an award greater than the result suggested by the sharing principle, needs should in principle prevail. When a result suggested by the needs principle produces an award less than the result suggested by the sharing principle, sharing should in principle prevail. In cases involving substantial assets, the Court can consider sharing prior to needs. In a so called "big money case", it is probable that sharing, whether equal or not, would cater automatically for needs.

The third principle of compensation is less relevant and only applied rarely – usually where one party has made financial sacrifices for the benefit of the marriage. An example is where one party has given up a lucrative career to care for the family.

Ultimately, the court will be looking to craft a bespoke solution taking into account all of the criteria set out above when applied to the particular financial circumstances of the family in question. It is important to emphasise that Family Court judges have a very broad discretion in reaching their decisions.

Will a Pre-Nup hold up in court?

Strictly speaking, pre-nuptial agreements remain unenforceable as a matter of English Law. However, since the landmark case of Radmacher v Granatino in 2010, the case law demonstrates that, if properly drafted and subject to a number of what are now well-established criteria, the Court is likely to uphold such agreements. Our advice is: if you want to protect your assets and have as much certainty as is possible, get a pre-nup.

However, if you missed the boat before your marriage, it remains possible to put in place a Post-Nup. A post nuptial agreement is an agreement signed during the marriage by which a couple can reach a consensus on how assets are to be treated in the event of a divorce. Like pre-nuptial agreements, they are not legally binding (and cannot oust the jurisdiction of the court) but if prepared properly a court is likely to give weight to the agreement in the event of the marriage breaking down. A pre-nuptial agreement is usually drafted when a couple are at a harmonious stage of their relationship and it is easier to negotiate what is considered fair. Post-nuptial agreements can be negotiated at any time after the marriage and are sometimes put in place where a couple has simply run out of time to execute one prior to the marriage. However, they can also be put in place when a marriage has reached a rocky stage to provide the financially weaker party with financial comfort without resorting to divorce.

Does behaviour in a marriage impact on a financial settlement?

Very rarely. A spouse's behaviour during the marriage is highly unlikely to have an impact on the financial award. An adulterous party does not pay more for their affair nor is a neglectful parent awarded less for poor parenting. It may only affect a judge's decision in extraordinary cases of harm or where the behaviour directly affected the family finances. This can feel extremely unfair but the courts are clear: a financial settlement is not an opportunity to penalise bad behaviour.

WHAT HAPPENS TO CHILDREN IN DIVORCE?

The word "custody" does not apply in English law - it is an American term. In England and Wales, we have 'Child Arrangement Orders' and a number of other legal orders to protect the rights of the children, the co-parenting experience and financial provision for the upbringing of the children.

It is always advisable to avoid court wherever possible to minimise the destabilising stress on the children involved and to preserve the relationship between the parents. The relevant statute is the Children Act 1989 ("CA1989") and at its heart is the "no order principle". The court must not make an order relating to children unless it can be shown that it is in the child's best interests to do so. It is entirely open to parents to agree matters between themselves with no need to formalise the arrangements. The court will only intervene if the parents cannot resolve matters themselves.

What is a Child Arrangement Order?

This is an Order made on an application to court under section 8 of the CA 1989 regulating with whom a child will live ("residence"), how much time the child will spend with the other parent ("contact") and when and what other types of contact will take place (such as phone calls). They are legally binding and usually last until the child is 18 although they can be reviewed at any time and frequently are redefined as the child grows older and has different needs.

What is a Specific Issue Order?
An application for a Specific Issue Order deals with a specific aspect of a child's upbringing. This might include issues such as identifying the most appropriate school for a child to attend, or whether a child should receive a particular form of medication or vaccination or follow a particular religion. These orders can be useful if you and the other parent have very different outlooks or considerations on bringing up your children.

What is a Prohibited Steps Order?
This is the other side of the coin to a Specific Issue Order and specifically prevents a parent from doing something that the other parent objects to. An example might be an order prohibiting one parent from taking a child overseas to a particular country.

