Breaking Up –

Without Falling Apart

The Essential Guide to Separation and Divorce in Scotland

Anne Hall Dick
Retired Family Law Specialist
Family Mediator
Trainer in Mediation, Negotiation and Collaborative Law
Associate Member of the Chartered Institute of Arbitrators

Inkdance
FAMILY MEDIATION
anne@inkdancemediation.co.uk

BREAKING UP – WITHOUT FALLING APART

Introduction and CONTENTS

INTRODUCTION

Since you're reading this, you are either thinking about a separation, find yourself coping with a separation or helping someone else deal with a separation. Some parts of this will seem more important to you than others.

Look at the list of contents

Read through the sections which deal with the questions you have been thinking about. Then take some time to have a look at the other chapters, because they may help you to understand the whole picture. The idea is to let you have information and details of resources which can help you through.

Going through a separation is never easy

It is best to cope with things a bit at a time. With the right attitude and the right help separation can become a transition to something workable. However, even with the right attitude and the right help there will still be times when you may feel you cannot cope.

Be patient with yourself. **Don't panic!**

A separation is both a psychological and a legal journey. It is not a single event but a process. In the navigation, both elements will have some impact. The purpose of this guide is to shine a light on the terrain. It's a small scale map. There are suggestions about how to fill in the detail for any parts you want to explore more fully. The guide is available on a website because the legal information tends to change quite regularly. The information is as up to date as possible at the date you'll find at the foot of each page.

Travelling companions

Separation can feel quite a lonely transition. Both aspects of the journey, legal and psychological, are complex. I hope this book helps you get your bearings and to make sense of the new terrain you are in. Family law is complicated. It is important to seek advice from a family lawyer you have confidence in. The legal information here is to help you start to make sense of things. It is not the same as having legal advice about your own particular circumstances. Some guidance is given about finding family lawyers. The way you sort things out will make a big difference. Guidance is given about the different ways available. The right support is crucial. Friends and family can be fantastic. Sometimes more neutral assistance to deal with the emotional rollercoaster is also a powerful catalyst and various resources are outlined later.

So good luck!

Remember that the word "crisis" in Chinese is said to be made up from the pictograms for "danger" and "opportunity". Hopefully this will help you minimise the dangers and maximise the opportunities.

Chapter 1

You are thinking about separating.

Separation solves some problems and causes others. Because separation causes so much upset and hurt, the first thing to do is to consider very honestly and carefully whether there is any chance of saving the relationship. Couple counselling or individual counselling can be invaluable here, and, even if separation still occurs, counselling is likely to make the process easier all round. For more information about counselling and names and addresses of counselling agencies, see Chapter 22

Remember that if you have children they will usually very much want you to stay together. This is not necessarily the best thing for them, but you must be sure enough of what you are doing to be able to cope with the children's reaction.

Be very practical – think of the mundane day to day things that would have to be sorted out. You will realise that money coming into the house when you are together in one household will not go so far as between 2 households. Separation triggers major financial consequences. Think them through very realistically.

If your partner has a drink problem or is violent or abusive to you and will not go for help, or perhaps will not even acknowledge the fact, then it is likely to be more urgent for you to get out of the relationship. It might also be helpful for you to have specialised support.

One thing you have to accept is that if you don't like your partner's behaviour, and your partner doesn't think there is anything wrong with it, then you can't make your partner change. You must either find some way of living with the situation, or leave the relationship. Living with a partner who for some reason is behaving badly to you can have a terrible effect on your self-confidence.

Try to make your decision while you still have enough energy to use for the future!

If you do decide to separate, you must not expect your partner or your children to accept your decision without some hurt or anger. However, once you have thought things through carefully and made your decision, don't spend too much time in trying to justify your decision to other people – even your partner. Doing this usually involves underlining or exaggerating the faults of your partner, and only causes more bitterness. It is often better to be able to accept that you both embarked on the relationship with optimism and believed it would work. If you have now come to the conclusion the dynamic has changed, you can agree to disagree about the reason for that. If you have children they will cope much better if they don't overhear arguments about where it went wrong.

If you have children, make it a priority to arrange matters so that the children suffer as little confusion and uncertainty as possible. For example, if you have become involved with someone else, be careful how you explain this to the children and how you make the introductions. If your partner has become involved with someone else, be just as careful how this is approached with the children.

Don't rush it.

Bear in mind that no decision will be 100% right. Whatever decision you make will leave some problems to cope with. What you should do is work out which of the possible problems you would be most able to deal with.

If you decide to separate, and you are the main source of income, don't offer more financially than you can realistically manage. Sometimes people do this because they feel bad about hurting their partner. They think such an offer will soften the blow.

Well – it might at that point. Then it will become obvious to you that the amount you are left with won't keep you going. If you have to backtrack on the offer it will feel worse for your partner than if you had never made it. Equally, don't leap to the opposite extreme.

Be realistic

If on the other hand, you are not the main earner don't be so eager to get out of the relationship that you insist on giving up any possible claims you might have. Money claims on separation are generally about fair sharing and practicalities – not blame apportionment or assuaging feelings of guilt.

Caution
Remember that you have taken time to adjust to the prospect of a separation. You have probably gone through various stages including sadness and perhaps anger or anxiety. Your partner is about to be faced with the necessity of adjustment to huge changes, and not of choice and will have to go through those stages while trying to deal with practical problems.

It is important to disentangle the emotional aspect of a separation from the money aspect.

To Think About

If you have made the decision to separate, the priorities are:-

The children: think about a referral to mediation by finding a Family Mediation Service through https://www.relationships-scotland.org.uk/family-mediation or a solicitor mediator through CALM website http://www.calmscotland.co.uk/our-mediators.htmlor using the Collaborative process http://www.consensus-scotland.com/

Practicalities: a consultation with a sympathetic family lawyer can help stop things going into a downward spiral. http://familylawassociation.org/family-lawyer-search.aspx Support using a divorce coach or counsellor can help you keep on track with the emotional journey. Chapter 22

Back to Contents

Your partner has made the decision to separate.

This is a 100% "rug being pulled out from under your feet" situation. It is frighteningly cold and lonely for most people.

If your partner had died, you would at least have happy memories to look back on. As it is, you probably feel that the pain of what is happening now spoils the past as well. Even taking one day at a time at this stage may seem like a tall order. It is important to keep in mind that if you can just put one foot in front of the other and plod through the practical things that come up, then at some point the weight will start lifting.

You will probably feel very drained. Try to use the energy you have to deal with the present, rather than constantly thinking over what went wrong. Begin to paint a picture of what could be salvaged to build the best that can be achieved for the future. If you approach things this way, you may find that at some point you are also able to rescue some of the good memories you had in the past.

You may feel almost overwhelmed by quite violent emotions from time to time. This does happen. You are likely to go through a range of emotions from denial and anger to sadness. The most important thing to remember is that it is natural to go through this roller coaster of emotions. You are coping with a threatening situation and significant loss. It is also important to let yourself move through the stages and not get stuck.

Don't fight it but don't feed it!

Talking to friends and relatives can help but remember that although they will want you to feel better, they will be feeling upset too. It can be a good idea to talk things over with someone who is not involved, such as a counsellor. For information about counselling and names and addresses of counselling organisations see Chapter 22.

If you have children then they will almost certainly be upset too. It is very important to see that although you and the children are hurt, you are not all in the same position. The relationship you had with your partner is ending. The relationship the children have with the other parent goes on. It is considered very important for children to keep in contact with both parents, except in unusual circumstances.

If the children are based with you, then once the dust has settled you should find it helpful to have the other parent still making a practical contribution. Try not to have a gap in contact.

You may find that is just too upsetting to be present at the hand-over in the aftermath of a separation you did not anticipate happening. If so, try to arrange for a friend or relative to be there instead until you can cope with seeing your partner. A referral to family mediation could be very helpful. Details of relevant websites can be found at the end of this chapter.

If your partner is involved with someone else then you might feel strongly that the children shouldn't see that other person. For a little while after the separation it might indeed be better for the children not to have to deal with a new person – they will have a massive change to cope with anyway. However, there will come a point quite soon when it will almost certainly be important for them to meet.

Remember the children are not being introduced to a replacement parent. They will be meeting someone who is an important friend of their mum or dad. For the children to remain close to the other parent, and in order to prevent the situation becoming artificial, then they need to meet. This will not be easy for you to cope with, but if you can it will be a huge help to the children.

If the children are based with your partner, then when you see them try not to rub in how unhappy you are. The children will probably be very anxious about you anyway. It is frightening and unsettling for children to see their parents being very sad. Avoid blaming or criticising the other parent. It is very distressing to children to feel they have to take sides. You are likely to be seeing the children less frequently than before. You may be seeing them somewhere they are unfamiliar with. The temptation may be to provide treats and be indulgent. The main gifts you can give your children are your time and attention.

While on the subject of minimising anxiety, try to keep very closely to arrangements you make about contact with the children. If you are quarter of an hour late picking the children up, then they and the other parent will be getting more and more worried about whether you are going to turn up. When you do arrive, the atmosphere will be tense – and an argument all too likely. Similarly, if you are quarter of an hour late bringing them back, your partner will probably be imagining that you are on your way to Australia and again it will be so tense when you do turn up, sparks will fly.

Finally, a reminder to be realistic where money is concerned with the overall finances. If you are the main earner, avoid making financial arrangements that are really bribes. If you offer a lot more than you can reasonably afford, in order to try to make your partner see you in a better light and in the hope of a reconciliation, you are likely to remain separated and very poor!

See the information about making financial arrangements in Chapter 12.

To Think About

If your partner has decided to leave, your priorities are –

The children: separate out your interests from those of the children – a referral to the Family Mediation Service through Relationships Scotland https://www.relationships-scotland.org.uk/family-mediation or a solicitor mediator through CALM website http://www.calmscotland.co.uk/our-mediators.html can help.

Practicalities: taking advice from a sympathetic family lawyer can help make some of the practical problems more manageable. See Chapter 6, Choosing a Solicitor

Support: coping with a separation you had not anticipated is most likely one of the most stressful things you could have to deal with. It would be very wise to seek the help of a divorce coach or counsellor to help you cope. See Chapter 22, Counselling and have a look at some suggestions about how to deal with conflict in Chapter 29.

Back to Contents

You have agreed to separate.

If the relationship is definitely over and you can separate amicably, that would be great! Just a word of caution. If you are inclined to describe the choice to separate as a mutual one, be very frank with yourself about what your partner would say if he or she was asked that question by a third party. If, on reflection, you realise they may not be so clear it is a joint decision then do have a look at Chapter 1.

If a decision is a mutual recognition that you have drifted apart then that should make the separation easier to manage. Any children involved will be much better able to cope than if there are lots of arguments. You will be able to keep the happy memories you have without feeling they are spoiled.

Even if there are no obvious problems concerning the children, you might wish to use the Family Mediation Service, part of Relationships-Scotland.org.uk to discuss how best to break the news. A mediator can help you to make sure you have thought things through from the children's point of view. Children usually want their parents to stay together. That is not always possible but it is important to be able to cope with their sadness and perhaps anger.

Preliminary advice from a Solicitor could be wise – it can help in avoiding unexpected pitfalls. Sometimes people want to have a friendly separation, but find that their ideas of what constitutes a fair financial split are much further apart than they would have expected. It might be helpful to use a solicitor mediator to tackle both arrangements for the children and finances –find a solicitor mediator through their organisation called CALM at http://www.calmscotland.co.uk/our-mediators.html.

The legal rules were intended to be fair. They were arrived at after consulting a wide range of people about what would be appropriate. Sometimes people make informal agreements between themselves, only to discover when they take legal advice that they have more rights than they realised. Plans made without full information are likely to unravel later.

Take legal advice before you shake hands on something

Anything other than the most simple agreement usually has to be drawn up in a fairly technical way if it has to be relied on in the future.

The Collaborative Process can be a particularly good way to maintain a problem solving constructive focus when making practical plans for the future. See Chapter 5 – Ways Of Sorting Things Out.

Another complicating factor can be the appearance of a new partner on the scene. Even if the new relationship only starts after the separation, it can make the other person feel more hurt and threatened than they might have expected. Things should settle down again eventually, but don't feel too dismayed if there are some hiccups.

Any separation – even if agreed by both partners – brings about big changes, which uncover unexpected insecurities and anxieties. Just accept that there are likely to be bumpy patches, and fasten your seat belt ready for when you hit them!

To Think About

Is the decision really a joint one?
Are the plans you're considering really fair to both of you?
Remember that even a planned separation will trigger strong emotions.

Back to Contents

Chapter 4

What does the law offer?

When two people are no longer making plans for a joint future difficulties can arise because there may be a disagreement over what is fair and what values are important on a personal level. Each of you will tend to become increasingly preoccupied about your own separate future. Because that will have an element of uncertainty about it this preoccupation is likely to be coloured by anxiety. In turn, that can make you become rather less sensitive to others in the situation.

Because of all these factors it is usually helpful and important to be able to refer to some more neutral framework as a benchmark for fairness. The legal rules can provide such a benchmark. If you can resolve matters by agreement then the legal rules remain simply guidelines. If you can't agree, then the legal rules will be applied in the decision making process which would then be likely to take place in court proceedings.

The legal rules may not reflect your personal values. They are usually an attempt to be fair. They were arrived at after wide consultation about what would be fair for the adults in terms of finance and helpful to children. Even so, they may not take into account ethical or moral aspects which might be considered important by one of you. Sometimes in an agreed settlement these other values can be given some weight but if matters have to be resolved in court proceedings, it is important to understand that the rules are there to provide certainty and will not always do so in a way of your choosing.

What is useful is to know what the legal rules are. It is then possible to assess how close they are to your own value system. If they coincide then it is reassuring to know that whether or not matters can be agreed the legal considerations will reflect your own priorities. It then becomes important to weigh up what factual information there is to tie in with your own reading of a situation. If legal rules have to be applied then there is usually quite an exacting standard of evidence needed to prove your account if this is in conflict with someone else's.

One aspect which can seem quite harsh about legal rules is that people are expected to a large degree to look out for their own interests. That will often mean ensuring that there is a very clear record, preferably in writing, of any financial arrangements such as family loans or gifts.

In Scotland when couples separate, in most cases the arrangements for children and the financial consequences are resolved by agreement. The terms are set down in a document called a Separation Agreement or Minute of Agreement. Only a court can end a marriage or civil partnership by granting a divorce. Although that is a very significant step it is usually fairly straightforward in legal terms. What is more complex is sorting out the child related and financial issues.

If they have been sorted out in a Separation Agreement or Minute of Agreement the court doesn't need to deal with those aspects. If not then the court has to be asked to make decisions about them, to think about applying the legal rules. Legal rules don't need to be a straightjacket. They should help give shape to agreed settlements. There are potential legal claims involving money, property and pensions which will be lost if not sorted out before or as part of divorce proceedings.

What Do Lawyers Offer?

Family lawyers act as interpreters, guides, negotiators and advocates as well as being a gateway to other resources. They help you make sense of the legal rules in your particular circumstances, assess the options and work out the best way to deal with the practical plans. This broad outline of information is just a starting point. The specific combination of details relevant for you has to be taken into account to assess a workable way to take matters forward. A family lawyer provides practical support and strategies to achieve a workable transition. You and your partner may have similar ideas about how to sort things out. You may have very different ideas. You may have no idea of where to start. Whichever applies lawyers have a helpful role to play. Your lawyer can help you to check that proposals are fair and what other aspects need to be considered. Unless there is very little in the way of money and no property to sort out, it will be important to have a properly worded agreement drawn up and carried out or, in some cases, an application made to court to sort things out. Chapter 5 Ways of Sorting Things Out explains the different approaches available to sorting things out.

