FORSTERS

Law Reform: What is new? A perspective from England and Wales

Jo Edwards, Partner/Mediator and Head of Family

Forsters LLP, London

January 2019

Forsters LLP 31 Hill Street London W1J 5LS | **DX:** 82988 Mayfair
T: +44(0)20 7863 8333 | **F:** +44(0)20 7863 8444 | **W:** www.forsters.co.uk

Law reform - what is new? A perspective from England and Wales[1]

A. Introduction

1. When reflecting upon preparing for this talk today, there were numerous topics which immediately sprang to mind as being new (or, at least, current) in England and Wales. Among them are the following :

   1.1 Brexit - what will be the impact on family law of the UK's withdrawal from the EU on 29 March 2019?

   1.2 The status of divorce law, Owens v Owens, the Nuffield Foundation's Finding Fault research, the Ministry of Justice's recently concluded consultation period and moves towards reform.

   1.3 How couples are forming relationships - including marriage (opposite- and same-sex), cohabitation (for all) and civil partnerships (for same sex couples) - plus the legal consequences of any of those relationships ending through separation or death, the ongoing inertia in relation to cohabitation reform and the move towards opening up civil partnerships for all (query how much interest is there in this from the wider public?).

   1.4 Financial remedies on divorce - the breadth of judicial discretion; the status of the Law Commission's 2014 report "Matrimonial Property, Needs and Agreements"; moves in case law away from joint lives spousal maintenance towards independence within a defined timeframe; the increasing prevalence of nuptial agreements and the development of jurisprudence about their impact on divorce; how the English courts approach concepts such as the treatment of assets accrued post-separation and the circumstances in which one party's special contribution will dictate a departure from 50/50 division of assets; and the progress through the House of Lords of Baroness Deech's Divorce (Financial Provision) Bill.

   1.5 The ravages of the legal aid cuts following the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in April 2013 and progress with the long-promised post-implementation review.

   1.6 The courts modernisation programme, including court closures and the move to online divorce and other applications, as well as the spectre of online hearings in certain circumstances.

[1] For those who want to keep their finger on the pulse of all things family law and policy-related south of the border, Resolution's Law Reform Committee, which I chair, publishes regular policy briefings. The most recent, from January 2019, may be found here http://www.resolution.org.uk/site_content_files/files/resolution_policy_briefing_january_2019.pdf

1.7 The difficulties created by alleged perpetrators of domestic abuse being able to cross-examine their victims in the family court, and other developments in the domestic abuse sphere.

1.8 Developments in the law surrounding modern families and different cultures.[2]

1.9 The imminent 5th anniversary of Child Arrangements Orders, as to which practitioners will be interested to see whether the new form of Order has had the desired effect of reducing litigation over the prize of "residence" under the previous legislation[3].

1.10 Developments in alternatives to court and new and pioneering ways of helping separating couples keep their issues away from the court.

1.11 Transparency in the Family Courts.

2. Unfortunately, due to lack of time, and the rich content available elsewhere in the programme today, the speakers in this slot quickly realised that we couldn't do all of these topics justice. We therefore decided to focus on comparisons between our respective jurisdictions in relation to (a) the legal position for those cohabiting/wanting to form civil partnerships; and (b) the status of divorce law. It was also suggested, as a hoped-for segue to our next speakers, that I cover (briefly) the status of calls for reform of the law around financial provision on divorce.

3. I ought to add that, because of the nature of my practice, the focus of my talk (and this paper) is rather more on the private law, rather than the public law side. I acknowledge that there is very much going on in relation to public law also and there are others within Resolution (primarily our Legal Aid, Domestic Abuse and Children committees) who take the lead on that work and shaping reform.

B. Backdrop to current state of the law and family justice system

4. Although our primary sources of legislation - the Matrimonial Causes Act 1973 and the Children Act 1989 - are somewhat older, and indeed I could trace the sources of our current system back much further still, in this paper I undertake a review of the more recent sources of where Family Law and justice in England and Wales finds itself today.

5. In essence, the climate in which we are working today is as a result of the coming together of three main events, the second not fully anticipated when the first got under way - the Family

[2] I have not been able to devote space to this topic in my paper. Of interest may be the following : (a) the recent announcement that single parents going through surrogacy will be able to apply for a Parental Order https://www.stowefamilylaw.co.uk/blog/2019/01/03/single-parents-now-able-to-apply-for-a-parental-order-in-the-uk/ (b) Resolution's evidence submitted to the Sharia Review Team in August 2016 http://www.resolution.org.uk/site_content_files/files/sharia_review_team_august_2016.pdf

[3] Again, this topic is not covered in this paper but readers may be interested in Resolution's responses to consultations before the new legislation took effect on 22 April 2014, namely the response to the cooperative parenting consultation http://www.resolution.org.uk/site_content_files/files/resolution_response_to_co_operative_parenting_consultation_september_2012.pdf and the response to the draft Child Arrangements Programme http://www.resolution.org.uk/site_content_files/files/resolution_response_to_draft_cap_december_2013.pdf

Justice Review, which began in 2010; the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act ("LASPO") in April 2013 and the beginning in 2016 of arguably the most ambitious courts modernisation programme the world has seen, as a result of which court closures are aligning with digitisation and the move towards online issuing, tracking of cases and (in certain circumstances, as it is anticipated) hearings being determined online.

(i) Family Justice Review

6. In March 2010 the then Labour Government appointed a board to carry out a review of the family justice system, which was also supported by the Coalition Government that took office shortly afterwards. David Norgrove, then Chair of the Pensions Regulator, was appointed to lead the review. The Family Justice Review, jointly sponsored by the Ministry of Justice (MoJ), the Department for Education (DfE) and the Welsh Government, began work in March 2010. The Coalition Government that took office shortly afterwards supported the review. The board's interim report was published in March 2011 and its final report in November 2011; the Government response followed in February 2012.

7. Resolution submitted written evidence to the Family Justice Review panel, both a response to the call for evidence in September 2010[4] and the making of proposals in February 2011[5], as well as giving oral evidence.

Guiding principles

8. The Review was conducted against the background of certain "guiding principles" set out by the commissioning Ministers[6]:

8.1 The interests of the child should be paramount in any decision affecting them.

8.2 Delays in determining court applications to be kept to a minimum.

8.3 The court's role should be focused on protecting the vulnerable from abuse, victimisation and exploitation and should avoid intervening in family life except where there is clear benefit to children or vulnerable adults in doing so.

8.4 Individuals should have the right information and support to enable them to take responsibility for the consequences of their relationship breakdown.

8.5 The positive involvement of both parents following separation should be promoted.

[4] http://www.resolution.org.uk/site_content_files/files/resolutions_response_to_family_justice_review_call_for_evidence_september_20101.pdf
[5] http://www.resolution.org.uk/site_content_files/files/summary_of_proposals_to_the_family_justice_review_for_the_web_feb_2011.pdf
[6] for a good summary of the backdrop to this see the Obiter J post at http://obiterj.blogspot.com/2011/12/family-justice-review-1-overview-and.html

8.6 Mediation and similar support should be used as far as possible to support individuals themselves to reach agreement about arrangements, rather than having an arrangement imposed by the courts.