What is a Leave To Remove Application?
This is an application by a parent who wishes to move a child from the place where they usually live, to live in another part of the UK (internal relocation) or to live in another country (external relocation). In order to relocate, both parents must consent or the court will be asked to adjudicate.

If you have concerns about the safety and protection of your children, you must discuss this with your solicitor to ensure that the right type of order can be made and will be legally upheld.

Provision of Finances for Children
Child maintenance arrangements meet the cost of a child's day-to-day expenses, one-off costs and the costs of providing them with a home post separation. It is open to parents to agree this directly between themselves and it can be included in an overall financial agreement between the parents. It is usually done by agreeing that a monthly amount will be paid to the parent that the children spend most time with. In the event that an agreement cannot be reached, then an application can be made to the Child Maintenance Service who will apply a formula to calculate how much maintenance should be paid. In the event that there are special circumstances (such as a child's disability) or a parent earns in excess of £156,000 gross per annum, it is possible to make an application to the court for a "top-up" order.

In addition, it is possible to make applications in relation to provision for children under Schedule 1 to the CA1989. This is typically a route for unmarried parents to make applications on behalf of children for provision beyond monthly payments (for example for the provision of suitable accommodation during their minority).

ADVICE ON PLANNING A SMOOTH DIVORCE

Approaching separation and the resolution of issues around finances and children usually takes place at a time when the parties are feeling emotional and can seem daunting. A "smooth divorce" might feel like a tall order, but it can certainly be a realistic ambition. Here are some best practice tips to help achieve that goal:

Establish your strategy at the start

It is crucial to consider from the outset what your realistic priorities and objectives are. This can be incredibly difficult when one is feeling emotionally fragile and therapy may help support you in this process. Being led by your needs, and the needs of your family and children, is the most crucial part of the pre-planning stage on moving forward with a divorce process. If you know what you want the end point to be, and are clear on to what extent your ex-partner agrees or disagrees with your objective, then you can set your strategy and work with your solicitor towards your goals.

Get qualified legal advice

Good, trusted, qualified advice from a solicitor and a team you have a rapport with and who have taken the time to understand your needs and objectives will make the process far less stressful. The team around you are the people that you will need to share private information with, to trust with resolving issues about the things that matter most to you - children, pets, home and others - so they need to be experienced, qualified and have your best interests firmly at the centre of their approach.

Get a legally binding Financial Order

It is essential to ensure that any agreement is properly recorded and sanctioned by the Court so that it carries the status of an order which means that it can be enforced if one party fails to adhere to it. It is crucial to remember that financial arrangements between former spouses are not included in the divorce process, meaning that it is possible to be divorced yet still have financial obligations to a former spouse. In fact, there are examples of former spouses successfully claiming millions of pounds, even years after a divorce. Even if you are the most amicable of ex-spouse, make sure you have a legally binding Financial Order that protects everyone's best interests. It will help to guarantee a fair and just separation.

HOW WE CAN HELP

Payne Hicks Beach's best-in-class divorce lawyers act for and against a wide variety of individuals. Our divorce lawyers are regularly involved in high profile cases at all levels and are well known for their discretion, empathy and trust.

We are sensitive to the highly personal issues involved and are able to recommend suitably qualified professional counsellors and mediators, where appropriate. We frequently deal with international aspects of divorce and separation and work with trusted lawyers and other advisers in many different jurisdictions. We frequently work with IAFL lawyers in overseas jurisdictions.

Seeking our advice promptly is often the best way to having one of the best solicitors in England & Wales looking after your interests.

PAYNE HICKS BEACH

CONTACT US

10 New Square, Lincoln's Inn, London, WC2A 3QG

DX 40 London/Chancery Lane
T: +44 (0)20 7465 4300
F: +44 (0)20 7465 4400

General enquiries contact: enquiries@phb.co.uk
PHB.CO.UK/FAMILY