To Think About

Remember that the legal rules were drawn up after wide consultation to provide for fairness and help to cushion children from the impact of separation. Family lawyers can help you achieve those objectives. See Chapter 6 Choosing a Solicitor

Back to Contents

Chapter 5

Ways of sorting things out

The ways in which decisions can be arrived at following family breakdown are varied. If it was a joint decision you might have discussed broadly how to take things forward. Even there, it is usually helpful and often necessary to have some more formal assistance to check and finalise matters. If it has not been a joint decision then it is likely to be necessary to have some assistance to plan things as constructively and fairly as possible. If your partner has been violent or dishonest then it is particularly important to have assistance in sorting things out. The most important thing is to be aware of the different ways things can be tackled and to decide what is appropriate for you.

The spectrum

The range of options goes from mediation through the Collaborative Process, negotiation and arbitration to litigation.

Mediation

Mediation can help you identify a mutually acceptable formula for settlement by direct discussion with your partner with the assistance of an impartial third party. The mediator facilitates the process by providing a clear structure for discussions and skills to keep the conversation constructive and foster understanding.. The first mediation session is usually an individual one. That gives you the chance to ask any questions you have about mediation. It lets the mediator check mediation is a good fit for you both, After that mediation sessions are usually joint so you and your partner must be willing to sit down together to have this assisted conversation. These sessions usually last about an hour and a half. Three or four sessions may be sufficient although more may be necessary. Once plans are made in mediation they can be put into binding form by your lawyer and your partner's lawyer.

Mediators can be found through the Family Mediation Service which is a publicly funded organisation. Some family lawyers are trained as mediators. The association for family law mediators is called CALM. More information can be found through https://www.relationships-scotland.org.uk/family-mediation and through the CALM website http://www.calmscotland.co.uk/our-mediators.html.

Collaborative Process

The Collaborative Process enables you to have the support of your own advising lawyer through a structured series of meetings. It recognises the importance of the emotional transition and the impact it can have on decision making. You,

your partner and the solicitors all agree to use a solution seeking approach. You have to agree to make full disclosure of information. Other professionals such as financial advisors are likely to be involved in the Collaborative Process. Support can be given by Family Consultants are counsellors training in the Collaborative Process. The Family Consultants focus their skills on helping you and your partner communicate effectively within the Collaborative Process and in the future. They can help you discuss arrangements for the children. The Participation Agreement you sign at the beginning of the process underlines the importance of dealing with a separation in as constructive a way as possible to limit the impact on the children. It allows options to be explored with full information and legal advice in a joint problem solving exercise.

If matters cannot be resolved by negotiation then the collaborative lawyers cannot take matters forward by litigation. You would have to instruct a new firm of solicitors. It is more usual to reach an agreement. In that case the Collaborative lawyers draw up a Separation Agreement. Information about the collaborative process can be found in the Consensus website http://www.consensus-scotland.com/.

Solicitor Negotiation

Negotiation again allows you to retain your own advising solicitors through a process of exchanging information and looking for terms which will be acceptable to both of you. There is no set structure or time scale for negotiation. Sometimes it can be very problem solving and co-operative. Sometimes it may feel more adversarial and seem to take a long time. If matters are resolved the solicitors adjust and finalise a Separation Agreement as part of the process.

Family Law Arbitration

Occasionally the legal rules and emotional climate generate a big gap in expectation. This can create a need for a third party to make a decision. If that happens you can still avoid going to Court if you and your partner use a family law specialist as an arbiter. Family Law Specialists who are trained in arbitration have formed The Family Law Arbitration Group (Scotland) (FLAGS)- http://www.flagsarb.com/. A member of FLAGS could be appointed as arbitrator. If you were using the collaborative process and there was a particular matter you and your partner were not able to agree about you could also use a joint referral to arbitration to deal with that, without the need for a change in advising solicitors.

Litigation

Litigation means having things sorted out in Court. It is the most formal decision making process. You and your partner each ask for the remedies you want and provide information and legal argument in support of that request. You

challenge what the other person wants. The outcome is binding and enforceable.

Weigh the options

Would you be able to sit in the same room as your partner and a neutral third party to discuss plans which would be workable for you, your partner and any children involved? If the answer is yes, mediation may be right, particularly if you and your partner have in the past been able to make joint decisions when things were more positive between you.

If the answer is no, would you be able to sit in the same room as your partner and both advising solicitors to consider plans which would be workable for you, your partner and any children involved? A positive response could mean that Collaborative Practice may be right for you, particularly if despite any current difficulties, you and your partner have had a reasonably respectful relationship in the past.

If not, can you discuss matters with your own solicitor and consider the plans that are best for you and let your lawyer see how much of that can be achieved with a lawyer doing the same for your partner? If so, negotiation may be right for you.

If not, would you both provide the financial details and other necessary information to a third party who is a specialist in family law, who would explore the possible ways forward then make a decision binding on both of you? If so, arbitration might be right.

If not, litigation is the remaining route. It would be the right process to use if there are complex legal issues or if your partner is abusive or dishonest about financial matters.

To Think About

Unless a separation is a joint decision, at some point it is likely you will have a mainly negative view of your partner. It is very important to be wary if your partner has a history of abuse or dishonesty. In other cases, there is a risk that because the relationship has broken down, you will each begin to see one another in an unrealistically bad light. If someone is dishonest or abusive the law does give protection and it is important to take advantage of that protection. In other cases, the legal rules emphasise fairness to both parties on the financial issues and putting the best interests of children first.

The reason why a relationship has broken down is usually not considered significant in dealing with the financial aspects. There is a risk that if you use a process which emphasises the adversarial elements, it will be financially and emotionally draining. The main thing is to give careful thought to what form of

Dispute Resolution you chose. It will affect the kind of family you have in the future.

The concluding Chapter 29 – 'So how do you break up – without breaking apart?' gives some more information to take into account when deciding which way to us to sort things out

Back to Contents

Chapter 6

Choosing a solicitor

This may be the first time you have had to see a lawyer. If you have already seen a lawyer it may have been about buying a house or making a will.

The kind of lawyer you talk to at this stage will almost certainly be a solicitor, rather than the other type of lawyer, an Advocate. Advocates are more specialised and have a focus on the legal rules as they are or may be applied in court. Solicitors have a more general approach. Some solicitors do extra training to become solicitor advocates although they are less usual in cases involving families.

It may feel very daunting to think of having to discuss very private and emotional matters with a solicitor. In fact, it should help. A solicitor is impartial and able to get the measure of your situation without having any personal angle. Often people going through separation are worried about things they don't need to. Even if the situation is not great, there is usually a way of tackling it to make it manageable. Solicitors can provide understanding, essential practical advice and information about what other resources are available.

There are a number of ways of choosing a solicitor. Personal recommendation is a good one – if someone you know has had a solicitor for the same sort of thing and you like the sound of their approach, then you should phone the office and make an appointment, giving the name of the solicitor involved. Most firms have more than one solicitor, and often each one tends to practice in a different area of law. Some solicitors, especially in rural areas, still deal with more than one area of law. Many specialise so you should always check.

It is very important for you to choose a lawyer who is used to dealing with family law. You can check the Family Law Association website . http://familylawassociation.org/family-lawyer-search.aspx. Most solicitors who are interested in family law join the Family Law Association. You can also check the website for the Association of Collaborative Lawyers, Consensus http://www.consensus-scotland.com/ and the Association for Family Law Mediators, CALM. Solicitors who are members of all those groups will tend to be very experienced in family law. They are also likely to be able to help you assess the best way of tackling things since they have experience in these various areas. The Law Society of Scotland accredits specialists in Family Law and those details can be found on The Law Society of Scotland website. Your local Citizens Advice Bureau might also provide details of local firms dealing with this kind of work. If you might need Legal Aid then check when you phone to make an appointment whether the firm deals with Legal Aid cases. Some firms, particularly in the cities, don't. You could look at the Scottish Legal Aid Board website (SLAB) to get some idea of whether you might qualify for Legal Aid.

To Think About

The legal rules emphasise fairness and the best interests of children. They can also provide protection if someone is being abusive or dishonest. Lawyers with an interest in family law can help you benefit from these rules in a constructive way.

Back to Contents

Using a solicitor

Most solicitors have a system of appointments – don't expect to be able to see one immediately. You might be lucky and find that someone can see you at once, but usually you will have to wait for a few days and sometimes a little longer.

If you know you are not going to be able to keep an appointment, do let the office know – it might let someone else have an earlier appointment.

At quite an early stage – possibly the first meeting – your solicitor will need some basic details. Sometimes it is difficult to remember things when you are a little nervous, so it could help if you note down some information beforehand. **There are forms available at the end which set out the type of financial information your solicitor is likely to ask for during the process of sorting things out.** It won't be necessary to have all that information before you see your lawyer. Check if you have your children's full birth certificates and your marriage certificate (originals not photocopies). Although they are unlikely to be needed right at the beginning, they are likely to be needed at some point and in a few cases, might be needed quite urgently. It is best to establish if they are available.

If you and your partner have ever entered into any kind of written Agreement, take a copy of that. If you have been married before and divorced, check you have the divorce papers.

If there are specific questions you want to ask, write them down and leave space to jot down the answers.

You might want to take a friend or relative to the office for company, but it is usually better if you go in to see the lawyer on your own. Even if your companion is someone you like and trust very much, some of what they remember and what they think you should do will get mixed in if they are in the meeting and this may confuse matters.

Another point is that the person you take with you could turn out to be a useful witness for you, if matters end up in Court. It is important in those cases that the information about what had been going on is taken from each of you separately.

If you feel you won't be able to remember all that you are being told, you could ask your solicitor if your friend or relative could come in for 5 minutes at the end, in order to listen to a summary of the main points. That could allow you to discuss the options better afterwards.

Don't ever be worried about telling your lawyer if you change your mind about what you want to do. Your lawyer will want to help you get the best out of the situation. For instance, if you start some sort of legal action and your partner then realises that his or her behaviour has simply not been acceptable, you may wish to stop the Court action and enjoy a successful reconciliation.

Whatever you do, you must keep in touch. No lawyer can do what is necessary unless you provide proper instructions and information. The family law framework puts a big emphasis on full disclosure of information. If someone tries to hide information or dispose of assets that is very likely to rebound badly on them.

If for any reason you feel unhappy about the advice you are being given, try to work out:

- Is it the legal rules that you don't like? Sometimes the rules don't fit in with the way you feel, but the solicitor still has to tell you them. It is then a case of "don't shoot the messenger"!
- Is it the way you are being told the information you don't like? If so, try again. Ask questions if there is anything you don't understand and tell your solicitor if you are puzzled or if the reply is unclear.

Sometimes clients appear more composed than they feel. They seem to be taking in information when they are not. Don't worry about saying you don't understand – it's the solicitor's job to explain the legal rules in a way that makes sense. Just remember that solicitors need some feedback – so that they know how they are doing!

If things go wrong

If you or your solicitor are not communicating well, it is usually better to try to get on a better footing than to change solicitors, since such a change will only add to the complexity of the situation. In most cases it would be best to let your solicitor know that you are unhappy and explain the reason. The first solicitor will probably want their bill paid before they hand on your papers – a solicitor generally has the right to keep your papers until you have paid the bill.

If you are receiving Legal Aid, it can take a while to have all the paperwork completed, transfer the Legal Aid to the new solicitor, and delays might not be to your advantage. There are some circumstances, particularly if it is not the first move, in which a transfer might not be allowed.

It is also more difficult from the new solicitor's point of view to pick up things in the middle.

It may happen that the relationship between you and your solicitor does break down completely and can't be mended. If this happens, then of course you

should change solicitors. If things have gone really wrong and can't be resolved by discussion between you and your solicitor, complaints should be directed to the Scottish Legal Complaints Commission - www.scottishlegalcomplaints.com

To Think About

A solicitor is there to advise you, to give you information and to help you think through the possible choices. A solicitor is not there to tell you what to do. You are the one who is going to have to live with the consequences!

It is important that you have a good relationship with your solicitor, that you feel you are being told things in a way that you understand and that you are being kept informed. The best way is to be careful choosing in the first place.

Separation is usually an emotional roller coaster. A family lawyer understands that and will try to help to avoid making important decisions when you are swamped by emotions but it is very often extremely helpful if you have counselling to help cope with the emotional journey. It could help keep the legal fees down!

Back to Contents

Paying for a solicitor

You will probably want to know how much a solicitor's services will cost. Unfortunately, it is very difficult to predict this because it is so uncertain how much work will be involved.

A great deal depends upon you and your partner. If a negotiation or Court action go on and on because there is no give and take or information is slow in coming, with frequent meetings, telephone calls, letters, or court hearings, the legal fees will increase.

If you are receiving state benefit or are on a low income you may qualify for Legal Aid (possibly with a contribution to pay towards that). You should look at the Legal Aid website www.slab.org.uk to establish if you might qualify and that will also give you information about how the Legal Aid Scheme works.

If you don't qualify for Legal Aid and are paying privately, the final cost is likely to be worked out by adding up the cost of each meeting, telephone call, letter, document or Court attendance. Your solicitor will give you an indication of the basis for his or her fee charging. At the outset you should ask your chosen firm for details of their hourly rate and as things progress, the spectrum of costs likely, depending on what process you are going to use to sort things out.

You will also be asked to pay what are known as outlays, the cost of for example specialist reports, valuations or surveys. Remember too that VAT is chargeable on your solicitor's fee.

In 2018 a survey suggested that the average cost of getting married was nearly £18,000. Dealing with a separation should not cost as much as that (unless your situation is very complex or it becomes a very bitter battle when it could cost even more) but the legal costs are likely to be significant and they should always be discussed at the outset, so that you know where you stand about the practicalities of making payment. Most solicitors will expect payment of their fees as the work progresses. Some might agree to accept payment from a final settlement but that is very unusual.

If matters are resolved by agreement, then the starting point would be that you each pay your own solicitor's costs. Occasionally, people agree something else but unless there is an agreement to the contrary, you will be responsible for your own costs. Even if there is an agreement between you and your partner that your partner will meet your costs, you would still be responsible to pay your solicitor if your partner failed to pay up. Even if Court proceedings are necessary, in family actions it is usual for each person to end up paying their own costs. Traditionally, the person who wins a Court case is able to recover the costs from the other person. Because the family law rules are about fairness to both

parties and the best interests of children there is less emphasis on "losers" and "winners" and again, each person usually pays their own costs. If one person is obstructive, unrealistic or dishonest during the Court process then in those circumstances it is possible they might be made to pay at least part of the costs to the other person. You should never bank on recovering costs and you should always remember the risk of having costs awarded against you.

Another feature is that if you don't have Legal Aid and your partner does, then it is even more likely that you will end up paying at least your own costs, even if the outcome seems favourable to you.

To Think About

Remember the legal rules are in general about allowing a fair outcome for both parties and putting the best interests of children first. If either person tries to use the legal process to punish the other person this is likely to make things expensive.