8.7 The processes for resolving family disputes and agreeing future arrangements should be easy to understand, simple and efficient and transparent both to those involved and wider society.

8.8 Conflict between individuals should be minimised as far as possible.

8.9 The review should assess how the current system operates against these principles and make recommendations for reform in two core areas: the promotion of informed settlement and agreement; and management of the family justice system.

9. The Review panel were asked to look at certain issues:

9.1 The extent to which the adversarial nature of the court system was able to promote solutions and good quality family relationships in private law family cases and what alternative arrangements would be more effective in fostering lasting and positive solutions.

9.2 Examination of the options for introducing more inquisitorial elements into the family justice system for both public and private law cases.

9.3 Whether there were areas of family work which could be dealt with more simply and effectively via an administrative, rather than court based process, and the exploration of what that administrative process might look like.

9.4 How to increase the use of mediation when couples separate as a preferred alternative to court processes.

9.5 How to promote further contact rights for non-resident parents and grandparents.

9.6 Examination of the roles fulfilled by all of the different agencies and professionals in the family justice system, including consideration of the extent to which governance arrangements, relationships and accountabilities were clear and promote effective collaboration and operational efficiency.

Recommendations

10. Some of the main recommendations of the Family Justice Review included the following[7]:

10.1 The child's voice: the report sought to ensure that children's interests are truly central to the operation of the family justice system. Children should be given age appropriate information to explain what is happening when they are involved in

[7] again, neatly summarised in an Obiter J blog at http://obiterj.blogspot.com/2011/12/family-justice-review-2-main.html

public and private law cases and they should be supported so that they are able to make their views known.

10.2 Family Justice Service: - the review wished to see the creation of a Family Justice Service, with responsibility for the budgets for court social work services in England, mediation, out-of-court resolution services and, potentially over time, experts and solicitors for children.

10.3 Judicial leadership and culture: - the review recommended that the judiciary should aim to ensure judicial continuity in all family cases. There was also a call for specialisation in family matters, not just for professional judges but also magistrates.

10.4 The courts: - the review recommended a single family court with a single point of entry, in which all levels of family judiciary (including magistrates) should sit and work should be allocated according to case complexity. However, the the Family Division of the High Court should remain, with exclusive jurisdiction over cases involving the inherent jurisdiction (of the High Court) and international work that has been prescribed by the President of the Family Division as being reserved to it. All other matters should be heard in the single family court, with High Court judges sitting in that court to hear the most complex cases and issues.

10.5 Case management: - the review noted that different courts take different approaches to case management in public law and called for robust case management. Specifically, it noted that government should legislate to provide a power to set a time limit on care proceedings, to be set at six months, achieving the time limit to be the responsibility of the trial judge.

10.6 Alternatives to court: - a number of recommendations sought to encourage the development of approaches and programmes that better supported families while avoiding or reducing the need for distressing and costly court cases. The review also stated that "a pilot on the use of formal mediation approaches in public law proceedings should be established."

10.7 Making parental responsibility work: - recommendations were made which were intended to enable parents to reach agreements following separation, while ensuring that the child's welfare remained paramount. The review came out against a presumption that there should be either substantial sharing of time with the child or equal time; the view was taken that a presumption could well create more conflict between the separated parents and also detract from the key focus on the welfare of the child.

10.8 Government should develop a child arrangements order, to replace residence and contact orders and which would set out arrangements for the upbringing of a child when court determination of disputes related to the care of children is required.

10.9 A coherent process for dispute resolution: - as an ideal, adults would resolve their disputes out of court and the review made recommendations to encourage this. These included:

- an online information hub and helpline;
- rebranding "Alternative Dispute Resolution" as "Dispute Resolution Services";
- where intervention is necessary, expecting separating parents to attend a session with a mediator who would assess the most appropriate intervention including mediation and collaborative law, or whether the risks of domestic violence, imbalance between the parties or child protection issues require immediate referral to the family court; and provide information on local Dispute Resolution Services and how they could support parties to resolve disputes.

Those parents who were still unable to agree should next attend a Separated Parents Information Programme and thereafter, if necessary, mediation or other dispute resolution service. Attendance at a Mediation Information and Assessment Meeting and Separated Parent Information Programme should be required of anyone wishing to make a court application. This cannot be required, but should be expected, of respondents.

10.10 Voice of the child: children and young people should be given the opportunity to have their voices heard in cases that are about them, where they wish it. The government and the judiciary should actively consider how children and vulnerable witnesses may be protected when giving evidence in family proceedings.

10.11 Enforcement: where an order is breached within the first year, the case should go straight back to court to the same judge to resolve the matter swiftly. The current enforcement powers should be available. The case should be heard within a fixed number of days, with the dispute resolved at a single hearing. If an order is breached after 12 months, the parties should be expected to return to Dispute Resolution Services before returning to court to seek enforcement.

10.12 Divorce and financial arrangements: - The final set of recommendations related to divorce and financial arrangements and were intended to enable divorcing couples to dissolve their marriage efficiently and, wherever possible, to reach an agreement on financial arrangements without using the court. The process for initiating divorce should begin with the online hub and should be dealt with administratively by the courts, unless the divorce is disputed. People in dispute about money or property should be expected to access the information hub and should be required to be assessed for mediation. Where possible all issues in dispute following separation should be considered together whether in all issues mediation or consolidated court hearings. HMCTS and the judiciary should consider how this might be achieved in

courts. Care should be taken to avoid extra delay particularly in relation to children. The Ministry of Justice and the Legal Services Commission should carefully monitor the impact of legal aid reforms.

Consequences of the Family Justice Review: changes which came into force on 22 April 2014

11. Those proposals which saw the light of day did so under the raft of family justice reforms which came into force on 22 April 2014, the detail of which is summarised here: https://www.gov.uk/government/news/family-justice-reforms-to-benefit-children.

12. They included:

12.1 The introduction of the new Family Court in England and Wales with a simpler single system and a network of single application points making it easier for the public to navigate. The Family Court make sure the right level of judge is appointed for a particular case, in the most suitable location. All levels of judge being able to sit in the same building, which will help reduce the unnecessary delays caused by cases transferring between different courts.

12.2 Justices' clerks and their assistants were to be authorised to assist all judges across the Family Court (including on undefended divorce cases), allowing judges to focus their time on more difficult cases.

12.3 The introduction a 26 week time limit for care proceedings to further reduce the excessive delays in these cases and give greater certainty to the children involved.

12.4 New child arrangements orders that will encourage parents to focus on the child's needs rather than what they see as their own 'rights'.

12.5 Expert evidence in family proceedings concerning children only permitted when necessary to resolve the case justly, taking account of factors including the impact on the welfare of the child.

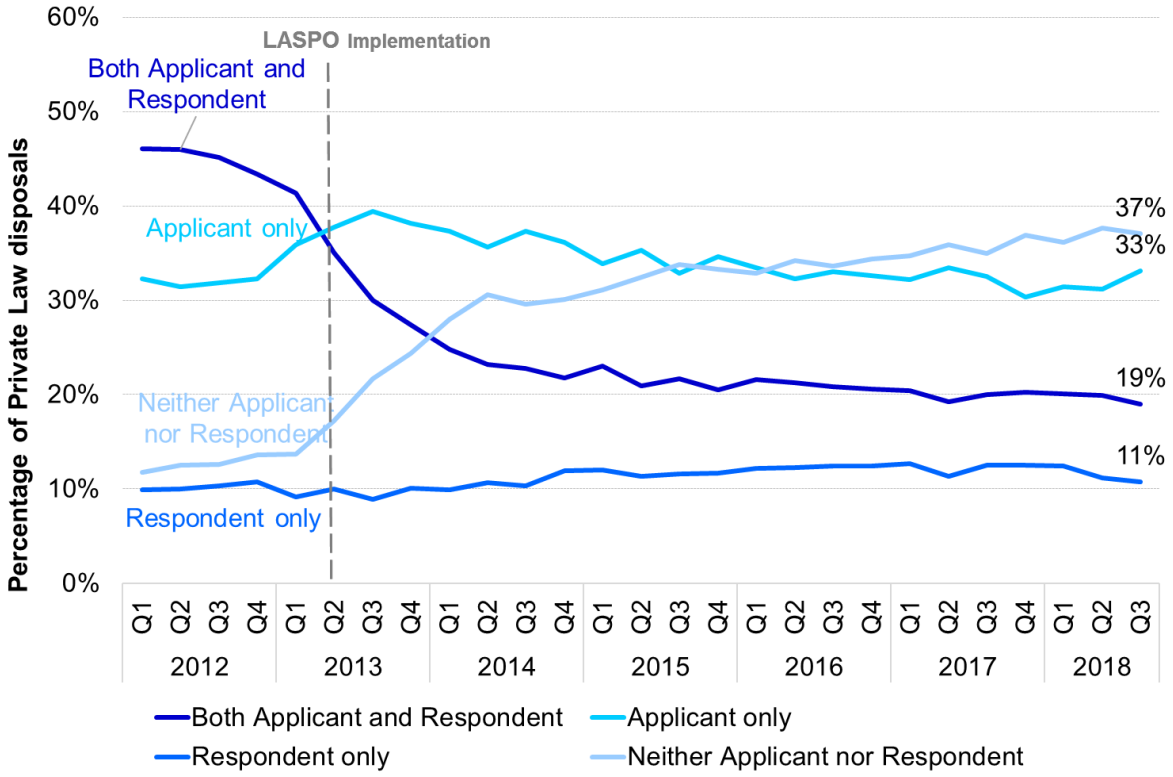
12.6 Compulsory family mediation information meetings so separating couples must consider alternatives to the harmful and stressful court battles when resolving financial matters and arrangements for child contact.

13. For a detailed summary of what became of all of the recommendations made by the Family Justice Review, including those not taken up, see https://www.gov.uk/government/publications/whats-happened-since-the-family-justice-review-a-brighter-future-for-family-justice and especially *"A brighter future for Family Justice"* published in August 2014 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/346005/family-justice-review-update.pdf

(ii) Legal Aid (Sentencing and Punishment of Offenders) Act 2012

14. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) pared back access to legal aid significantly, in one strike making hundreds of thousands of people ineligible for funding where they had been previously. It has had a particularly stark impact on family proceedings, seen in the huge rise in the number of self-representing litigants. The most recently published statistics[8], for the period July to September 2018, show that the proportion of disposals where neither the applicant nor respondent had legal representation was 37%, an increase of 15% since July to September 2013. Correspondingly, the proportion of cases where both parties had legal representation dropped by 11 percentage points to 19% over the same period. 81% of cases involved at least one unrepresented litigant –

Representation in private law family cases, pre- and post-LASPO



15. What we can't see so readily, of course, are the doubtless huge numbers of people who, not knowing where to turn in the absence of funding for initial advice, are not pursuing their rights on divorce, whether to make financial claims or to see their children.

16. Opposition to the cuts, and the £350 million which was to be taken from the civil legal aid budget, was vocal well before the legislation took effect in spring 2013. Most if not all of the

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764339/FCSQ_July_to_September_2018_-_FINAL.pdf

consequences of the cuts, and the access to justice desserts which have resulted, were predicted and warned of[9].

17. The Ministry of Justice (MoJ) had initially planned to assess LASPO within five years of its implementation in April 2013. In 2014 the Justice Select Committee launched an inquiry into the *"Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012"* which, although it was early days, attracted comment and evidence from widespread sources[10].

18. A report by the Bach Commission on Access to Justice[11], published in September 2017, assessed the effect of LASPO, concluding that there was a crisis in the justice system so widespread and varied that it warranted a new Right to Justice Act which would:

    18.1 Codify existing rights to justice and establish a new right for individuals to receive reasonable legal assistance without costs they cannot afford;

    18.2 Establish a set of principles to guide interpretation of this new right covering the full spectrum of legal support, from information and advice through to legal representation; and

    18.3 Establish a new body called the Justice Commission to monitor and enforce this new right.

19. The post-implementation review of LASPO was finally announced by the Ministry of Justice in March 2018[12]. In its terms of reference, the MoJ acknowledged that the objectives of the LASPO reforms was to discourage unnecessary and adversarial litigation at public expense; target legal aid at those who need it the most; make significant savings to the cost of the scheme; and deliver better overall value for money for the taxpayer.

20. In terms of engagement, it was said that to inform the review, and the Government's thinking on how to move forward into the future, the Government was also keen to engage with interested parties who wished to contribute to the evidence-gathering exercise of the Post-Implementation Review, through consultative groups led by MoJ officials, to which certain interested parties would be invited to participate (including a family justice group). The MoJ was said to be committed to ensuring that legal aid and other forms of legal support are available to those who need it; but that it was right that the Government takes the time to assess the extent to which the objectives of the LASPO changes were achieved.

---

[9] See e.g. Resolution's response to the proposals for the reform of legal aid in England and Wales, February 2011 http://www.resolution.org.uk/site_content_files/files/resolution_final_response_legal_aid_green_paper_february_2011.pdf as well as a response to a consultation about the practical operation of legal aid, May 2013 http://www.resolution.org.uk/site_content_files/files/final_resolution_response_transforming_legal_aid_may_2013.pdf

[10] https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/?type=Written . Resolution's evidence is at http://www.resolution.org.uk/site_content_files/files/resolution_evidence_to_justice_select_committee_legal_aid_april_2014.pdf

[11] A link to the Bach Commission's detailed and incisive report is here http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf Resolution's submission to the Bach Commission in April 2016 is here http://www.resolution.org.uk/site_content_files/files/resolution_submission_to_bach_commission_april_2016.pdf

[12] https://www.gov.uk/government/publications/post-implementation-review-of-laspo

21. In July 2018, the House of Commons library published a useful briefing pack on legal aid and the post-implementation review. It contains a full background to LASPO and the history behind the review, as well as parliamentary material – an essential read for anyone interested in this area.[13]

22. Resolution's response to the LASPO review[14] contained some stark headlines –

*A number of **respondents reported decreasing their legal aid work since LASPO implementation**, including **20% who have stopped all together (5% within the past year)**. This reduction in provision is seen elsewhere, with **a quarter of respondents** saying they are unable to signpost to a legal aid provider within a reasonable distance.*

The majority of practitioners (98%) reported that their average client has either no or basic legal knowledge, and they (93%) are also seeing increased numbers of litigants in person.