Back to Contents

Written Agreements

In Scotland, the most usual way of sorting things out at the end of a relationship is to enter into a written Agreement. Chapter 5, "Ways of sorting things out" sets out the processes you can use to identify the terms of an agreement. If you have used mediation to identify a mutually acceptable formula then each of you would have your own advising solicitors to check over those terms and in most cases put them into a binding Agreement.

If you are using the Collaborative Process or conventional negotiation then the solicitors involved will draw up a document setting things out. This document may be called a Separation Agreement or a Minute of Agreement. It can be worded in such a way as to have the same force as a Court Order so far as the financial side is concerned. In terms of a married relationship, the Separation Agreement or Minute of Agreement operates a bit like a financial divorce.

Only a Court can end a marriage by granting a divorce or dissolving a civil partnership. The word 'dissolution' is technically the term for the legal ending of a civil partnership. Most people think of it as a divorce for either married couples or civil partners so the word 'divorce' will be used to cover both, although there are differences in the actual procedure. That is always a significant step. However, all the other aspects can be dealt with before that step and set out in the Agreement.

If matters cannot be resolved by agreement then on divorce, the Court has to be asked to decide about the financial aspects and also make arrangements for children if that has not been agreed.

What is covered by an Agreement

An Agreement can cover as much or as little as you want. You could simply agree about financial support for a trial period of separation. However, if you are going to the effort of having a written document prepared, you are more likely to want it to cover all the outstanding matters.

A Separation Agreement usually sets out the pattern of time the children will spend with each parent. Arrangements about children set out in a Separation Agreement do have not the same force as a Court Order. In most cases they provide a reliable enough framework but if there was any real danger of children being whisked away by the other parent, a Court Order would be safer. If matters were as adversarial as that, it is unlikely you would be considering a Separation Agreement!

Depending on how the division of the joint matrimonial or partnership assets is decided, the Agreement may be to allow the family home to be sold and if so, to

say what share each of you should receive. Alternatively, the house and secured loan (mortgage) might be transferred from joint names to one person. If the house is rented, the tenancy could change hands with the agreement of the landlord. The question of occupancy rights might also have to be dealt with.

Division of the contents can be sorted out, preferably with a common sense approach, to reflect the practical needs and wishes of all concerned.

To achieve a fair division of matrimonial assets might involve sharing one person's share pension interests and it is possible to have a pension sharing provision set out in the Separation Agreement. It is very important to remember that the pension sharing is only implemented once a divorce is granted. Implementing means transferring the pension credit to the other person. If you are receiving a pension credit it will depend on your age, not your former partner's age, when you receive the benefit from it. If a pension credit is going out of your pension fund to your former partner then whenever you reach retirement age, it will be the reduced amount which will pay your pension, even if your partner has not yet reached retirement age by then.

The other very important thing to remember is that a pension sharing provision set out in a qualifying agreement will only be valid if the divorce Decree and the provision is intimated to the pension fund within 2 months of the divorce order being issued. Your Solicitor may attend to that on your behalf or your financial adviser. It is essential for you to be sure someone is attending to that step and that they know when the divorce is granted .

Sometimes an Agreement might set out that a capital payment is to be made by one person to the other. The Agreement will detail not just the amount but how and when it has to be paid and whether any interest should be added on until payment is complete, or in the event of late payment.

You might well both agree to give up any claim you could have had against the estate of the other person on death. Just because a married couple or civil partners separate does not mean that their succession rights end immediately. It is nearly always a good idea to draw up a new Will after a separation. It is also important to consider the terms of any nomination in the pension interests you have since that would have to be dealt with separately from these other steps.

The question of ongoing financial support based on income should also be dealt with. Money payable between spouses or civil partners will usually have a cut off date. The amount of support for children is likely to be influenced by the formula set out by the Child Support Agency (CSA) now administered by the Child Maintenance Service(CMS). Even if you both agree on an amount for child support then as things stand, one year after the Agreement is entered into, either of you could ask the CMS to carry out an assessment which would

supersede the arrangement in the Agreement. That means that the amount now fixed in terms of Agreements tends to reflect the Child Support Agency formula.

Any Agreement setting out ongoing financial support will normally also set out the possibility of review on a change of circumstances and sometimes provide for index linking of the amount.

There will also be provisions that make it absolutely clear you have each had full information and advice and are quite clear you wish the Agreement to be formally binding. There are only very limited circumstances which would allow the terms of a Separation Agreement to be challenged, on the basis that it was not fair and reasonable at the time it was entered into. It is rare for a successful challenge to be made so it is very important to be clear about what the terms of an Agreement will mean for you.

The Agreement will be rounded off with your consent to have it registered for preservation and execution. Although this sounds alarmingly like sanctioning capital punishment, it allows for the possibility of chopping off money rather than heads! It allows the Registered Agreement to be enforced in ways that a Court Order can so far as the financial aspects are concerned.

There may be other documents to be prepared in order for some of the agreed steps to be carried out. For instance if a house transfer is involved then a document known as a Disposition has to be prepared to change the ownership. If there is a secured loan, then either a variation of the existing loan or a discharge and a new Standard Security will be needed to sort out that responsibility.

Now that there are potential claims at the end of a cohabitation it is not uncommon for couples who are setting up together though not marrying, to set out their intentions about the money aspect in writing in a pre-cohabitation contract. Before people marry or enter a Civil Partnership they sometimes wish to enter into a Prenuptial or Pre Civil Partnership Agreement. That is particularly relevant if there are quite a lot of assets in existence already or if there are children involved, from earlier relationships. These extra elements can mean that the "default mode" in the legal rules is less appropriate and "bespoke" arrangements more necessary. Sometimes a couple will want a Postnuptial or Post Civil Partnership Agreement to deal with things that happen during the marriage which could impact on the money aspect if they end up separating.

To Think About

Since life has become more complicated it is worth considering whether a written Agreement at the beginning of a relationship might be helpful to avoid friction and uncertainty. See chapter 15 about cohabitation and 16 about prenuptial agreements

An Agreement entered into at the end of a relationship is intended to allow both parties to move on with certainty about the future.

For terms of settlement to be identified, remember that both of you have to agree and so it is necessary to be able to see things from your partner's perspective to be able to achieve an agreed settlement.

Back to Contents

Chapter 10

Children in separation and divorce

When parents separate it is terribly important, and often very difficult, for them to bear in mind that although they are no longer going to be a couple, they will continue to be parents.

Children usually want their parents to stay together – they are likely to be unhappy about the separation. Children should be able to love both parents without feeling guilty or disloyal. They won't want to feel that one of their parents is a bad person. More and more research is available on how children feel during a separation and how they turn out afterwards. It seems that children are often so frightened to rock the boat any more, and so anxious not to hurt their parents, that they hide their own feelings. In most cases, the parents are quite unaware of how badly the children feel. A separation will usually sadden children but it need not cause serious lasting damage. The damage is usually caused by the adults fighting, especially where that conflict has the children as a focus, which often happens after separation.

Although the separation itself is likely to upset the children, it is up to both parents to protect the children from the fallout. As mentioned, if either parent fails to do this, it is likely to lead to damage. It is particularly difficult if you didn't want to separate in the first place.

You have to think about the long term, and hold on to the fact that your own relationship with the children later on is likely to be much better if you keep them out of the adult problems. The children are also likely to turn out happier and better adjusted. So will you probably!

Children are usually much more aware of what is going on than you would realise. Uncertainty about the future can make them feel worse than the truth. They will want to know where they are going to live and go to school and when they will be with the other parent. It is usually best to spare them the gory details of the reason for the separation. The main message for children from both parents should be that sometimes parents do separate, that it is sad when they do, but they continue being parents and loving their children and that the separation is not the children's fault.

If you were the one who left the family home, it is quite likely that the children will feel hurt about that themselves. This is particularly true if you have a new partner, especially if that partner has children. Don't assume that just because the children seem happy when they are with you, they are not upset. They might confide such feelings to the other parent.

Try to work with rather than against the other parent over this. Don't assume the children are being coached or indoctrinated. Similarly, don't reach for the

telephone to protest if you are the main carer and the children return after contact upset and full of complaints.

Children, like adults, take time to adjust after a separation. They have to work through various stages. This will show up in different ways, depending on their ages, from bed wetting to tantrums to lack of concentration. The signs often peak after contact but it is better that there should be visible signs of adjustment than silent suffering! Make sure they realise that the separation isn't their fault.

Both parents: beware of misreading your children's messages. A child will often say to each parent separately that they want to be with that parent. Both parents may interpret this as meaning: "I want you to fight for me", and rush off into a bitter battle in Court. Usually the child usually means "I love you both. I don't want to chose, I just want you to stop fighting", and practical arrangements can generally be made which allow both parents to be truly involved in their children's lives.

To Think About

Using mediation or the collaborative process can help create a climate which makes a separation more survivable for children. See chapter 5 and Relationships Scotland https://www.relationships-scotland.org.uk/family-mediation, CALM http://www.calmscotland.co.ukand Consenus http://www.consensus-scotland.com/websites.

Think of how the children will feel you dealt with the separation when you all look back in five or ten years. Keep a focus on being good separated parents even if you still feel very raw about the ending of the adult relationship. Imagine how the children would like things to be post separation.

bear in mind 10 golden rules:-

10 GOLDEN RULES FOR PARENTS

1. Tell your children that mum and dad love them and you know they love mum and dad.

2. Tell your children that you want them to feel at home with both mum and dad.

3. Tell your children that the separation was not their fault.

4. Show your children you are able to sort things out and they don't need to look after you.

5. Give the children an example of the way you want them to behave.

6. Find some way of communicating direct with your ex-partner, don't use the children as go-between.

7. Don't argue with the other parent in front of the children.

8 Don't criticise the other parent in front of the children.

9 Pay attention to the children individually.

10. Accept the other parent may have a different parenting style.

Back to Contents

Chapter 11

The Law Relating to Children

Often, couples reach agreement between themselves on arrangements for their children. In some cases, the children will live mainly with one parent but see and stay with the other on a regular basis. In an increasing number of cases, parents will decide to share the care of their children on a pretty much equal basis. It is good to think of any arrangements as allowing children to feel at home when they are with each parent.

Agreement

If you have agreed arrangements, these can be on an informal basis or written into a more formal Agreement. The Agreement can either specify the exact arrangements or make a more general provision. It really depends on the degree to which you are able to discuss matters yourselves. Where there has been more of a breakdown in communication, it is better to specify arrangements in more detail. If either of you fail to keep to the arrangements, there is no immediate way of enforcing the Agreement, but its terms are an important commitment.

Mediation

If you both want to co-operate but need some help to decide what arrangements would be best for the children, you can go to a Family Mediation Service or a Solicitor/Mediator where you will be helped to do this. Once arrangements have been made, these can again be written into an Agreement.

Parenting Plan

It is also worth going through the Parenting Agreement plan and guide put together by the Scottish Executive. This can be found at http://www.scotland.gov.uk (search for "parenting plan"). The plan is not legally binding on parties but aims to encourage parents to think about potential problems, and their solutions, before they cause major difficulties.

Parental Rights & Responsibilities

If you cannot agree between yourselves what is best for your children, you can ask the court to decide. The law which governs this is the Children (Scotland) Act 1995. This Act emphasises the responsibilities parents have rather than their rights. Parental responsibilities include the responsibility to safeguard and promote their child's health, development and welfare, and to provide guidance and direction. A parent is also responsible for maintaining contact with their child. The rights which parents have mirror these responsibilities, and their function is to enable parents to fulfil their responsibilities. These rights and responsibilities continue until the child reaches 16 years, except for the right and

responsibility to provide guidance, which continues until the child reaches 18 years.

Unmarried Fathers
Until 2006, unmarried fathers did not automatically have these rights and responsibilities. They could only obtain them either by asking the child's mother to sign an agreement conferring them (known as a "Section 4 Agreement"), or by asking the court for an order granting them.

Under the Family Law Act 2006, which came into force on 4th May 2006, unmarried fathers who jointly register the birth of a child with the child's mother share parental rights and responsibilities with the mother. This puts unmarried fathers who jointly register the birth into exactly the same position as married fathers. However, this provision is not retrospective, which means that it only applies to registrations made after 4th May 2006.

Court Orders
The 1995 Act discourages parents from asking for Court Orders unless they are absolutely necessary. It encourages parents to remain as involved as possible with their children, and in fact says that a parent not living with a child has a duty to keep in touch with that child. Where both parents have parental rights and responsibilities neither parent is to take children out of the UK without the other parent's consent.

Residence & Contact
The court can be asked to step in and make various orders where necessary. The most common are orders for residence and contact. Residence orders regulate where children are to live. Contact orders regulate the maintenance of relations between, for example, the children and the non-resident parent. Contact and residence orders are not confined to disputes between married couples. Unmarried fathers whose children were born before 4th May 2006 or who have not jointly registered the birth and grandparents are just two examples of parties who frequently have questions about rights relating to children. Children themselves may need and can obtain advice on how the law affects them and their rights.

Interdicts & Specific Issue Orders
Other orders which the court can make include interdicts and specific issue orders. An interdict would be used to prevent steps being taken by only one parent in relation to the children, for example changing the child's school without the other parent's permission. A specific issue order can be used to regulate any other matters relating to the best interests of the children, for example deciding what school the children should attend.

Decisions About Children
The law does not consider that either the mother or father has a better claim. The decision is based on what is in the best interests of the child. That will

depend on who is best able to provide for the practical and emotional needs of the child. A court is usually slow to significantly change arrangements which have been working well enough.

Reports

In order to help make its decision, the court can call on the expertise of third parties. For example, the court can order a Reporter to produce a report. The Reporter may be an experienced family lawyer, or sometimes a Child Psychologist, who will meet both parents, the children and other parties involved with the children: for example, teachers or grandparents. The Reporter will then write a report on how she or he has assessed the situation. The court can then use the report when making its decision, usually at quite an early, interim stage. If required, the Reporter can produce supplementary reports. Reports are expensive, although their cost might be met by Legal Aid if one or both parents have a legal aid certificate. Decisions made at an early stage often influence the final outcome or are accepted by both parents as if they were final.

Curators

The court can also appoint a Curator. A Curator can become a party to the actual court action, and will act on behalf of the child. A Curator is not the same as a solicitor acting on behalf of the child. The Curator may recommend to the court a course of action which the child may not necessarily agree with, but which the Curator believes is in the best interests of the child. This would cover, for example, the situation where a child is being pressurised by one parent to stop seeing the other.

Child Welfare Hearings

Parents are actively encouraged to become part of the decision-making process, and this is done by way of Child Welfare Hearings. Both parents must attend these hearings, along with their solicitors. The Sheriff will encourage parents to try to agree matters. There can be several hearings over the course of several months, and these are used to monitor arrangements. For example, if one parent has not had any contact for a while, contact would be built back up gradually, with hearings every couple of months to assess the situation.

Children's Views

The views of the children themselves are also important. If parents are using mediation some mediators are trained in child inclusive mediation. In that process a mediator meets the children and will pass on any messages the children want their parents to hear, or simply listen to what the children want to say and allow them to feel they are being listened to. If arrangements are being made by a court, a form called an F9 will be sent out to the child or children unless there are strong reasons why not, like the child being too young to understand a form. The form asks the children if they want to say how they feel about the proposals their parents are asking the court to make into court orders.

Court action is very much a last resort. It is expensive and often stressful. In the long-term, it is better if parents can agree arrangements for their children between themselves.