*When asked which **area of law they find themselves most often turning away prospective clients, 82% cited "child arrangement orders"**, which would likely result in private children cases where both parents are unrepresented.*

*Conservative estimates from the 104 legal aid providers responding show that, at a minimum, they've **had to turn away just under 10,000 people over the last 12 months**.*

*Positively, **nearly half (46%) of respondents reported that fewer people at risk or victims of domestic abuse are being turned away** since the widening of the gateway evidence requirements in January 2018. At the same time, just over half **(56%) said it has not become easier for those facing financial or coercive control to provide evidence** (compared with 12% saying it was easier).*

*Our results show that, compared with our 2014 LASPO survey, **more people are returning when asked to come back with gateway evidence**. In 2014, nearly half (46%) of respondents said the majority of people did not return. In 2018, only a fifth said the majority do not return.*

23. Confirmation of the date when the review will be completed is still awaited. The MoJ indicated in December 2018 that it has yet to complete the review, which is said would be published 'early in the new year'. The MoJ has said the delay is due to the large number of organisations and individuals who have been consulted. A detailed report may be found in the Law Society Gazette dated 13 December 2018[15]

24. Whatever the upshot of the review – and it is clear what respondents' views will be – what is clear is that the system is broken. Without access to early legal advice and signposting, more people are having to represent themselves in the family courts or abandon their rights altogether. Although there have been valiant attempts to simplify and demystify the system for litigants in person – e.g. the Family Justice Council producing a guidance note for litigants, *Sorting out Finances on Divorce* in April 2016[16] and having also published guidance for the

[13] http://researchbriefings.files.parliament.uk/documents/CDP-2018-0193/CDP-2018-0193.pdf
[14] A link to the detailed response is here http://www.resolution.org.uk/site_content_files/files/resolution_laspo_pir_response.pdf
[15] https://www.lawgazette.co.uk/news/laspo-review-publication-delayed-again-to-early-2019/5068682.article
[16] https://www.judiciary.uk/wp-content/uploads/2016/04/fjc-financial-needs-april-16-final.pdf

judiciary[17] to try to achieve a more uniform approach towards finances on divorce (and therefore greater certainty for litigants/more likelihood of settlement) – they are no substitute for early legal advice and signposting to e.g. mediation. Publicly funded mediation has fallen off a cliff since the legal aid cuts, as the main source of referral to mediation – solicitors – has been taken away. This is a false economy, given that people then become self-representing litigants who clog up the family courts and take up judicial resource.

25. For details of the Resolution policy position on how things should change, see our 2015 Manifesto for Family Law –

Protect vulnerable people going through separation

The problem

Since the cuts to legal aid in April 2013, fewer people have access to legal support during their divorce or separation.

This restricts people's potential to resolve their disputes, whether or not they use the courts. Before the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), solicitors provided crucial initial advice for people going through separation under the legal aid scheme, helping them to understand their options and steps they needed to take.

They were also the major point of referral to out-of-court dispute resolution. Publicly-funded mediation numbers have dropped 45% over two years, despite the Government's objective of diverting more separating couples into mediation.

Our solution

*Some form of initial advice from a professional, who can talk someone through the options available as well as the individual's legal rights and responsibilities, is essential. Resolution therefore proposes a form of "**family law credit**" – where anyone who meets the criteria for legal aid for family mediation is able to have an initial meeting with a family lawyer to help them gather evidence they need in order to access legal aid, or to discuss their options.*

It may be a combination of services, so that people are able to receive help from a legal professional at the points in the process where they need it most – so even if they end up representing themselves, they have an initial discussion about what they need or want to do.

This would provide a more comprehensive system of support and enable vulnerable people to access the domestic violence gateway to legal aid, and/or learn about and choose more options to help them than just mediation. It is also likely to result in a higher referral rate to mediation, as it would restore a major source point of access that existed before LASPO.

[17] https://www.judiciary.uk/wp-content/uploads/2018/04/guidance-on-financial-needs-divorce-2nd-edition-april-2018.pdf

(iii) Courts modernisation programme

26. HMCTS are investing £1.2 billion in a six year programme to modernise the courts, which started in 2016. The ambitious programme came in for some criticism from the National Audit Office in a report published in May 2018 https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progess-in-transforming-courts-and-tribunals.pdf as a result of which the Public Accounts Committee (the parliamentary committee with oversight of the public purse) announced an inquiry later that month. A link to details of the inquiry, the evidence given by Resolution (including my oral evidence on 6 June 2018), the PAC's report published 20 July 2018 and the government response published 9 October 2018 may be found here[18]. Over time Resolution has responded to a raft of consultations to do with court closures and the modernisation programme and I have included details in the footnote below[19].

27. Since the inquiry HMCTS have seemed to wish to be seen to be publishing more information about the direction of travel of the courts modernisation programme and allay concerns about access to justice and moving too quickly to close courts when the technology to underpin the move to online applications and hearings has not yet been robustly tested. Blog posts are published on the HMCTS website https://insidehmcts.blog.gov.uk/category/transformation-courts-and-tribunals-2022/ and regular updates are being published on the HMCTS website https://www.gov.uk/guidance/the-hmcts-reform-programme. The most recent update is here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752790/Reform_Update_issue_2_September_2018.pdf

28. In terms of overall direction of travel -

    28.1 Since April 2018 litigants in person have been able to issue divorce petitions online and as of early January 2019 it was thought that around 23,000 applications had been processed. The Press picked up on a press release from the MoJ on 4 January 2019 about the number of people issuing over the festive period https://www.bbc.co.uk/news/uk-46761442. It is said by HMCTS that rejection rates of petitions with the move online have reduced from around 45% to less than 1%.

    28.2 From January 2019, litigants in person are able to submit their acknowledgment of service and applications for Decree Nisi online. From Q2 of 2019 they will be able to check the outcome of Decree Nisi and Decree Absolute applications and the overall "service journey" online.

[18] https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament 2017/transforming-courts-tribunals-17-19/publications/

[19] http://www.resolution.org.uk/site_content_files/files/resolution_response_to_inquiry_on_working_of_the_family_court_september_2010.pdf
http://www.resolution.org.uk/site_content_files/files/resolution_response_court_estate_october_2015.pdf
http://www.resolution.org.uk/site_content_files/files/resolution_response_transforming_our_justice_system_assisted_digital_november_2016.pdf
http://www.resolution.org.uk/site_content_files/files/resolution_response_flexible_operating_hours_pilot_november_2017.pdf
http://www.resolution.org.uk/site_content_files/files/resolution_response_fit_for_the_future_march_2018.pdf
http://www.resolution.org.uk/site_content_files/files/resolution_evidence_on_court_modernisation_june_2018.pdf

28.3 The pilot for solicitors being able to issue divorce petitions online has been successful and a few days ago a new practice direction was issued for next stage of online divorce, PD 36L[20]

28.4 A financial remedies consent orders online pilot has started involving 12 firms with an average turnaround of financial orders of 1.8 weeks (compared to a wait of up to 2 months with the old box system; the benefit of the online system is that work can be more evenly distributed around the country and orders picked up remotely by judges as they have capacity.