To Think About

The message that comes across loud and clear is that the usual and normal thing for children to want is to continue to have a good relationship with both their parents without being exposed to bickering, arguing or being made to feel disloyal.

It's no fun being the meat in the sandwich!

Consider using mediation or the Collaborative Process to sort things out.

Check out chapter 5, Ways Of Sorting Things Out, and find out more about family mediation through Relationships Scotland https://www.relationships-scotland.org.uk/family-mediation, or solicitor mediators through CALM or the Collaborative Process through Consensus http: //www.consensus-scotland.com/

.

Back to Contents

Division of money and property – married couples/civil partners

One of the big worries after separation is money. Two households are going to be more expensive than one. There may be debt already, and even if there isn't, there is a real risk that some will start mounting up unless you are both able to be realistic. There may be assets which are more complicated, like business interests, and questions about how to take them into account.

There are two separate money issues to tackle. In the short term there's the need to sort out immediate ongoing finances including weekly or monthly support, division of responsibility for repayment of existing debt and how each of you will meet commitments like mortgage payments and utility bills.

The longer term question is how to split up fairly the property that you have built up during the marriage or civil partnership (known as matrimonial property or partnership property), decide if differences in income merit some further adjustment and sort out child support.

If things can't be agreed it is possible to ask the Court (or the Child Maintenance Service (CMS) in the case of child support) to sort out the split of income at any time but it is generally only in an action for divorce or dissolution that you can force a decision regarding division of matrimonial property or partnership property by asking the court for the orders you believe are justified by the legal rules.

In practice, couples often want to sort out all the finances by agreement fairly soon after a separation, even if they are not wanting to divorce immediately. You can use mediation, the Collaborative Process or negotiation to work out terms for a Separation Agreement taking into account the rules that would apply on divorce. When you are dealing with matter by agreement, the legal rules are guidelines and not a straightjacket. Before the rules were introduced there was a lot of consultation and so the basic legal rules do reflect what the majority of people felt would be a fair approach. It can be helpful to have that objective benchmark after a separation.

A Separation Agreement can be sorted out when you are both ready to make longer term plans. It can set out the arrangements for any children and for the finances. It doesn't need to be revisited subsequently, when a divorce happens, or be approved of by the court at that point.

What is matrimonial or partnership property?

Matrimonial or partnership property is all the property belonging to you both at the time you stop living together as a couple (which occasionally can happen when you are still under the same roof but start leading separate lives) or raise

proceedings for divorce or to end your civil partnership (whichever is earlier and is the date referred to as the "relevant date") and which you acquired during the marriage or civil partnership (or any house or furniture you bought before then to use as or for a family home), including any business interests either of you built up after your marriage or civil partnership up to the date of separation.

It includes the proportion of pension or life policy interests which accumulated during the time of the marriage or civil partnership up until the separation. It excludes inherited assets or money and personal gifts from third parties (and assets you owned before the marriage or civil partnership, subject to the rules about family homes mentioned earlier). Things become more complicated if any pre-marital assets or inherited assets or gifts are sold & re-invested after the marriage.

Division of partnership or matrimonial property

The Family Law (Scotland) Act 1985, which has been amended to cover both married couples and civil partners, encourages the "clean break" principle. Lump sum payments, known as capital sums, and orders allowing pension sharing, were encouraged to take the place of ongoing payments to a former partner and the circumstances in which ongoing support would be payable were restricted.

The basic principle set out in the Act is that the net value of the matrimonial or partnership property should be shared fairly between you. "Fairly" usually means equally. There are no circumstances which will automatically guarantee an unequal division in one person's favour but there are circumstances where that may be justified (which are explored later in this chapter).

The starting point is reasonably straightforward but there have been some areas which have proved more difficult in practice.

One overriding principle is that although the way someone behaves might be the reason a divorce or dissolution of a civil partnership is granted, that behaviour will usually not be taken into account when the money side is considered. You might be surprised by this. You might think, for example, that your partner should be penalised for having walked out on you to go and live with someone else. It is perhaps not easy to accept, but it is important to realise that even though the ending of the relationship may be achieved by proving fault, the financial division will not be.

It is only in very restricted circumstances that conduct can be taken into account. The cases where this is a factor are very rare and mainly focus on circumstances where quite extreme behaviour has had a significantly negative impact on the finances. The other general point to remember is that if the financial things have to be sorted out in Court rather than by Agreement, it doesn't matter which of

you raises the action, the other one can normally get their entitlement sorted out in the same action.

Family Homes & Pensions

In many cases, the most valuable assets will be the family home and pension interests. If a couple have been together for some time, the value of the house and pension may in fact be quite similar. Pension interests are usually valued by the pension scheme which provides the date of separation ("relevant date") cash equivalent transfer value (CETV) which is the amount to be taken into account as matrimonial or partnership property. If the pension started before marriage, that value has to be apportioned for the period from the date of marriage or civil partnership to the date of separation. That value is included as part of the matrimonial or partnership property

Of course, the value can't be used like a cash sum of money although it is a valuable asset which will generate an income at some future point and can release capital, subject to timing and tax implications.

If one of you had a pension fund which started before the marriage then reinvested it in a new fund after the marriage, the new fund becomes an asset acquired after the marriage. The whole fund becomes part of the matrimonial property, even though some of the value of it accumulated before the marriage. That doesn't mean the value has to be split equally since those circumstances might be a factor making an unequal split fair. More about circumstances which might justify unequal sharing later on in this chapter.

Business interests

In some cases another significant asset will be the value of any business interests which either or both of you have acquired after the date of the marriage or civil partnership. The business might be run as a sole trader or a partnership or a limited company. How it is run can make a big difference in whether the business interests are matrimonial property. There are a number of ways in which businesses can be valued. An expert is usually asked to assess the correct approach and value. There can be disagreement over which approach is correct. There can be complications if a business was in existence at the date of marriage or civil partnership and if so, about how much, if any, of the value of it should be considered matrimonial or partnership property.

Debt

Once all the assets including any other properties such as holiday homes, investments, the value of any policies built up during the marriage or civil partnership or any other asset acquired has been worked out then all the debt which has accumulated during the marriage and was outstanding at the relevant

date has also to be identified. The debt is taken away from the assets and the amount left is the net matrimonial or partnership property.

Possible Factors for unequal division

It might be appropriate for one of you to end up with more than half of the value of the net matrimonial property. That could happen where there are special circumstances relating to the matrimonial property to justify it or where equal sharing wouldn't really balance out financial advantages and disadvantages arising during the relationship.

Examples of why division might be unequal in favour of one of you could be:-

- One of you gave up well paid employment with a good career structure to accompany the other person who had to work abroad to further their career.
- One of you has not pursued their career fully because of childcare commitments.
- Where a slightly unequal division would allow a family home to be retained for children to live in.
- One of you is unable to work because of a combination of age and poor health.
- If business assets or shares in a company which were owned by one of you before the marriage, excluding then from being matrimonial property, have increased significantly during the marriage because of efforts, direct or indirect of the other partner.

None of those circumstances would automatically guarantee an unequal division but might justify it, particularly if more than one element was present, although **only if an equal division failed to balance those factors.** Some of these examples could justify financial support after divorce, rather than extra capital. (See 'Financial Support' further down this Chapter)

Source of funds

One of the more common circumstances which might affect the division is if one of you had assets before the marriage or civil partnership which were then used to acquire assets after the marriage. For example if you had savings, then married, then bought a painting with them the value of, the painting is included as part of the matrimonial property on separation. You could ask for the source of the funds used to buy the painting to be taken into account in your favour when it comes to deciding how to divide up the matrimonial property .

Even if you can prove you invested non matrimonial funds into a matrimonial asset it doesn't guarantee that will be recognised in the division and if it is recognised, that you will get back what you put in. It's a discretionary argument so it depends on persuading your ex-spouse, or failing that, a court.

The argument is probably at its strongest if the investment was substantial and recent and weaker if the investment was not significant and was a long time ago.

Approach to division

Once all these factors have been taken into account the approach to division can be either by offsetting assets where one person keeps for example the house and the other the pension fund or by dividing assets such as selling the house and sharing the pension. In other cases a capital sum can be paid by one person to the other to result in a fair overall division. Quite often there is a mixture of approaches, depending on the value of the assets.

Financial support

Quite apart from the division of matrimonial or partnership property there is the question of the need for ongoing financial support when a relationship breaks down. While you are still in a marriage or civil partnership, if you are not working or earning much less than your partner, you can ask for weekly or monthly support called aliment (separate from support for any children you might have).

If your partner wants you to live with him or her and this offer is reasonable you may not be able to get aliment for yourself. The amount of aliment has to take into account the needs and resources of both parties.

To continue receiving ongoing financial support after divorce (this time called periodical allowance) you must

- Be hampered from being self supporting because of looking after any children of the relationship under 16
- Have been financially dependent on your partner for financial support in which case support can go on for up to 3 years after divorce (or earlier settlement by agreement)
- Be likely to suffer serious financial hardship as a result of the divorce. This is difficult to establish but there is no maximum fixed period if you are in this category

If you want to claim periodical allowance you have to show your partner can't pay a lump sum instead. Sometimes the fact that a claim could be made for periodical allowance can be used to justify an alternative higher capital settlement which could involve for example the transfer of the family home.

Subsequent variation of aliment or periodical allowance

If either of you undergoes a major change in circumstances during the period the support is payable, you can ask the Court to review the level of financial support.

The overall amount of a capital sum on the other hand cannot be changed, even if it is payable by instalments.

To Think About

It is always worth remembering the cost of having the financial split sorted out in Court is liable to use up quite a chunk of the resources available, especially if there are numerous expert witnesses like surveyors and actuaries involved. It is better if you can keep the principle of fair sharing in mind and reach an agreement which you can both live with.

Back to Contents

Chapter 13

Financial support for children

Both married and unmarried parents and in some circumstances people who have been like parents to a child can be asked to share the financial responsibilities of childcare.

If you are not living with children this is usually in the form of weekly or monthly support called aliment or child maintenance. The rules for this are not the same as the rules for aliment for a spouse or civil partner.

The question of child support can be dealt with by agreement. If agreement is not reached then the Child Maintenance Service (CMS) which assumed responsibility for all new cases from the Child Support Agency (CSA) on 25th November 2013, applies a formula to work out how much maintenance should be paid by the paying parent for children. Even if an agreement is reached and set out in writing, either of you could ask CMS to calculate the maintenance at any time after the first anniversary of the Agreement. The CMS formula is now often used as a guideline for child support. The CSA/CMS deal with children under 16 or children between 16 and 19 inclusive where child benefit is still in payment or the young person involved is still in full time non advanced education.

CSA Formula
The CSA calculated maintenance on the basis of a simple percentage system. The starting point was the paying parent's weekly income, net of tax, pension and national insurance contributions. A percentage was then used to calculate maintenance: 15% for one child, 20% for 2 children and 25% for 3 or more. Income over £2,000.00 net per week was disregarded.

CMS Formula
The CMS formula starts with gross (not net) income though under deduction of pension contributions, but apply lower percentages (12% for one child, 16% for 2 children and 19% for 3 or more children on weekly income between £200 and £800 and 9%, 12% and 15% of income over that to a maximum gross income of £3,000.00 per week). There is a lower rate for income under £200 per week

gross. A calculator for the amount due can be found at https://www.gov.uk/calculate-child-maintenance.

Other Factors For Both CSA and CMS

The formula in either case also takes into account other children which either parent may have and the number of nights when the children stay overnight with the paying parent. These factors can alter the maintenance payable. If you want to know more about child maintenance, go to www.gov.uk/child-maintenance or phone Child Maintenance Options on 0800 988 0988 between 8am and 8pm, Monday to Friday and between 9am and 4pm on Saturdays with any general questions about child maintenance. Calls to 0800 numbers should be free but you may have to pay if you are calling from abroad. The CMS encourages parents to come to an agreement about support. If that can't be achieved and assessment and collection has to be carried out by the CMS there are charges made.

Variations, Top Up and School Fees

There is a Variation procedure. Previously it could make some allowance for things like unusually high travel costs for contact but in terms of the current formula, it can take account of unearned income such as rental income, income from dividends and interest from savings and investment or deal with a situation where the paying parent may be able to control the amount of income they receive by diverting it to another person or other purpose.

In addition, if the non-resident parent has a very high income (over £2,000 per week net in the CSA formula and £3,000 in the CMS formula) then the receiving parent can ask the Court to award "top-up" maintenance over and above the CSA or now CMS assessment.

School fees are not included in the CSA/CMS assessment and the Courts can still deal with that.

Shared care

If you and your partner share the time and costs of the day to day care on an equal basis then the CMS will not carry out an assessment. In those circumstances, if one of you earns significantly less than the other it is possible that since the CMS will not become involved, the courts might have the power to make an order for aliment although that does not appear to have been done yet.

In cases like that sometimes people make arrangements privately, as part of a Separation Agreement to pay aliment or share the costs of things like third party care of other costs payable to other people in a way which makes for a fairer split of financial responsibility.

If you have accepted a child into your family

If you have taken on the parental role towards a child or children and treated them as if they were your family then you may be asked to provide financially for them by the person caring for them. This means that a step-parent can be asked for financial support after separation, although that is not very common. The courts, not the CMS, would deal with that sort of claim.

If your children are under 25 and still in full time education or training

If your children are no longer dealt with by the CSA/CMS because they have completed the equivalent of secondary education or have reached the age of 19 and they are still under 25 they can ask you for financial support, known as aliment. if they are still in full time education or training.

Aliment is not calculated by the CSA/CMS. If you and your son or daughter cannot agree what should be paid by way of aliment, the young person can raise an action for aliment in court. The education or training must be reasonable. The amount of aliment is not a percentage but is to take into account needs and resources.

The aliment is no longer payable by one parent to the other once the children are 18 but instead paid by the parent to the young person direct. Most parents agree to make the transition to direct payment once the young person leaves school and starts at university or college

School fees

If your children are at a private school the CMS formula won't take payment of fees into account. You would still have to ask the Court to sort this out if it can't be arranged between you.

To Think About

The CMS makes it more difficult to agree support for children at quite a high level but with no support for an ex partner since the arrangements could be overturned by a subsequent CSA application after the first anniversary of the Agreement.

Back to Contents

Grounds for divorce (or dissolution of a civil partnership)

Most people know that divorces are granted because of the irretrievable breakdown of their marriage or civil partnership. What is less widely known is that there are only certain ways you can prove the fact that there has been an irretrievable breakdown.

Irretrievable breakdown can be proved by having lived apart. A marriage or civil partnership can be ended if there has been no cohabitation for one year and your partner consents or no cohabitation for 2 years even if there is no consent by the other person. This is usually referred to as a divorce based on separation.

Irretrievable breakdown can be established on the basis of proof of the other person's unreasonable behaviour.

A marriage can also be ended on grounds of irretrievable breakdown if you can show that your partner has committed adultery (whether before or after the separation).

A civil partnership can be dissolved if an interim gender recognition certificate has been issued to either of the civil partners.

Separation is by far the most common basis for divorce in Scotland.

Simplified Procedure divorce/dissolution

If and only if

- You have no children under 16
- There are no financial matters to sort out
- You have been separated for a year and
- You both want divorce or dissolution

Or

- You have been separated for 2 years and there are no financial matters to sort out and
- There are no children under 16

Then you can use the so called "quickie" procedure.

This involves getting the appropriate form from the local Sheriff Court, after you have been separated for one or 2 years. The form has quite clear instructions explaining how it should be completed. If you are seeking a one year divorce or

dissolution your partner has to sign. There is also a part which you have to sign in front of someone authorised to administer Oaths, such as a Justice of the Peace or a Notary Public. You don't need to use a solicitor, although you can if you choose.

There is a Court fee to pay but if you are on a low income you might qualify under the Legal Advice and Assistance Scheme in which case you would not have to pay the Court fee.

Change of surname

If you want to go back to using your original surname you don't need to wait until your divorce. Equally, you can go on using your married name after the divorce.

If you have children and you wish to change their names this is something which should only be done after consultation with the other parent. It is a very big step which requires careful thought. Where appropriate, the children's views would have to be taken into account. If you can't agree, a Court could decide the matter as a specific issue.

To Think About

You don't necessarily have to have been separated for a year before you start a divorce or apply for a partnership to be dissolved. However you do need to have sorted out any financial matters before you take this step or you will need to ask the Court to sort things out in the divorce proceedings.

You don't have to be separated at all to start proceedings in Court for divorce or dissolution if you can use a fault based way of showing the marriage is over by proving unreasonable behaviour or adultery.

In most cases, by the time the arrangements for the children and the finances are sorted out in a Separation Agreement a separation based divorce can be applied for without fault having to be proved

Back to Contents

Cohabitation

Since 4th May 2006 there are potential claims which could be made if you are in a cohabitation which ends in separation or death.

The Family Law (Scotland) Act 2006, which came into force on 4th May 2006, provides the possibility of some financial provision for cohabitants whose relationships end by reason of breakdown or death. This does not put cohabitants on the same legal footing as married couples. There is still no such thing as a common law wife or husband.

Provided an application is made to court within one year of the end of the cohabitation, a court may order a capital sum to be paid by one cohabitant to the other. The capital can be paid by instalments. The court will consider whether the applicant has suffered an economic disadvantage in the interests of their former partner, or their child (including a child accepted as a child of the family). The court will also consider whether the former partner has gained an economic advantage as a result of any contributions made by the other partner. "Contributions" can be financial or non-financial, like bringing up children.

The Court can also make an order to pay a specified amount in respect of the future economic burden of caring for any children of the cohabitants. That provision is not intended to cover basic living costs which child maintenance deals with. It could be used to cover a share of the future out of school care. Although the amount can be made payable by instalments, it can't be varied if things change.

There are also two presumptions, which can be overturned, depending on the circumstances of the case. Firstly, there is a presumption that each cohabitant will share equally in household goods acquired (except by gift or inheritance from a third party) during the course of the cohabitation. "Household goods" don't include money, cars or domestic animals.

Secondly, there's a presumption of equal shares in money or property derived from any allowance made by either party for their joint household expenses. That doesn't include property bought for the cohabitants to live in. "Property" does not include the cohabitants' home. It is really important to consider carefully how title to any property is taken if you are buying a property jointly. You should consider whether you might want a cohabitation contract.

Unmarried couples still have no legal obligation to pay maintenance to each other if they separate, although there will be an obligation to pay maintenance if there is a child from the relationship. There is no provision for the making of a transfer of property order, so you could not ask the Court to have the house transferred to you.

Provision is also made for surviving cohabitants to make a claim on their deceased partner's estate, but only where there is no will. The claim must be made within a very short time - six months of the death, and the parties must have been cohabiting prior to death. The claim will be considered after any claim from the cohabitant's surviving spouse or civil partner. The court will also have regard to any claims made on the estate by his or her surviving children. The maximum amount which a cohabitant can claim will not be more than would have been available to a surviving spouse or civil partner. If successful, the applicant could be awarded a capital sum or have property transferred from the deceased's estate to him or her.

Some cases have been decided in Court. Initially the trend has been to take quite a narrow view and set the bar quite high to establish financial disadvantage but more recent cases are taking a broader approach.

It is really worth considering having a cohabitation contract which will set out how you want to regulate your financial arrangements to avoid disputes later. The contract can be tailored to meet the specific requirements of your situation. For example, it can specify in detail the expenses for which each of you will be liable. It can be used to detail ownership of household goods, vehicles and other items. It can be used to determine how property is to be divided in the event of separation.

To think about

If you are cohabiting or about to cohabit consider the possibility of a cohabitation contract.

If you are about to buy a house to live in together and you're not married or civil partners and one of you is putting in more by way of a deposit or going to meet more of the mortgage repayments it is advisable to have this set out in writing.

Making a will.

As family law becomes more complex the legal rules may not reflect your assumptions. Don't take things for granted.

Back to Contents

Chapter 16

Pre-nuptial & Post-nuptial Agreements

Who should have them?

Pre-nuptial agreements tend to arise from two situations. The first is where you have been married and divorced before, and want to avoid future dispute in the event that a second marriage or civil partnership breaks down. The second is where you are already wealthy, perhaps with considerable inherited assets which you wish to protect. Sometimes things can arise after marriage such as planning to use inherited money to buy a house in joint names which could trigger the possibility of a post-nuptial agreement.

What are they for?

They can be tailor-made to suit your requirements. They are generally designed to exclude or limit the provisions of the law relating to matrimonial or partnership property and financial provision on divorce or separation. The law defines matrimonial or partnership property as being all assets acquired by parties either jointly or solely after the marriage or partnership which exist at the date of separation (and any house which was bought as a family home for the couple or furniture, even before the marriage). Inherited items or gifts from third parties are not matrimonial or civil partnership property nor are any other assets owned by either person before the marriage or civil partnership.

On this basis, there might seem little point in having a pre-nuptial agreement, since at that stage there will be no matrimonial or partnership property. However, the boundaries between what is and is not matrimonial property can easily become blurred. For example, non-matrimonial property, such as shares owned before or inherited during the marriage can become matrimonial property if you sell them and their proceeds used to purchase anything new, such as a holiday home. There are arguments to counter this, but you can't rely on the full value of the assets being recouped.

A pre-nuptial agreement can aim to exclude assets, or anything deriving from them from being considered matrimonial property. It can establish that your partner is to be excluded from making a claim against a particular asset, no matter what. This could be used for example if you have a business built up before the marriage, which then undergoes significant re-structuring over the course of the marriage. Ordinarily, your partner could argue that the restructured business had become matrimonial property.

The pre-nuptial agreement can also be used to agree in advance, settlement terms in the event that the marriage breaks down. It can restrict the division of assets, so that some provision is made for a spouse or civil partner, but not to the extent which might be available under family law.

A post-nuptial agreement could be used to ringfence money inherited or gifted during a marriage which is to be used to buy a joint asset.

How enforceable are they?

A pre-nuptial agreement can be set aside or varied by the courts. The overriding concern of the courts is to examine whether the agreement was fair and reasonable at the time the parties signed it. There are various factors to bear in mind.

If an agreement is clearly designed to benefit one partner to the exclusion of the other from what would otherwise have been their legal rights, there may be more likelihood of an attempt to challenge the terms on a subsequent separation.

The circumstances in which the agreement was signed will be relevant. Factors which may lead to the agreement being challenged successfully include one partner putting pressure on the other to sign, signing days before the ceremony and not having the opportunity of independent legal advice.

To think about

The more an Agreement reflects the legal framework and has a focus on clarifying potentially grey areas rather than excluding legal rights, the more likely it is to be upheld.

It may seem unromantic but it should be possible to talk through these issues. Being clear and frank about money is usually an important ingredient of robust relationships.

Back to Contents

Court procedure

If despite your best endeavours, or because there is abuse or dishonesty, things can't be resolved by agreement, then Court proceedings have to be raised to allow matters to be resolved in litigation. Most cases arising from family breakdown are dealt with in the local Courts known as Sheriff Courts. You can find where your nearest Sheriff Court is and other information about Courts in Scotland on the Scottish Courts Website at https://www.scotcourts.gov.uk/ Cases where there is a lot of money at stake, where questions of international law are involved, or where one party wishes to keep where they are living a secret are often dealt with in the Court of Session in Edinburgh.

Which Court

The question which Court could be used has become complicated. There are more international marriages and people move around more for their jobs. However, in most cases divorces are dealt with in the Sheriff Court for the area in which either the husband or wife normally live. If only issues to do with children are to be resolved then it is usually the Court near where the children are living which is involved.

Procedure and terminology

Since most cases are dealt with in the Sheriff Court, the terms used in the following paragraphs apply to the Sheriff Court rather than the Court of Session although there is some information at the end about Court of Session Procedure.

A divorce or an action to do with children starts off with a document called an Initial Writ. The person starting it is called the Pursuer and the other person is called the Defender.

This Writ states first of all what you are asking the Court for – a divorce, orders in relation to children, financial support or whatever – in short paragraphs called craves.

These are followed by a summary of the facts – the information on which you are basing these requests. Again these details are in numbered paragraphs, and are called Articles of Condescendence.

The Writ ends with statements of the legal rules you say should be used to get what you are asking for. These statements are called Pleas-in-Law.

The Writ will be signed by your solicitor as your agent and then sent to the Court involved, asking for the Court's authority – known as a warrant – to intimate (serve) this on your partner. Sometimes other people have to be told for

example, if you are saying that your partner committed adultery then the other person involved will usually have a copy sent to them so they are aware of the situation. If you are asking for the family home to be transferred to you and there is a secured loan, a copy will be sent to the lenders.

If the action includes a crave about arrangements for children a form called an F9 is likely to have to be sent to the children. The F9 gives children the opportunity to state their views about what is being requested. It has recently been revised to be worded in more "child friendly" language. The Court recognises that it can be difficult for even teenagers to make their views known that way. Particularly if the child or children are quite young someone, usually an experienced family lawyer who is not involved in the case, may be appointed to go and carefully explore what the child is making of the situation instead.

Usually intimation is made by your solicitor sending a copy of the Writ by recorded delivery post. If the person is not in when the postman tries to deliver the letter or if the matter is particularly urgent, the copy is delivered by a person called a Sheriff Officer. A period of time (the period of notice), normally 21 days, is allowed for the person at the receiving end to decide if they want to oppose any of what is being asked for or ask for something themselves. If they do, their solicitor will lodge a document known as a Notice of Intention to Defend and the case will become a defended (opposed) one.

If no opposition is lodged, the action is undefended and usually the person starting the action will be given what they want by the Court without any need for their attendance at Court.

The Court can give less money than is asked for if the information provided by you does not justify the amount requested.

In undefended divorce actions, if there are children under 16 or any financial matters to be sorted out the Sheriff has to have evidence from the person asking for the divorce and also from someone else which is given by way of Affidavit evidence. Affidavit evidence means that the information is set out in a formal written statement which is signed by someone in the Sheriff Court authorised to administer oaths, such as a solicitor who is a Notary Public.

Minute Procedure

Sometimes there is a need to vary an existing order to ask for orders in connection with children in a divorce again where no order was made originally. In that case the document asking for orders is a Minute and the response is called Answers.

Opposed Court actions

If a Notice of Intention to Defend is sent into Court after an action starts, a date is fixed for you, your partner and the 2 solicitors to attend Court for what is called the Options Hearing. The date will be just over 3 months from when the action started. By then, you and your partner will have had the chance to put in writing the main points you wish to have considered before the decision is made. Although the rules make it clear that both parties are supposed to attend the Options Hearing, in practice in many Courts the parties are actually not expected to attend, since the Options Hearing has turned out more of a formality than was probably intended. The Sheriff usually checks if there is still something to be decided by the court. If so, the Sheriff will fix a date in the future to hear evidence (a Proof). Sometimes there might be another Options Hearing. It is very important to check with your solicitor if you do need to attend. Never assume that you do not need to turn up.

The Initial Writ is answered in a document called "Defences". The Defences also set out any requests regarding financial claims or the arrangements for children. Once the Defences are available you both have a chance to amend your own written documents (known as Pleadings) in response to the information provided by your partner. The timetable sets out a period for this adjustment. There is also the possibility that a young person affected by the action might become involved in the case direct. His or her solicitor will then submit the necessary paperwork to become involved. Alternatively the Sheriff might decide that it would be best to appoint a Curator, usually a solicitor, to be involved in looking after the interests of a child or children, or a Reporter (again usually a Solicitor) to find out their views and to provide a preliminary assessment of how things stand at an early stage.

Child Welfare Hearings

If there are decisions to be made about children usually the court will fix a Child Welfare Hearing. The procedure for these varies from court to court but it is important for you to attend a Child Welfare Hearing. Generally it is intended to be more informal than most court hearings. The Sheriff will try to encourage parents to cooperate about arrangements for their children but failing agreement, will make decisions the parents are to follow. Usually these decisions are about immediate, interim arrangements to check how they work but decisions made at Child Welfare Hearings often end up being the longer term arrangements by agreement or by court decision, if they seem to be working well enough. Occasionally, especially if an urgent decision is needed, it is agreed that evidence from parents and their witnesses will be heard (or brought in by way of sworn statements known as affidavits) and a final decision made as part of the Child Welfare Hearing procedure. Otherwise, if arrangements made at a succession of Child Welfare Hearings don't resolve matters, a more formal procedure call a Proof is fixed. More about that further down. Sometimes affidavits are prepared for a Child Welfare Hearing even if it is not going to make a final decision, if there is a lot of dispute over the facts. The approach about to

Child Welfare Hearing varies from Court to Court so your lawyer will guide you about what's needed and what to expect.

Adjustment
Generally, while the adjustments are being made to the written documents negotiations between solicitors – and sometimes discussions between you and your partner – will be continuing.

If a settlement can be agreed then everyone can heave a sigh of relief and the details will be set out in a document known as a Joint Minute. This is signed by the solicitors and submitted to Court. In most cases this will eliminate any need for you to go to Court yourself. Where there are financial matters involved there may be a Separation Agreement as well as a Joint Minute. In that case you and your partner would sign the Separation Agreement.

Even if matters are agreed, in a divorce action sworn statements of evidence (Affidavits) must still be submitted to Court before the Court will grant the divorce decree and incorporating any terms of settlement which you have asked to be included in the Court Order.

In a minority of cases agreement is not reached and the Sheriff has to make the decisions. This is dealt with at an event known as a Proof.

Pre –hearing Conference and Case Management Hearing
If the case is about children, a pre-hearing conference and a case management hearing are fixed before a date for a Proof is arranged.

The conference involves the solicitors discussing:

- whether matters could be resolved by agreement and if not, identifying what is not disputed
- talking about practicalities about the proof including the number of witnesses (including whether there are any expert witnesses such as child psychologists) the extent of other evidence such as paperwork (known as productions) will be referred to
- checking that the case in writing (the pleadings) sets out enough indication of what is to be proved at the Proof.

The solicitor for the person who began the action (the Pursuer) has to send a summary (Minute) of what was discussed to court in advance of the Case Management Hearing.

At the case management hearing the Sheriff has to hear about the matters covered in the pre-hearing case conference and be satisfied that sufficient progress has been made in preparing the case before fixing a date for a Proof.

When a Proof date is fixed in cases involving children, a pre-proof hearing has also to be fixed.

Pre Proof Hearing

When a Proof is fixed in a divorce action the sheriff may also fix a pre-Proof hearing (*OCR 28A.1(1)*). The purpose of a pre-Proof hearing is again for the Sheriff to check that sufficient preparation has been made for the Proof, possibly clarifying what evidence might be agreed and what Is to be provided by sworn statements (affidavits), or by witnesses in person or as productions. The involvement of any expert witnesses might be discussed.