28.5 Solicitors should be able to lodge acknowledgements of service and apply for Decrees Nisi online from Q2/3 2019; the end to end journey for consent orders online was to start in Q1 2019; the pilot for an online contested financial remedies process to First Appointment is also due to start in Q1 2019 and to Financial Dispute Resolution appointment/final hearing by Q3 2019.

29. Separately, at the end of 2018 the senior judiciary updated judicial office holders about plans for 2019 and Judicial Ways of Working, which asked judicial office holders for their views on court reform.

30. In relation to the family court, the relevant extracts are set out below:

"At the end of 2018, senior members of the judiciary did their best to allay the concerns expressed by judges for whom they were responsible. All members of the judiciary received an update from their head of division, summing up individual judges' responses to the Judicial Way of Working papers (explained in the previous chapter) and outlining the senior judiciary's plans for the year ahead. This chapter summarises what individual judges were told. It is based on updates that have not been published.

Family

Sir Andrew McFarlane, president of the High Court family division, summed up his message in six headlines:

1. *HMCTS reform team assure us that there will be robust technology in the family court which is fit for purpose and developed with input from the family judiciary.*

2. *There is to be testing in Birmingham and Manchester of first directions appointments in financial remedy cases being conducted as fully video hearings.*

[20] https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-36l-pilot-scheme-procedure-for-using-an-online-system-to-complete-certain-stages-of-certain-proceedings-for-a-matrimonial-order

3. *There is no current plan to extend fully video hearings into other areas of family law.*

4. *There will be no case officers in the family court. Consideration is being given to extending legal adviser powers in the family court at the magistrates' tier.*
5. *All family courts will be staffed to agreed minimum levels and staff will be carrying out agreed roles to ensure that the judges can be supported in their work effectively and efficiently.*

6. *Judges will start to see features of the reform programme and its innovations being more widely rolled out in the family jurisdiction throughout the course of 2019.*

The judge also had more to say about the confusing phrase "assisted digital". It had two meanings, he explained:

1. *The process by which competent digital participants can be assisted to use the digital system to achieve access to the courts*

2. *The range of channels — telephone, webchat and face to face — in place for litigants who require support to interact with the system digitally.*

HMCTS recognised that this might not be suitable for all users. Some might not want to stay on the phone to receive support; a centre might not be in travelling distance; or they might want to share a paper form with trusted friends who would complete it with them. As a result, HMCTS would continue to make provision for litigants to use paper documents.

Like judges in other jurisdictions, family judges were concerned at the prospect of fully video hearings. Some felt they were being put forward in the name of cost reduction but at the cost of justice. Others believed they could be used for uncontested case management hearings. Judges were apprehensive that lawyers would lose the opportunity for face-to-face meetings at court that often led to agreements between the parties.

Sir Andrew said that fully video hearings would not normally be appropriate for contested cases involving the giving of oral evidence; for multi-party cases; for cases concerning litigants in person; and for cases concerning children. HMCTS had accepted that:

- *Robust technology is required for fully video hearings to succeed.*

- *Anyone appearing before the court must be clearly seen and heard throughout, as would be the case if they were physically in the courtroom. The video should ideally capture more than just a head-and-shoulders image.*

- *Broadband speed, wi-fi, and equipment used by those taking part in the hearing must be of sufficient quality.*

- *The use of video technology should not compromise the confidentiality of family court proceedings.*

- *The senior family judiciary proposed that family court litigants participating in any fully video hearing should do so from an authorised place — which could include, for example, a Citizens Advice Bureau, a personal support unit office or a solicitors' office".*

31. There is also the spectre of the Flexible Operating Hours pilot, which has had a mixed reaction from practitioners (it is fair to say that lots of concerns have been expressed from the perspective of working parents, and on the criminal law side practitioners seem successfully to have warded off what was proposed; not so in the civil courts, per this announcement made in November 2018) :

From: Sadler, Kevin [mailto:kevin.sadler@Justice.gov.uk]
Sent: 16 November 2018 10:28
To: Info; Communications; Joanne Edwards; Joanne Edwards
Cc: Watkins, Greg
Subject: Next steps for the Flexible Operating Hours Pilots in HMCTS

Dear Jo

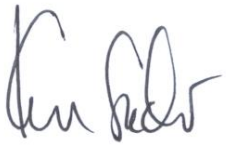
I am writing to update you on the Flexible Operating Hours (FOH) project, to let you know that we have decided to proceed with pilots in the Civil and Family Courts.

As part of the HMCTS Reform programme, the FOH project was set up to look at options to maximise the use of our court and tribunal hearing rooms by using them at different times of day, outside the traditional hours of 10am-4pm. The intention was to both increase the accessibility to courts - for example ensuring that people could attend court before or after their working day - and also improve the efficient use of our buildings.

In October 2017, we published an initial FOH Pilot Prospectus setting out the background and detail of the proposed pilots. We committed to listening to the responses we received and to review the pilot models before we proceeded with the actual pilots. We are grateful to all those that contributed and we listened carefully to the concerns that were raised, particularly by those in the legal profession. We agree that there are currently particular pressures in the criminal jurisdiction. On that basis, we have decided to proceed only with pilots in the Civil and Family Courts. Flexible Operating Hours are not being tested in the criminal courts.

We have drawn up a new prospectus that outlines the background and the aims and objectives of the FOH pilots; summarises the responses we received to the initial prospectus; and sets out the changes that we intend to make as a result in more detail - including on the ability to opt in and out of the FOH sessions. You can access this document here.

Two courts in Manchester and Brentford, Middlesex will run the pilots and we will work with the Local



Implementation Teams (LITs) there to agree the exact start dates of the pilots, based on listing lead-in requirements. We are planning for the first pilots to commence in Spring 2019 and all the pilots will run for six months from their respective start dates.

Decisions about using FOH in the future have not yet been made and we are committed to the pilots being a fair and transparent test. Any decisions about the rolling out FOH would only be made on the basis of robust evidence and data gathered through these pilots and a comprehensive evaluation of the impacts, costs and benefits across the justice system.

We have appointed an independent organisation to evaluate the pilots, looking at their impact on all court users and conducting a cost-benefit analysis for a potential scaling up of the pilots. To support a cross-system approach to the evaluation of the pilots, we have set up an Evaluation Advisory Group which includes representatives from the judiciary, partner government agencies, the Bar Council, the Bar Standards Board, the Law Society and CILEx.

Kind regards,

Kevin Sadler
Deputy Chief Executive and Courts and Tribunals Development Director
HM Courts & Tribunals Service
6th Floor
102 Petty France
London
SW1H 9AJ

C. Some specific aspects of family law reform

(i) Divorce reform

32. There has been so much written about divorce law reform in England and Wales in the recent past, and over the past year in particular, that I hope that delegates will forgive me for simply signposting to the key materials.

33. For 50 years, divorce law has remained unchanged in England and Wales. The only ground for divorce is that the marriage has irretrievably broken down, and the petitioner needs to satisfy the court of one or more of five facts, three of which are fault based (adultery, behaviour, desertion). However, the coming together of various factors recently, including the *Owens* case, The Nuffield Foundation's *Finding Fault?* Research, the move to online divorce and the

prevalence of litigants in person needing simplicity in the law, have all aligned to make the case for change more compelling than it has ever been.