Affidavits

An affidavit is a way of giving evidence in writing instead of in person. What is contained in your affidavit has the same force as if you had said it in Court after being put on oath or affirming that it was the truth. It is a written statement of evidence which is signed in front of someone authorised, such as a Notary Public.

Affidavits have become more widely used in Court cases in Scotland over the last few years. If some or all of your evidence is made available in an Affidavit it is extremely important that the wording of the affidavit is correct and also that it is stated in a way you might word it yourself.

So you have to be extremely careful to read over an Affidavit before you sign it and before signing, tell you solicitor if any of the information is not correct or worded in a way that you would never say.

What happens at a Proof

Dates are fixed several weeks in advance for the Sheriff to hear evidence. This means that you, your partner and all your witnesses who are not giving evidence by Affidavit alone have to attend Court in order to give the Sheriff the information you each have which has a bearing on the case and which there is notice of in the written Pleadings.

The Sheriff makes a decision based on what emerges at the Proof and is contained in the Affidavits or Productions which have been referred to, not what is in the written Pleadings but you won't be allowed to bring up incidents or matters that have not been mentioned in writing. These rules are not interpreted quite as narrowly in family cases as in other types of Court actions, but they do still apply.

When you give evidence, you are first asked questions by your own solicitor. These questions are not supposed to suggest an answer – they must not be "leading" questions. So don't be hurt if your solicitor asks you what your name is – it doesn't mean they have forgotten, just that they are getting you into the way of answering non-leading questions!

After your solicitor is finished, your partner's solicitor can ask you questions. This is called cross-examination.

Leading questions are allowed at this stage. The idea of cross-examination is to allow your partner's solicitor to challenge and test what you have said, and also to ask you about things your partner wants to prove, in order to give you the chance to comment.

The same procedure applies for your witnesses and in reverse for your partner when it is your solicitor who carries out the cross-examination. Once all the evidence has been presented, the solicitors sum up the main points and relate them to the law which applies. The Sheriff could decide things then and there but is more likely to want to think things over. This is known as taking the case to avizandum.

There will in most cases like this have been a shorthand writer taking down the evidence. Sometimes a Sheriff will ask for their notes to be typed out before making a decision. The Sheriff's decision is normally quite long and sets out the reason behind it. It is called an Interlocutor. It is sent to your solicitor who will "translate" it for you.

Court of Session Procedure

In some circumstances, for example if your case has an international aspect or is dealing with a very high financial claim, it might be raised in the Court of Session in Edinburgh. The basic approach of each of you setting out your claims and arguments in writing then having time set aside for witnesses to attend court to give evidence supplemented by affidavits is the same but the vocabulary and detailed procedure is different. The case is decided by a Judge, not a Sheriff. Although you will have a solicitor there with you, each of you will be represented in court by an Advocate (or possibly a Solicitor advocate although that is less usual in cases involving family law).

The case is started by a document called a summons (although the response is still called the defences) and the requests by both parties are called conclusions. The dates for the hearing of evidence are fixed quite early in the process although they are usually many months ahead. Meanwhile, there will be adjustment, a case management hearing and a pre proof hearing.

In many cases a meeting is arranged, called a joint consultation, where both of you and the advocates and solicitors all gather together, usually in Edinburgh, to allow the advocates to have discussions with one another and with each of you and your solicitors to see if there is enough common ground to reach an agreement. If not, matters are decided after Judge hears the evidence.

To Think About

So much for the theory – what about the practice?

The written Pleadings and the Proof are not the place to offload your stockpiled frustration and annoyance – mudslinging is strictly off limits. Sheriffs (and Judges) are not there to referee a heated exchange of insults but to hear evidence about the facts – past, present and future – which are relevant to the legal rules.

You may feel really annoyed and upset by what your partner puts in the written Pleadings. You may feel it is quite unfair or inaccurate. Remember that they probably feel the same way about what you have said. Try to keep calm, and don't worry if your partner has made statements you disagree with. If you deny something your partner has put in the written statement, then what they have written still has to be proved.

Back to Contents

Chapter 18

Attendance at Court

If you have to attend Court to give evidence, remember you don't have to turn in an Oscar winning performance! You are simply going there to provide information so as to let someone make a decision about a dispute in which you are involved. Remember to speak clearly and answer the questions you are asked.

The first thing to do is to make sure you know where the Court is – the last thing you want to do is be lost, late and panicking.

Be there in plenty of time. Court cases often don't start on time but it is absolutely crucial that you are there just in case.

If you are going by car, find out about parking – not all Courts have car parks. All Courts have websites which you can check which provide this sort of information. Scottish Courts Website

When you arrive at the Court building there should be a uniformed attendant about. Tell him or her the name of your case (your name) and you will be told where you should go.

You and your partner have the right to be in Court throughout the case. However, witnesses who have not yet given evidence must not be in Court when other people are giving their evidence. From this follows a very important point – once you have given your evidence you must not talk about what happened in Court to any witnesses who have not yet given evidence.

It's actually very important at any stage to avoid discussing with any of your witnesses what you are each going to say in Court. It can be very difficult to avoid discussing the thing that is probably uppermost in your mind in the weeks and months leading up to a Proof. The reason why it is so important is that if you and your witnesses talk over what you are going to say, or check information with one another, there's a real danger you will start getting the information a bit mixed together in your minds and when giving evidence, say things that sound so similar it makes it seem the evidence can't be relied on as what each of you can clearly say from your own memory.

Court layout

In most Courts during a Proof the Sheriff sits on a raised part of the Court and the shorthand writer sits nearby.

There is usually a table in front of the Sheriff. The Sheriff Clerk sits just below the Sheriff to deal with administrative matters at the beginning but often will slip

out during the case and only come back in at the end. The bar officer is a Court official who will go out and call the witnesses. You and your partner sit at a table with your solicitor except when you are giving evidence when you will go into the witness box.

You will be put on Oath or you can Affirm instead.

Your solicitor has to do a great many things at once – ask questions, note answers, consider the balance of information and mentally store important points for summing up – so certainly pass on briefly any information you may have that your lawyer doesn't and which might be important, but try to be sure it is pretty vital!

Do remember, if the case goes on over lunch or, as is likely, is not finished in one day if you are with witnesses who have not yet given evidence you must not discuss the case. This may make conversation rather difficult since the case will be the only thing on your mind, but it is very important to remember.

Don't pin your hopes on it all being over in one day. That would be very unusual. Sometimes there is more business than the Court can deal with and the case might not even start on the day it has been set down. Sometimes the Court will only allocate one day for a case. The reason is that a lot of cases are settled before they start and if several days are set aside, it is difficult to manage the Court time. That means that if the case is going to have to be decided by the Sheriff there may be one day of evidence then several days fixed some weeks later.

Even once all the witnesses have finished and the solicitors have summed up it is not very likely that the Sheriff will give his or her Judgment at once. Calm and patience are the order of the day – quite a tall order too in the circumstances!

To think about

You can check for details of any court at the Sheriff Court Website.

Back to Contents

Chapter 19

Protective Remedies

If you are a victim of domestic abuse, there are various orders the court can be asked to grant to protect you. The type of order will depend on whether you are married, in a civil partnership or cohabiting, and on the type of abuse. The fact that no-one has witnessed the worst of your partner's behaviour first hand will not automatically stop you getting some protection although it will be necessary to get some form of backup. That could be evidence about some aspects of behaviour and perhaps a medical report.

What is domestic abuse?

This includes but goes beyond violence to cover threatening or abusive behaviour which is likely to cause fear or alarm or, since the Domestic Abuse (Scotland) Act 2018 controlling, frightening, humiliating or degrading behaviour likely to cause physical or psychological harm.

Behaviour such as assault which would be considered criminal whoever the target was can be treated as an aggravated offence if the target is the perpetrator's partner or former partner.

The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 also introduced an offence of intimate image abuse where someone discloses or threatens to disclose intimate images or another person without their consent.

All those behaviours are considered a matter of public concern and dealt with by the criminal law. So it is important to remember the police are there to provide protection if you are at the receiving end of any of the behaviours listed.

There are also a number of remedies you can ask for through the civil courts by raising an action yourself, if you need additional or more specific protective remedies.

Interdict

This is an order prohibiting a person from behaving in such a way as to cause you fear, alarm or distress. This can include threatening someone, or using violence towards them, whether physical or verbal. It can apply to married couples, civil partners or cohabitants, whether opposite or same-sex, although the legislation used will differ depending on your circumstances.

Once an interdict has been granted, a power of arrest can be attached to it, which will mean that the abuser can be arrested without a warrant. The test for granting a power of arrest is whether it is necessary to protect you from a risk of

abuse in breach of the interdict. Where a power of arrest is attached to a domestic abuse interdict granted after July 2011, a breach of it has criminal penalties.

Domestic Abuse Interdict

The Domestic Abuse (Scotland) Act 2011 introduced an extra layer of protection for victims of domestic abuse. If you are granted an interdict you now have the option of asking the court to make a order saying that the interdict is a domestic abuse interdict.

The Court may make that order if the parties were married, civil partners, cohabitants, or conducting an intimate personal relationship with one another. In most cases it will be helpful to ask the Court to make that order since a breach of a domestic abuse interdict has higher penalties and is likely to act as more of a deterrent.

Non-harassment order

This is designed to deal with behaviour which is distressing and upsetting, but not necessarily inderdictable. This would cover, for example, following someone, phoning or texting them repeatedly for no good reason, loitering outside your house or even sending you flowers. Harassment is open to wide interpretation. Breach of a non-harassment order carries with it criminal penalties.

Exclusion order

This is an order excluding the abuser from the home. Usually it is asked for along with an interdict. Spouses and civil partners have occupancy rights (meaning, the right to live in the home) by virtue of their marriage or civil partnership. Cohabitants can also apply for an exclusion order, provided they can establish occupancy rights. The test for the grant of occupancy rights is whether the couple were living together as husband and wife.

An exclusion order suspends these occupancy rights. If the other person is still in the house, an exclusion order is authority for their removal. The order will be granted where the court is satisfied that the order is necessary for your protection or the protection of any child of the family. There must be harm or likely injury to your health or a child of the family.

A power of arrest must be added to an exclusion order by the court if requested. It can be quite difficult to obtain an exclusion order, as it is so extreme in its effect. Supporting evidence such as reports from the police, social workers and GPs is often a decisive factor.

To think about

If you feel in any way threatened by your partner you should call the police then consider whether to follow this up. If you don't qualify for Legal Aid it could be

costly to make an application to court but much of the behaviour mentioned is against the criminal law. That means the police can assist.

The Women's Aid website https://womensaid.scot/ offers useful information.

Back to Contents

Chapter 20

Making a Will

What follows is a general guide, and it is important to take full legal advice.

If you already have a will:
If you already have a Will, then if you die, the terms of your existing Will stand, even if your circumstances have changed since you made that Will. In Scotland marriage or entering into a civil partnership does not have the effect of making an old Will invalid. In these circumstances the terms of your Will might be open to interpretation. A court might have to decide whether a legacy to "my husband" meant the husband at the time the Will was written or the husband at the time of death. The birth of a child will not change or cancel a Will either, although there are other ways that a child can make a claim. (See the section called "Legal Rights").

Divorce may affect the terms of a will. If one of you has a will in place in which you leave a bequest to your spouse or civil partner and a divorce is granted your former spouse or former civil partner is treated as having died before you unless the will specifically provides otherwise

If you haven't made a will:
If you have never had a Will, then on death what you owned ("your estate") would be divided up according to legal rules of "intestacy".

Prior rights:
When someone dies and leaves no Will their surviving wife/husband/civil partner is entitled automatically to certain shares of the estate called "prior rights". The financial figures set for prior rights change from time to time. At the moment (May 2013) the surviving husband/wife/civil partner can inherit:

a) the home they are living in up to the value of £473,000 (or that amount if the house is worth more.)
b) the furniture in the house worth up to £29,000.
c) a payment of up to £50,000 if there are children, or up to £89,000 if there are no children.

Legal rights:
After prior rights have been dealt with the surviving husband/wife/civil partner and any children each have rights to a share of what is called the "net moveable estate**"**. This might include items such as money, jewellery and shares. If there are children the share for a widow or widower is 1/3 and the same proportion is shared among the children. If there are no children the widow or widower or civil partner receives ½ of the moveable estate. If there is no widow or widower, the children share half of the moveable estate.

Any remaining property:
The remaining property will go to surviving family members in a strict order. For example, if there are any children it would go to them. If not, it would be shared between the parents and the brothers and sisters of the person who died and so on. This sequence is laid down and can deal with all the combinations of surviving relatives.

Cohabitants: cohabitants do not have any automatic rights
They may be able to make a claim on their deceased partner's estate, but only where there is no will. The claim must be made to a Court within six months of the death, and the parties must have cohabited prior to death. The claim will be considered after any claim from the deceased's cohabitant's surviving spouse/civil partner. The court will also look at any claims being made on the deceased's estate by his/her surviving children. The maximum amount which a cohabitant can claim will not exceed the amount which would have been available to a surviving spouse/civil partner. If successful, the applicant could be awarded a capital sum or have property transferred from the deceased's estate. If you want to provide for your cohabitant it is best to make a Will. Otherwise, he or she will have the cost and distress of having to raise a Court action very soon after your death.

What's involved in making a Will?

Appointing an Executor:
An executor is someone who is appointed to help sort out your property after your death. This might include paying off any debts, dealing with the tax office and distributing the property. Most people appoint two executors.

You can appoint a professional person, such as your lawyer or bank manager but you should be aware that they may charge for this. People usually ask someone close to them such as their husband or wife and children.

The executors can employ lawyers to carry out work for them. The expense is met from the dead person's estate. The executor is legally responsible for any mistakes so it is worthwhile seeking legal advice and asking a lawyer to do the necessary administration.

If the estate is small your local Sheriff Clerk (a civil servant who can be found at your Sheriff Court) can assist in dealing with the estate without involving a lawyer. A "small estate" is one below a certain value.

Appointing a Guardian:
You can appoint someone to take over the same rights and responsibilities you have as a parent.

Preparing the Will

Your Solicitor will discuss your needs in detail.

Here is a checklist of what you need to think about:

1. Prior Will:
   If you have an old Will this should be destroyed after your new Will has been completed and signed.

2. Executor/Guardian:
   You need to consider who you would like to deal with looking after your property (the Executor) and who you would wish to make decisions about your children (the Guardian). They may be the same person and may not.

3. Property:
   You will need to think about who you wish to leave your property to. The following are examples.
   a) House - If you own a house or a share in one you can pass this on. You can also make a more complex arrangement where someone lives in your house during their lifetime but the house is owned by someone. (See the section called "Liferents")
   b) Specific items - If you have particular items, such as jewellery or a piece of furniture, which you would like to pass on to a relative or friend you can simply include this in your Will. This is known as a "specific legacy".
   c) Money - If you want to leave anyone, or your favourite charity or good cause, a sum of money you can make what is called a "pecuniary legacy".
   d) Residue - After all the above have been dealt with the property left over is called the residue. Think who you would like to have this. It is common to leave it to a surviving husband/wife/civil partner or to your children. If any of the people in these categories die before you it is possible for their share to be passed on to their own children or grandchildren (known as their representatives.)
   e) Liferent - In some circumstances you might wish someone to continue to use your property or money without actually owning it. For example, if you have a new partner you may wish them to be able to stay in your house after your death but also want to make sure your children inherit the property. This arrangement is called "Liferent and Fee". Your partner would be known as the "Liferenter" and your children the "Fiars". This is common in second marriages where there are children from the first marriage.

4. Other issues to consider:
   a) If someone dies before you - If you are worried that some of the provisions of your Will might not be effective it is possible to put in a kind of "what if" provision. For example you could leave your

residue to your husband/wife/civil partner "whom failing" your children. This would mean that if the first person died before or at the same time of you, your property could be passed on without the Will becoming invalid.

b) Changes to your Will - It may be in the future that you wish to make further changes to your Will. The most formal way of doing this is to make a "codicil". This is a supplement to your original Will which can be prepared by your Solicitors. It is also possible to have a provision in your Will to allow any "informal writings" for example a list of legacies signed and dated by yourself to be treated as part of your Will.

c) Funeral arrangements - Some people have strong feelings about how they would like their funeral to be conducted. It might be as simple as stating you would like to be cremated or buried or as detailed as choosing the music for your funeral, then you should consider the possibility that your taste in music could change over time!

5. Legal rights:
Whatever you say in your Will a surviving husband/wife/civil partner and surviving children can make a claim for "legal rights". They do not need to and can sign a document to say they do not want to. But if there are children under 16 who are not capable of making this decision money from your estate should be set aside on their behalf.

Inheritance tax

This is a tax which is paid on the estate. At the moment it only applies to estate with a value of over £325,000 but this figure varies, as it is set in the Budget. The tax does not apply to money left to a husband/wife/civil partner and there are tax exemptions up to a certain value and for certain items such as wedding gifts. Your solicitor or the Capital Taxes Office in Edinburgh should be able to help you.

Separation Agreements

There is usually a clause in a Separation Agreement cancelling rights of inheritance.

To think about

Society and family life has become more complex than in the past. The 'default mode' rules which would apply if you don't make a will may not be what you expect or would want.

Back to Contents

Financial Practicalities
Bank accounts, Council Tax, pension nominations, Child and Working Tax Credit, Capital Gains Tax, independent financial advice.

Bank accounts
If you have joint accounts**,** on separation you need to take great care since either of you can withdraw money, or use the overdraft without the other's agreement. This is especially important if your salary is paid directly into a joint account. If, as is likely, you use the joint account to pay direct debits and standing orders, you should try to agree how these should be shared. You could then each set up separate accounts and take over responsibility for particular outgoings, bearing in mind it can take some time for direct debits and standing orders to get moved over.

If there are credit cards where the person is second card holder, again you should try to agree that these will not be used and that they can be cancelled. Really, you need to do what is appropriate to protect your position financially. It is much better if this can be done in a planned and co-operative way. If it is clear that can't be done you should contact the bank and credit card company to explain the situation and ask to stop the accounts being used if possible.

Council tax
Couples living together are jointly responsible for council tax. If one person leaves, the other can apply for a single person discount of 25%. If you have left, you should contact the council tax department and let them know, so that they do not contact you if arrears build up. Bear in mind that arrears of council tax accrued up until your separation will still be a matrimonial liability for which you will be responsible for a share.

Pension Nominations
If you have nominated your partner to receive a death-in-service benefit, for example for your pensions, then you should decide if you want to try to change this. You need to contact the pension administrators direct to ask for a change.

Child Benefit and Universal Credit

Only one parent can receive child benefit for a child so if you separate the benefit should be paid to the parent who has more of the day to day care. If the parent who receives child benefit has an income over £50,000 then the child benefit will be reduced by tax.

Universal credit (UC) has replaced benefits such as child tax credit and working tax credit in most cases. More information can be found about child benefit and universal credit at http://www.direct.gov.uk

Independent Financial Advice
After a separation your finances will need to be re-structured. An Independent Financial Advisor can be a great help.

Depending on what kind of settlement you are hoping to achieve, your IFA will be able to advise on what assets you should be looking to retain, or acquire from your partner. This will depend on your long-term financial aims. These could involve protecting your existing pensions, building up a pension, or guaranteeing a steady income. If you hold more assets than your partner, an IFA can advise on the best way to manage the financial consequences of transferring assets to your partner. This could involve pension-sharing or realising a particular asset to pay a capital sum.

Capital Gains Tax
There are often tax implications following on from a separation. There are tax advantages for married couples/civil partners which generally do not continue after separation.

If assets are to be sold or transferred as part of a settlement, there will generally be capital gains tax consequences. Transfers between spouse/civil partners are exempt from CGT, and this exemption is still available during the tax year in which the couple separated. However, if a couple separate towards the end of a tax year, it is very unlikely that a settlement will be finalised before the end of that tax year. Without proper advice, you could find yourself financially worse off than you anticipated during the negotiation period, particularly where an asset has increased significantly in value over the course of the marriage. There is some leeway for the family home for up to 18 months currently, although that period is likely to be reduced so this is an issue to explore with an accountant.

To think about
IFA's can be checked out or located using www.fsa.gov.uk or
https://www.cisi.org/cisiweb2/cisi-website/homepages/cisi-financial-services-professional-body
Accountants can be located using https://www.icas.com/
Your solicitor may be able to point you in the right direction.

Back to Contents

Chapter 22

Counselling

With family problems, because of all the mixed emotions around, it can be difficult to see what is for the best. Counselling is a helpful way of coping with those feelings.

There are many different types of counselling, each with a slightly different emphasis. It is worthwhile 'shopping around', and booking an initial session, to see which type of counselling, and which counsellor suits you and your needs best.

Examples of different types of counselling, and how to find out more about them are shown below. These are just thumbnail sketches of the main points. There is a lot of overlap between different types of counselling and therapy, and a good therapeutic relationship should offer elements of all the qualities listed below:

Cognitive Behavioural Therapy
Emphasises finding links between your feelings, ways of thinking and behaviours, and working to understand and break patterns of thinking and acting which are not helping you any more.
www.**babcp**.com/

Person Centred
Offers an accepting, warm, non judgemental relationship in which you can explore your situation and make changes.
http://www.bapca.org.uk/

Transactional Analysis
Focuses on understanding the ways we relate to ourselves and other people. It offers the opportunity to experiment with new ways of relating to ourselves and others.
https://www.uktransactionalanalysis.co.uk/

Psychodynamic
Provides a way of exploring how our past experiences and relationships may have shaped the way we experience the present. Through this understanding, it offers us the chance to act consciously and skilfully in present situations.
http://www.hdscotland.org.uk

Gestalt
Makes use of our here and now experience to gain understanding of how we are feeling and acting. It encourages us to be aware of and act according to what we really feel and need, and to free ourselves of blocks which may have come from the past.
http://gpti.org.uk/

Transpersonal
Offers ways of working creatively and imaginatively, with issues which arise at times of transition and upheaval in life. The transpersonal acknowledges the spiritual aspects of life and questions of meaning.
www.**transpersonal**centre.co.uk/

If you are looking for a counsellor or psychotherapist, there are two umbrella organisations which keep lists of accredited members. These organisations supervise standards for the profession as a whole. They are the BACP www.**bacp**.co.uk/ and the UKCP www.psychotherapy.org.uk/ . The websites listed above under different types of counselling also provide links to practicing therapists. Many of these therapists will be accredited with BACP or UKCP.

British Association of Sexual and Relationship Therapy
Sexual and relationship Therapy. BASRT is a national charity for Sexual and Relationship Therapy.
www.cosrt.org.uk

Counselling & Psychotherapy in Scotland
As the professional body for counselling and psychotherapy in Scotland, COSCA seeks to advance all forms of counselling and psychotherapy and the use of counselling skills by promoting best practice and through delivery of a range of sustainable services. COSCA www.cosca.org.uk

Family Mediation Scotland and Relate Scotland merged to form **Relationships Scotland**. The Relationships Scotland website can be found at **www.relationships-scotland.org.uk**.

The organisation supports a comprehensive and developing national network of relationship and family mediation services and child contact centres across Scotland. The services provided for individuals, couples and families include:

- Relationship Counselling
- Family Mediation
- Child Contact Centres including Supported and Supervised Child Contact
- All Issues Mediation
- Family Counselling
- Young People's Counselling
- Group Work with Separating Couples
- Young People's Support Groups

- Mediation in the Context of Homelessness
- Sex and Relationship Therapy
- Telephone Counselling
- Training for Counsellors, Mediators and Supervisors
- Groups organised to give parents information and confidence to help their children deal with their separation or divorce

Some general resources available to refer to from the Scottish Government can be found at https://www.mygov.scot/support-after-separation/

There is useful information from Australia, which has for some decades been working hard to establish resources which will make separation sustainable for children which includes a booklet for separating parents which can be found at https://www.familyrelationships.gov.au/document/7251

Back to Contents

Chapter 23

Other Organisations for Support

Organisations for Parents

One Parent Families Scotland
Provider of support for one parent families with an extensive list of organisations which could be helpful to be found on their website.
www.opfs.org.uk

Gingerbread
1014 Argyle Street
Glasgow, G3 8TD
0141 576 5085/7976
www.gingerbread.org.uk

One Plus One
55 Renfrew Street, Glasgow, G2 3BD
0141 333 1450
www.oneplusone.org.uk

Child Maintenance Service
https://www.gov.uk/child-maintenance

ParentLine Scotland
0808 800 2222 – Confidential telephone support for parents who want to talk over worries, problems and concerns – available Monday, Wednesday and Friday 10am to 1pm, Tuesday and Thursday 6pm to 9pm and Saturday and Sunday 2pm to 5pm.
https://www.children1st.org.uk/help-for-families/parentline-scotland/

Parenting Across Scotland
Support and information for parents
www.parentingacrossscotland.org

Organsiations for children

Childline 0800 1111
Freepost 1111, Glasgow G1 4BR
www.childline.org.uk

Scottish Child Law Centre
0131 667 6333

www.sclc.org.uk
also free advice to the under 18s at 0800 328 9870

Dispute resolution organisations

CALM (Comprehensive Accredited Lawyer Mediators)
www.calmscotland.co.uk

Relationships Scotland.
www.relationships-scotland.org.uk

Consensus
Information about Collaborative Practice and Collaborative professionals
http: //www.consensus-scotland.com/

The Family Law Association
For information about family law and details of family lawyers
http://familylawassociation.org/

The Law Society of Scotland
Find accredited specialist solicitors by choosing the advanced search option then either 'child 'or 'family' specialists.
https://www.lawscot.org.uk/find-a-solicitor/?type=sol

Other Organisations
Scottish Women's Aid
National Organisation
https://womensaid.scot/

The Spark
Support for stepfamilies
https://www.thespark.org.uk/relationship-support-parents-families/stepfamilies/

One Parent Families Scotland www.opfs.org.uk

Grandparents Apart Self Help Group Scotland
0141 882 5658
www.grandparentsapart.co.uk

Back to Contents

Books

"Children, Feelings and Divorce – Finding the Best Outcome" Heather Smith. Free Association Books. 1999

"Chasing Rainbows: Children, Divorce and Loss" Brynna Kroll. Russell House 1994

"Children's Minds"
N Donaldson, Fontana – ISBN 0-00-686122-9

"Making Decisions about Children" (second edition)
H Rudolph Schaffer, Blackwell – ISBN 0-631-20259-5

"Children in the Middle"
Ann Mitchell, Tavistock Publications – ISBN 0-422-79270-5

"Listening to Children's View" – the findings and recommendations of recent research.
Ann O'Quigley, Joseph Rowntree Foundation – ISBN 1-902633-70-9

"Divorce and Separation – the Outcomes for Children"
Rodgers and Pryor, Joseph Rowntree Foudnation – ISBN 1-85935-043-7

"The Exeter Family Study – Family Breakdown and its Impact on Children"
Cockett and Tripp, University of Exeter Press – ISBN 0-85989-473-8

"Young Children's Rights: Exploring Beliefs, Principles and Practice"
P Alderson, Jessica Kingsley Publishers, ISBN 1-85302-880-0

"The Participation Rights of the Child"
M G Flekkoy, N H Kaufman, Jessica Kingsley Publishers, ISBN 1-85302-490-2

"Children and Young People's Voices: The Law, Legal Services, Systems and Processes in Scotland"
Gallagher, R, The Stationery Office, ISBN 0-1149-7258-3

For Parents

"Your Children matter. Know Your Responsibilities and Rights" The Stationery Office on behalf of the Scottish Office 1998.

"Putting Children First". A Handbook for Separating Parents
Karen & Nick Woodall Piatkus ISBN 07899-2804-2

"Helping Your Kids Cope with Divorce the Sandcastles Way"
M Gary Neuman, Random House – ISBN 0-679-77801-2

"Helping Children Cope with Divorce"
Rosemary Wells, Sheldon Press – ISBN 0-85969-668-5

Family Matters – Parenting Agreement for Scotland
ISBN 07559-5067-4

"Separation & Divorce – Helping parents to help children"
Handbook produced by "Resolution", the organisation for Family Lawyers in England and Wales, written by Christina McGhee, a parenting expert from Texas, USA. There is reference to the law in Appendix 1 and it is important to note this is different from Scottish Law. – ISBN 978-0-9526809-7-0
Obtainable through Resolution, PO BOX 302 Orpington Kent, BR6 8QX info@resolution.org.uk or on the website at http://www.resolution.org.uk/

Books for Children

"I have Two Homes"
Althea Braithwaite, Dinosaurs

"Dinosaurs Divorce"
Laurene K Brown and Marc Brown. Collins 1986

"The Suitcase Kid"
Jacqueline Wilson. Doubleday 1992

"Splitting Up"
Karen Bryant-Mole, Wayland

"Caught in the Middle"
Alys Swan-Jackson, Piccadilly Press

"Children Don't Divorce"
Stones, R, Happy Cat Books, ISBN 1-899248-02-1

"Mum and Dad Glue"
Kes Gray, ISBN 978-0-340-95711-0

Back to Contents

Chapter 25

List of Useful Websites
(Also see chapter 22 and 23)

Citizens Advice Bureau www.citizensadvice.org.uk

The Official Government Website for Citizens www.direct.gov.uk

The Scottish Government www.scotland.gov.uk

The Child Maintenance Servichttps://www.gov.uk/manage-child-maintenance-case

The Financial Conduct Authority https://www.fca.org.uk/consumers/finding-adviser

The Institute for Chartered Accountants of Scotland https://www.icas.com/

The Law Society of Scotland www.lawscot.org.uk

The Scottish Legal Complaints Commission
https://www.scottishlegalcomplaints.org.uk/

The Scottish Legal Aid Board www.slab.org.uk

Scottish Child Law Centre www.sclc.org.uk

Back to Contents

Chapter 26

Financial Information likely to be needed at some point

FINANCIAL INFORMATION – Income and Basic Expenses		
INCOME DETAILS	**YOU**	**YOUR PARTNER**
Pay from Employment		
Is O/T or bonus usual		
If s/e – usual drawings		
average annual pre tax profit		
Support Received from ex partner		
Child Benefit		
Universal credit		
Investment income		
Other income		
Means tested benefit (specify)		
Other Benefit (Specify)		
EXPENDITURE	**YOU**	**YOUR PARTNER**
Housing costs Rent/mortgage		
Endowment policies		
Buildings		
Contents		
Gas/ electricity		
Telephone		
Car costs		
Food		
Clothes		
Council Tax		
Nursery Fees		
School Fees		
Support		
New Partner?		
Are you living with new partner?	YES / NO	
If YES, do they have an income?	YES / NO	
If YES, give details of how much they contribute to your listed expenditure		

Assets and Liabilities –

Values at date you stopped cohabiting unless asset/liability in joint names. Where assets and liabilities are joint or if assets are likely to be transferred, current value will be needed.