Owens

34. In Owens, in 2016 a judge in the Central Family Court refused to grant Mrs Owens a decree nisi of divorce, even though he found that the marriage had broken down. The husband had defended the divorce and the judge found that Mrs Owens had failed to prove, within the meaning of the law, that her husband had behaved in such a way that she could not reasonably be expected to live with him. Both the Court of Appeal in 2017[21], and the Supreme Court in 2018[22], dismissed Mrs Owens' appeal. Judges in both courts said that it was for Parliament and not judges to change the law. In the Court of Appeal, Sir James Munby, then President of the Family Division, spoke of an aspect of the law and procedures being based on "*hypocrisy and lack of intellectual honesty*". There has been worldwide coverage of the case and consternation about the outcome.

35. The legal test in unreasonable behaviour cases was said to be as follows: (i) by reference to the allegations of behaviour in the petition, to determine what the respondent did or did not do; (ii) to assess the effect which the behaviour had upon this particular petitioner in light of all the circumstances in which it occurred; and (iii) to make an evaluation as to whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation that the petitioner should continue to live with the respondent would be unreasonable. This test has been applied for many years but the application of the test to the facts of an individual case is likely to change over time, in line with changes in wider social and moral values. The most relevant change over the past forty years is the recognition of equality between the sexes, and of marriage as a partnership of equals.

Finding Fault?

36. This important research[23], led by Professor Liz Trinder and published in October 2017, was the first empirical study since the 1980s of how divorce law in England and Wales is operating. The study included interviews with people going through divorce, focus groups with lawyers, observation of the court scrutiny process and analysis of divorce court files, coupled with a national opinion poll and comparative analysis of divorce law in other countries.

37. The findings demonstrated that many of the problems persist. Key findings were that:-

    37.1 Divorce petitions are often not accurate descriptions of why a marriage broke down and the courts make no judgement about whether allegations are true.

[21] https://www.familylaw.co.uk/news_and_comment/owens-v-owens-2017-ewca-civ-182
[22] https://www.supremecourt.uk/cases/docs/uksc-2017-0077-judgment.pdf
[23] *Finding Fault? Divorce Law and Practice in England and Wales* http://www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_full_report_v_FINAL(1).pdf

37.2 Uncertainty about what constitutes unreasonable behaviour undermines the principle for the rule of law to be 'intelligible, clear and predictable'.

37.3 The use of fault may trigger, or exacerbate, parental conflict, which has a negative impact on children.

37.4 Fault does not protect marriage or deter divorce. The study found no empirical support for the argument that is sometimes made that fault may protect marriage because having to give a reason makes people think twice about separating

37.5 Divorce law in England and Wales is out of step with Scotland, most other countries in Europe, and North America. It was noted, and worthy of note, that in 2015, 60% of English and Welsh divorces were granted on adultery or behaviour. In Scotland, this figure was 6%. The table illustrating quite how out of step England and Wales is in its reliance on fault was stark:

Table 11.2: Divorce law, use of fault and crude divorce rate (selected jurisdictions)

	Relevant legislation, year	Divorce by mutual consent	Divorce without mutual consent (time- or separation-based)	Divorce without mutual consent (fault-based)	Use of fault (% of all divorces)	Crude divorce rate[298]
England & Wales	Matrimonial Causes Act 1973	2 years' separation	5 years' separation	Adultery, behaviour, desertion	60% (2015)	1.8
Scotland	Family Law (Scotland) Act 2006	1 year's separation	2 years' separation	Adultery, behaviour	6% (2013/4)	1.7[299]
France	French Civil Code, amended 2004	Immediate (once married for at least 6 months)	2 years' separation	Grave or repeated breach of duties and obligations of marriage	6.9%	1.9
New York State	Domestic Relations Law, amended 2010	6 months irretrievable breakdown[300]	6 months irretrievable breakdown	Cruel and inhuman treatment,[301] abandonment, 3 year imprisonment, adultery	5%[302]	2.8[303]
Italy	Italian Civil Code, amended 2015	6 months from notification	1 year from notification	Sexual offence, insanity, prison (15 years)	1%	1.4
Norway	Marriage Act 1991	1 year separation	1 year separation	Attempted murder of petitioner or children, forced marriage	0.2%	1.9
Denmark	Marriage Act 1989	Immediate	2 years' separation	Adultery, bigamy, child abduction, domestic violence	No data	2.9
Belgium	Belgian Civil Code, amended 2007	3 months' notification or 6 months' separation	1 year	In exceptional circumstances, cohabitation cannot reasonably be resumed	Rare	2.2
Spain	Spanish Civil Code, amended 2005	Immediate (once married for 3 months)	6 months	-	-	2.1
Sweden	1973	Immediate (6 months' waiting period if minor children)	6 months' waiting period	-	-	2.5
California	1970	6 months' waiting period	6 months' waiting period	-	-	No data
Finland	Marriage Act 1987	6 months' notification (or immediate if 2 years separation)	6 months' notification (or immediate if 2 years separation)	-	-	2.5
Ireland	Family Law (Divorce) Act 1996	4 years' separation	4 years' separation	-	-	0.6 (2013)

38. Based on these findings the researchers recommended removing fault entirely from the divorce law and replacing it with a notification system where divorce would be available if one or both parties register that the marriage has broken down irretrievably and that intention is confirmed by one or both parties after a minimum period of six months. This broadly reflects the government consultation launched in September 2018.

39. Note that in April 2018 the Nuffield Foundation published some follow-up research, on defended divorce[24]

Attempts to reform the law[25]

40. Part 2 of the Family Law Act 1996 would have introduced no-fault divorce and required the parties to a divorce to attend information meetings with a view to encouraging reconciliation where possible. In 2001, following a series of information meeting pilot schemes, the then Government concluded that the provisions were "unworkable". The relevant provisions in Part 2 have now been repealed.

41. In 2015, Resolution engaged with Richard Bacon MP over a Commons Private Member's Bill he introduced which would have added a sixth ground of mutual consent to the existing five[26]. It fell when no parliamentary time was made available for it.

42. In July 2018, Baroness Butler-Sloss introduced a Lords Private Member's Bill, which would require the Lord Chancellor to review the law relating to divorce and judicial separation and to the dissolution of civil partnerships and the separation of civil partners. The review would include consideration of whether the law ought to be changed so that irretrievable breakdown of a marriage or civil partnership is evidenced solely by a system of application and notification. It had its first reading in July and a second reading has yet to be scheduled (Baroness Butler-Sloss is understood to be waiting to see what becomes of the government consultation).

Government consultation paper

43. On 15 September 2018, the Ministry of Justice published a consultation paper, *Reform of the legal requirements for divorce*[27] The consultation closed on 10 December 2018. It asked for views on replacing the current requirement to establish one or more of the five facts to show that a marriage has broken down irretrievably, with a process based on notification. The Government is proposing to remove both the ability to allege fault and the ability to contest (defend) a divorce.

[24] *No Contest : Defended Divorce in England and Wales* http://www.nuffieldfoundation.org/sites/default/files/files/No%20contest%20final_Nuffield_Foundation.pdf
[25] I have written quite extensively on this topic and the bars to reform in the past – see e.g. *"It is time to end the blame game in divorce"*, Conservative Home, October 2017 https://www.conservativehome.com/platform/2017/10/jo-edwards-it-is-time-to-end-the-blame-game-in-divorce.html and *"Nobody's fault - why does the state trap people in unhappy marriages?"*, the Guardian, May 2018 https://www.theguardian.com/commentisfree/2018/may/18/state-trapping-unhappy-marriages-no-fault-divorces Also Law In Action on no fault divorce, June 2018 (featuring Rachael Kelsey and I) https://www.bbc.co.uk/programmes/b0b50kxf and ITV *Tonight* in January 2018 featuring (inter alia) Nigel Shepherd and I https://www.itv.com/news/2018-01-11/tonight-a-family-lawyers-top-tips-for-a-good-divorce/
[26] https://services.parliament.uk/bills/2015-16/nofaultdivorce.html
[27] https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf

44. In his Ministerial Foreword, David Gauke, Lord Chancellor and Secretary of State for Justice, referred specifically to the Owens case, and said that it had generated broader questions about what the law requires of people going through divorce and what it achieved in practice. The proposals were said to be made for the following reasons:

- *The breakdown of a marriage is a difficult time for families. The decision to divorce is often a very painful one. Where children are involved, the effects in particular where there is ongoing conflict, can be profound.*

- *Under current law in England and Wales, couples must either live apart for a substantial period of time before they may divorce, or else they must make allegations about their spouse's conduct. This is sometimes perceived as showing that the other spouse is "at fault".*

- *Both routes can cause further stress and upset for the divorcing couple, to the detriment of outcomes for them and any children. There have been wide calls to reform the law to address these concerns, often framed as removing the concept of "fault".*

- *The government therefore proposes to reform the legal requirements for divorce so that it is consistent with the approach taken in other areas of family law, and to shift the focus from blame and recrimination to support adults better to focus on making arrangements for their own futures and for their children's. The reformed law should have 2 objectives:*

- *to make sure that the decision to divorce continues to be a considered one, and that spouses have an opportunity to change course*

- *to make sure that divorcing couples are not put through legal requirements which do not serve their or society's interests and which can lead to conflict and accordingly poor outcomes for children*

- *This consultation proposes adjusting what the law requires to bring a legal end to a marriage that has broken down irretrievably. This adjustment includes removing the ability to allege "fault".*

45. A link to Resolution's (unsurprisingly, supportive, subject to the detail) response to the consultation is here - http://www.resolution.org.uk/site_content_files/files/resolution_response___the_case_for_no_fault_divorce.pdf

Advocates for change/voices in opposition

46. Among others, some senior members of the Judiciary; the Family Mediation Taskforce; Resolution and The Times newspaper have called for the introduction of no-fault divorce.

Advocates of this form of divorce speak of reducing the conflict which can be caused by allegations of fault. In some cases, the assertion of fault is considered to be a "charade".

47. One reason for change is that the need to apportion blame creates conflict from the get-go and makes reaching agreement on other aspects (children arrangements and money) more difficult. This can fuel conflict between parents, which can have effects on children worse than separation itself. The requirement to assign blame can also undermine attempts to resolve disputes in mediation. It is the Government's policy aim to divert separating couples from court. In my mediations, most couples are ignorant of the need to apportion blame, having just drifted apart. Invariably, the temperature rises when I explain that one of them has to apportion blame and often the resulting acrimony can end the process.

48. There are other changes which make reform pressing. One is the huge rise in self-representing litigants since the legal aid cuts in 2013. How is someone without representation to know how to complete a fault petition? And how is an unrepresented respondent to know they don't have to defend it? People's instinct is to defend themselves and this necessitates a hearing and further burden on the system. The digitisation of the divorce process adds even more impetus to the calls for change.

49. The arguments of those who oppose the introduction of no-fault divorce include that the institution of marriage should be supported; the risk of the divorce rate increasing if it is perceived to be 'easier' to get a divorce; and the negative impact of family breakdown on society. Of the arguments I have heard against reform, the most common are: (a) it will lead to an increase in the divorce rate. Academics have shown that this is not the experience of countries where no-fault divorce has been introduced. Instead, the trend is a short-term increase in the divorce rate (as people wait for the new legislation) and then a return to previous levels. (b) Divorce should be hard, to disincentivise people. But, really? The fact that most are ignorant of the law at present shows that this does not drive their decision-making. Second, few people treat their marriages as disposable; they reflect carefully before making a final decision. Third, is it the place of the state to keep people trapped in unhappy (sometimes abusive) marriages, unable to access financial remedies until they have proven the breakdown of the marriage? (c) We have no-fault divorce already – two years' separation. But few people want to wait for two years' separation, particularly where the decision to divorce is mutual. No divorce is speedy – fault-based divorces take 5-6 months even if undefended – but forcing people to stay together for two years (even then, assuming mutual consent) is paternalistic and wrong.

Next steps

50. It is to be hoped that, notwithstanding the political turmoil presently being caused by Brexit, quick progress can be made on the no fault divorce issue. It now seems to have cross-party support. I attended a round-table with HMCTS, the MoJ and other stake holders in November

2018 to talk through some practical aspects of the consultation and what reform would look like. At that time they had already had hundreds of responses to the consultation, broadly supportive of what was proposed. It was said that government will report back by March 2019.

51. In the meantime, as though by way of stark reminder, in November 2018 there was another reported defended divorce case[28] which showed the utter futility of the current system. The judge's introduction alone gives a flavour of the case:

This has been an extraordinary case in very many respects as I shall return to in some detail later. The two most obviously unusual features should, however, be set out at the start. First, that this has been a three-day contested divorce trial. I understand that there are only about twenty contested divorce trials a year in this whole country. Secondly, that the respondent in these proceedings, Mr H, has contested the divorce which Ms W has brought because of his adultery despite admitting to having committed adultery for some twenty-two years of their marriage