Separation date values unless marked otherwise

	YOU	YOUR PARTNER	JOINT	CURRENT VALUE
Family Home - address				
Specify how valued				
Amount of loan				
Name and Address of Lenders				
Reference number				
Net value of house				
Endowment loan(s) YES/NO				
Policy details				

OTHER ASSETS				
Time share/holiday home/ other heritage				
Household contents of special value				
Other Endowment policies				
Savings				
Shares				
Premium Bonds				
Other Investments				
Pension values Occupational/ Private Additional State Pension (give start date for any pension)				

	YOU	YOUR PARTNER	JOINT	CURRENT VALUE
Business Interests				
Vehicles				
Any inheritance or gifts or previous assets				
Other resources				
Totals				

LIABILITIES				
Bank loans				
Car loans				
Credit cards				
Other:				
Additional Information				
Totals				

Back to Contents

Chapter 27

Frequently asked questions

Q. **Should I stay in the relationship because of the children?**

A. Most children want their mum and dad to stay together. Sometimes parents cannot be happy together and it is inevitable that there will be a separation, especially if there is very high conflict. The most important thing then is to work out how best to approach this for the children. Chapter 1 and Chapter 10 are starting points for more information. The crucial thing to recognise is that the impact of a separation on children will be hugely affected by how the separation is handled.

Q. **I am an unmarried father, do I have any legal rights in respect of my child?**

A. Previously unmarried fathers did not automatically have rights and responsibilities but from 4th May 2006 unmarried fathers who jointly register the birth of a child with the child's mother share parental rights and responsibilities with the mother. Another way to obtain parental rights and responsibilities is by signing an Agreement conferring them. See Chapter 11 for more information. It is also important to remember that the best interests of children are the basis on which any decisions are made. If you have a close relationship with your child, even if your child's birth was registered before 4th May 2006 that is probably the most important factor which would be taken into account if court has to be asked to make decisions because you and your child's mother cannot agree on decisions to be made.

Q. **Do I need a solicitor to sort things out?**

A. Family lawyers can act as interpreters, guides, negotiators and advocates as well as being a gateway for other resources. A family lawyer can provide practical support and strategies to achieve an amicable transition. If a partner is being abusive or manipulative then lawyers can use the law to seek protection. The approach needed will depend on the circumstances. Chapter 4 outlines why the legal framework can be a support at times of separation.
Chapter 6 sets out how you can go about choosing a solicitor.

Q. **I need to watch how much it costs to deal with this**

A. Cost is a very real issue. At the same time, what you are sorting out is the basis for your future. It's important to get value for the investment you make in tackling what has to be deal with. You are making a transition which may involve children, money and legal steps. If there are children you are adjusting to being separated parents. If there are pension interests or a business to be factored in then there will be many factors to consider before deciding what is best. If you are able to use collaborative practice there will be a clear structure to follow and all the aspects you need to tackle are integrated within the process. You can be given a better idea of what the costs might be. See Chapters 5 and 8.

Q. **Would it not be better just to sort things out by direct discussion?**

A. If things are straightforward and you are able to talk without finding it gets difficult then you could explore plans direct. The trouble is that in many cases the decision to separate is taken by one person and the other person is adjusting to this at the same time as sorting things out. That makes it likely that direct discussion will be derailed by emotion. If you own property or have any significant assets then there will need to be formal steps taken to deal with them. There may be aspects you don't know you don't know and so plans you discuss might not be workable after all. It should be helpful to check out your legal position early on and to use the way of sorting things out which will give you the best support through the process. See Chapters 1, 2, 3, 5 and 12

Q. I don't want things to get adversarial when we start sorting out the practical things

A. If you and your partner both want to take a problem solving approach then Mediation or the Collaborative process might be appropriate. See Chapter 5 for the ways things can be sorted out.and have a look through Chapter 29 for suggestions about dealing with conflict.

Q. **My daughter-in-law is separated from my son and is not letting me see the children. Can I get contact?**

A. It is always good to try and sort things out in connection with the children by agreement and you could try using mediation to resolve this. If

agreement cannot be reached then, although there are no automatic legal rights for grandparents, the court can be asked by grandparents to step in and make a contact order if that is in the children's best interests. See Chapter 11 for the law relating to children and Chapter 5 for ways of sorting things out.

Q. **I am about to marry. I was married before. I own my own house and have some savings. I want to make a go of this marriage but I also want to safeguard my children from my first marriage. What should I do?**

A. In those circumstances, particularly if you are going to buy property together, it can be helpful to have a Prenuptial Agreement. See Chapter 16 for more information about that. It is also sensible to consider the terms of your Will. See Chapter 20, making a Will, for that.

Q. **I have been living with my partner for some years but we have not married. I have heard there was a change in the law a while ago. Does that mean I now have the same rights as if we were married?**

A. It is true there has been a change in the law but it is not the case that the change makes cohabiting couples have the same rights as married couples. See Chapter 15 for more details. It is particularly important if you are in a cohabitation to consider making a Will and see Chapter 20 for that.

Q. **I was in a pension for many years before I married. Does that mean all my pension is going to be taken into account in dividing things up?**

A. No, in Scotland it is only the value of the portion of the pension which accumulated after the marriage up to the date of separation which is taken into account. See Chapter 12.

Q. **I built up a business I started during the marriage. My wife didn't work so I was supporting the household as well as developing the business. It's very successful now although really only because of my involvement in it. I'm worried about the what will happen to my business.**

A. The value of your business is included as part of the matrimonial property. That doesn't mean it automatically has to be split or sold. The value can be worked out by a business valuer who understands what should be taken into account in valuing it as a matrimonial

asset. It is important for the family that the business prospers. When it is agreed or decided how things should be split up the needs of the business will be taken into account. Approaches like offsetting the value of the business against other assets or deferred or instalment payments can be used to allow the division to be sustainable for the business. See Chapter 12

Back to Contents

Chapter 28

Acknowledgements

I have had enormous help along the way in assembling this information (though any shortcomings in it are all my own work!).

Jenny Smith of Harper McLeod, Solicitors, Glasgow provided the basis for the chapters on cohabitation and pre-nuptial agreements which was much appreciated.

Dr Margaret Kerr, psychotherapist (info@margaretkerr.com) kindly contributed the information about the various types of counselling.

Dawn Finlayson of MTM Solicitors, Glasgow provided invaluable input to the content.

To those named and many unnamed I owe a debt of gratitude.

Back to Contents

Chapter 29

Conclusion – so how do you break up, without falling apart

Dealing with change and conflict

So how do you break up, without falling apart? The legal framework can help give you a starting point for realistic possibilities for the future in terms of sorting out the practicalities of where you live, what money you might have to live on and how any assets and debts might be dealt with.

Your psychological framework will have a big impact on how much that information can help you. Conflict can be damaging for adults as well as children. It's great if you can cushion your children from the fear and uncertainty conflict will trigger in them. It's also great if you can be aware of how fear and uncertainty may affect you as well.

A core skill is being able to know how to tackle things in a way which is a good match for your particular circumstances. If you're dealing with abuse or dishonesty in a former partner then accepting the buffer and protection the legal process can provide may be the most sustainable option.

In other circumstances the challenge will be for you to find a way to become 'negotiation ready'.

Even positive change generates stress. Most separations involve some negative changes. Some separations seem to bring nothing but loss and unwanted change. All separations trigger a review of who you are to some degree. In some cases it may feel that you have become a stranger in your own life.

So, in dealing with conflict, the first stage is negotiating with yourself.

An early task is recognising you are likely to have painful internal conflict between how things are and how you feel they ought to be. There's a risk you will spend a lot of mental energy on how you think things should be when that's not under your control. Once you acknowledge and mourn the loss of what you hoped for, you can begin to release your energy into dealing with the situation as it is. Being fast forwarded through change you didn't expect is hard work. Being the one who triggered significant change can be quite frightening. In either case, counselling can be very helpful.

Conflict need not be a stark choice between battling to get all you think you deserve or resignedly putting up with what you get. It can be a journey into understanding and growth. Sustainable conflict involves an ability to recognise your system is trying to look after you but when confronted by psychological and financial rather than physical threat your system may trigger the wrong coping mechanism. The 'fight or flight' response which would deliver you from a sabre toothed tiger might pitch you into an unproductive adversarial battle on separation or giving up rights which could have given you a more workable future.

So how to get on more productive ground? There are some very practical steps which could help including basics like regular meals, a regular routine to help with sleep and regular exercise (which could just be going for a brisk walk at lunchtime). Although that may seem a tall order when dealing with the volatility of life in the aftermath of a separation, it pays dividends to attend to those basics.

When things are particularly overwhelming, 'first aid' steps could include:

- writing down how you feel (without sending that anywhere) to help you get the thoughts out of your head
- using a breathing exercise like breathing in on a count of 3, holding for a count of 4 and exhaling for a count of 5 when anxieties start crowding in
- deliberately noticing and describing to yourself inwardly how your thoughts feel in your body when you feel invaded by negative thoughts and worries, going through your body from head to foot, noting where you feel tension or discomfort in your body. No need to make any conscious effort to change anything, just observing.

Those steps can help you to be negotiation ready, switch from the "fight or flight "to the "rest and digest" state and begin to create enough space to begin responding rather than reacting to events. It's important to be able to identify what your needs and interests are so that you can look at all the ways they can be met, rather than be panicked into thinking that there's only one outcome which will make things ok.

While you are creating this space for adjustment it's good to put a hold on crystallising round a plan which may not in the end be workable. Leave some room to grow into your future rather than risk an exhausting fight trying to protect your past.

Once you're ready, the next negotiation is with your ex partner. Remember that the rules setting out the framework for children and money don't pivot round who was at fault in the relationship. The rules are about providing each of you with a fair share financially and the children with as much security as possible in the new circumstances.

With your system primed for measured decision making you have a better chance of exploring the area of shared interests and needs to build arrangements which will give you the best platform for the future. That process involves accepting that your partner will also have some of their needs met which may seem unfair if they have hurt you by behaving contrary to what you believed were your shared values.

What you might find is that if you have treated yourself with kindly understanding during the first stage you may be able to accept more easily at this stage that negotiation is about solution seeking rather than blame apportioning.

Your solicitor may ask what you think your partner might be telling their solicitor to get an idea of what the dynamics of the negotiation might be. You might find that a helpful exercise anyway. If you can consider what your partner might feel and need out of the arrangements you will be better placed to start considering arrangements which could meet your needs and also factor in elements for your partner which would square with the legal framework.

Once you and your partner are both ready to negotiate and have decided what process to use, the next stage is to exchange information to build up a complete picture of what's around in terms of assets and debts. Sometimes it can feel like one person has to do more of that work. Quite often one person does have access to more of the financial details and in that case, will have the bigger task.

Then comes the stage ot looking at possibilities and checking what will work best. The practicalities of how the information is assembled and the options assessed will depend on what dispute resolution process you're using. See chapter 5 for an outline of the options.

If you decide to use mediation remember:

- the mediator is keen to understand both of you and help each of you understand one another, not to judge either of you
- the mediator can give you information but not advice
- all the discussions take place during mediation sessions, not by email or telephone between you and the mediator

If you decide to use Collaborative Practice to make progress with negotiations remember:

- your solicitor is there to support you in the process and you can have as many one to one meetings or discussions with your own solicitor as you need
- the Collaborative meetings have a problem solving, co-operative approach. Your solicitor will talk direct to your partner during the meetings and their solicitor will talk to you
- using family consultants helps you navigate the psychological process of transition and using financial neutrals helps everyone think of options which

might otherwise be missed. The counsellors and financial advisers who have trained in Collaborative practice are also familiar with the legal context of separation.

If you use conventional negotiation remember:

- there is no set framework for this process so if your former partner is not co-operating to provide information or respond to proposals there are no rules to use to get a response, only levers like threatening to go to court which only have force if you are willing and able to follow through if necessary
- the process is usually carried out by letter and you might find things are said in letter which you believe are not true. Although that's annoying, it gives you an insight to what may not be well founded about their arguments
- negotiation only works if both parties feel they have been treated fairly in the process and succeeded in achieving some of what is important to each of them and the children. That means it's usually better to keep things courteous and avoid correspondence becoming an adversarial battle as if each of you were trying to persuade a third party to agree with what you want. It's your ex partner who will need to agree!

If you're using arbitration or negotiation remember:

- each of you will have to put your best foot forward in saying what you want and why you should get it so what is written down is likely to look very challenging and adversarial to the other person
- it takes months (and occasionally years) to get to the point of a third party decision so it's important to find a way of living with uncertainty for some time
- it's quite possible that the outcome will be not quite what either of you want so be very realistic about how things might end up

The process you use to sort things will have a big impact on the kind of separated family life you all have in the future. It's good to imagine how you want that future to be, and chose the process that is most likely to get you there.

If you are coping with your own separation then I do hope this has helped make things clearer and given you a starting point to sorting things out. The information given is just a broad overview. It is to give you some idea of the resources available and allow you to feel more confident about how to take matters further.

If you have gone through a separation or are helping someone cope with a separation and you know of any resources which could be helpful for others, please be in touch with the details (See "About the Book").

If you have any feedback about the book then do please be in touch.

Separation is never going to be easy but if it has to happen then I hope this can help make it a workable transition.

Back to Contents

About the Book

Every effort has been made to ensure that information is accurate. If you believe any of the details need correction or could be added to, please contact anne@inkdancemediation.co.uk

This book does not represent individual legal advice.

First published 1993 'Breaking Up – Without Falling Apart'
This edition published in 2019 by Anne Hall Dick, Inkdance Mediation, Glasgow.

Back to Contents

About the Author

Anne Dick is a retired family law specialist. She started the firm of Anne Hall Dick & Co in 1975 which had offices in Glasgow and Kilmarnock and which went on to merge with Mowat Dean WS (subsequently MHDLaw) in 2003. In 2013, Anne became involved in setting up Family Law Matters Scotland LLP with 3 other partners. She is an Associate Member of the Chartered Institute of Arbitrators and for some years was a part-time Tribunal Chairman of both Social Security Appeal Tribunals and Child Support Appeal Tribunals

Anne retired from legal practice in 2017 and now does freelance work as a trainer and mediator, working as Inkdance Family Mediation in Glasgow http://inkdancemediation.co.uk/

After training in Collaborative Family Law in London in 2004 she became one of the original four founder members of the Scottish Collaborative Family Law Group now 'Consensus'. .

Anne was founder Chairman of the Family Law Association in 1989. In 1993 she was the first mediator to be accredited by the Law Society of Scotland and first Convenor of CALM, the association of Accredited Family Mediators in Scotland. She annotates "The Family Law (Scotland) Act 1985" for W Green and is co-author of "Child Centred Legal Practice", "The Art of Family Law" and "The Science of Family Law".

Anne is very keen to contribute to making separation a workable transition rather than a battle and to enable accurate information about Scottish Family Law to be available to assist in that process. She appreciates how important it is to choose the right approach when making plans after separation.