(ii) Cohabitation and civil partnerships

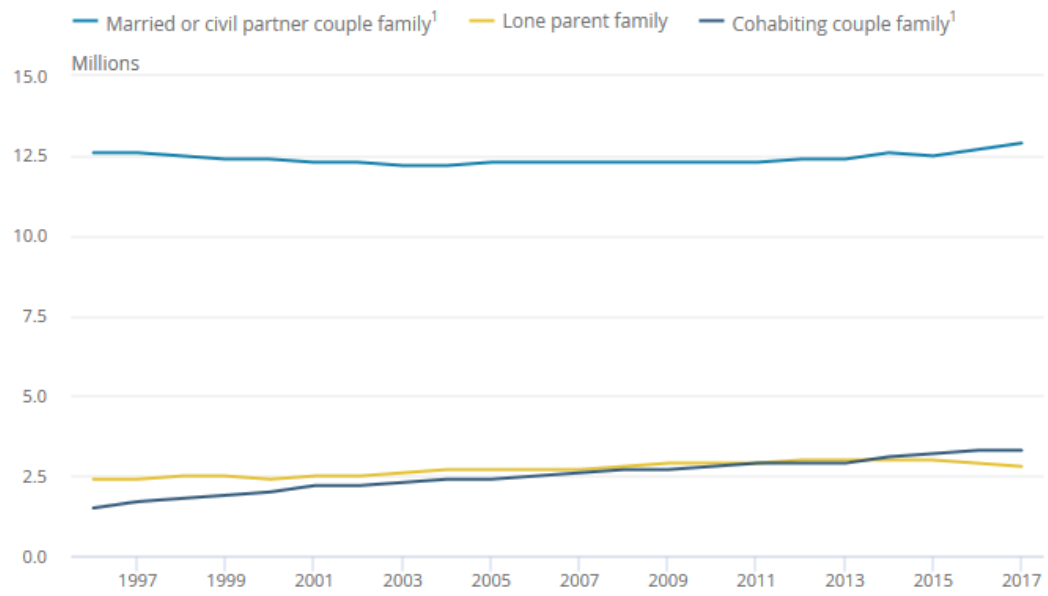
Cohabitation

52. A comprehensive overview of *"Common law marriage and cohabitation"* may be found in the House of Commons Library briefing published in June 2018[29]. The backdrop is well known. The latest stats on families and households, published by the ONS in November 2017[30], show that the cohabiting couple family was the second largest family type, at 3.3 million families; this is expected to double by 2032.

[28] *VW v BH* https://www.bailii.org/ew/cases/EWFC/OJ/2018/B68.html
[29] http://researchbriefings.files.parliament.uk/documents/SN03372/SN03372.pdf
[30] https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017#links-to-related-statistics

Figure 1: Families by family type, 1996 to 2017

UK



Source: Labour Force Survey, Office for National Statistics

Table 1: Detailed family types, UK, 2017

Thousands

Family type	2017		
	With dependent children	Without dependent children[2]	Total families
Married couple family[1]	4,944	7,890	12,834
Opposite sex married couple family	4,938	7,862	12,800
Same sex married couple family	6	28	34
Civil partner couple family[3]	8	47	55
Cohabiting couple family[1]	1,251	2,040	3,291
Opposite sex cohabiting couple family	1,246	1,943	3,190
Same sex cohabiting couple family	4	97	101
Lone parent family	1,781	1,037	2,817
All families	7,983	11,014	18,997

Source: Labour Force Survey, Office for National Statistics

53. Between 1996 and 2017 the number of same sex cohabiting couple families increased from around 16,000 to 101,000, an increase of around 530%. However, this figure understates the true extent of growth in same sex couple families, because the introduction of civil partnerships in December 2005 and of marriage for same sex couples in March 2014 means some same sex couple families are no longer recorded as cohabiting.

54. As things stand, in England and Wales those couples have no real legal protection when their relationship ends through separation or death. Such rights as they have on separation arise from a patchwork of property and trusts law, and in practice it is often difficult (in cases where a property is owned in the sole name of one, as opposed to joint names cases) to be able to provide evidence to sustain a claim, and costs disproportionate/risky to do so. As such the only real rights which exist at the end of a cohabiting relationship are on behalf of a child, under Schedule 1 of the Children Act 1989.

55. State benefits can also be more difficult to access if cohabiting (as opposed to in a married) relationship. Contributory benefits do not recognise couples who are not married or in a civil partnership. So, for example, partners who are not married or in a civil partnership would not be entitled to bereavement benefits. Successive governments have resisted calls to extend bereavement benefits to unmarried partners on the grounds that a founding principle of the social insurance system is that all rights to benefit derived from another person's contributions are based on the concept of legal marriage (extended to include civil partnerships). However, practical considerations have also been cited, such as the difficulty of ascertaining the nature and depth of the relationship, and the possibility of conflicting claims (e.g. where the spouse was separated when they died, leaving both a surviving unmarried partner and a legal spouse). These issues were highlighted starkly in 2018 in the case of Siobhan McLaughlin, in which the Supreme Court[31] made a declaration that a refusal to grant bereavement benefits to an unmarried partner and mother of children was in breach of article 14 of the ECHR. An update is still awaited, nearly 6 months after that decision, as to whether ministers will make changes to the law[32].

Update: On 23 January there was a debate in the House of Commons about Widowed Parent's Allowance for unmarried parents and a request for an update on progress after the McLaughlin decision last August. The Minister indicated that, *"we have recognised the importance of the [McLaughlin] hearing. We are keen to do this thoroughly. We are taking it very seriously. We wish to do it as swiftly as possible, but it has to be done absolutely right. Let me give further reassurance. Although there is no one simple or obvious solution following the declaration of incompatibility, the officials are working very carefully, and ultimately I will return with potential solutions. This must go through the House's legislative process, so all Members will have further opportunities to shape what we then believe would be the right conclusion. We are working very closely with our counterparts in Northern Ireland, recognising that the specific case was from there. But this must be done very thoroughly. In conclusion, we are carefully considering the McLaughlin court ruling. We recognise that we currently have incompatible law on the statute books, and we are actively considering all options. With the introduction of the bereavement support payment, we have demonstrated that we will seek to make sensible and positive changes to target support at those most in need. It is very clear that the hon. Members present feel strongly that the emphasis has to be on the children; I have*

[31] https://www.supremecourt.uk/cases/docs/uksc-2017-0035-judgment.pdf
[32] http://www.childhoodbereavementnetwork.org.uk/media/92073/Note-for-parents-on-Siobhan-McLaughlin-case.pdf

heard that loud and clear. As I said, it has always been our intention to assess the impact of the bereavement support payment, which we will do once we have sufficient data. We are committed to supporting the bereaved and ensuring that they receive the right support at a difficult time... It is a real priority for the Government and for me, and as we make progress I will be very happy to meet again, individually, those who are interested, in order to update them on the work. I want to be inclusive, because we all want the right outcomes. It is just that the issue is complex. There was not a clear steer, which meant that there could not be a quick fix, but the issue is a genuine, real priority for us". A link to the Hansard note of the debate may be found here[33].

56. Pension rules can also work against cohabiting couples. A cohabitant cannot rely upon their former partner's contributions for the purposes of State Pensions. The pension tax legislation allows pension schemes to provide a survivor pension to a person who was not married or a civil partner of the scheme member but was financially dependent on them. Until reforms introduced in the mid-2000s, public service schemes did not provide survivor pensions for unmarried partners. This was in contrast to private sector schemes, where the trustees often had discretion to do so. Changes in lifestyles led to pressure for schemes to be modernised and in 1998, the Labour Government said it would extend eligibility to survivors' pensions to unmarried partners if members were prepared to meet the additional costs. Subsequent reforms to all the main public service pension schemes included improvements to survivors' benefits, such as the introduction of pension for unmarried partners and allowing pensions to be paid for life rather than removed on remarriage or cohabitation. These improvements were generally not made retrospective.

57. When pensions for unmarried partners were introduced, most schemes required a nomination to have been made and this remains a feature of some. In February 2017, on an application by Denise Brewster for judicial review relating to the local government scheme in Northern Ireland, the Supreme Court allowed[34] Ms Brewster's appeal and declared that:

"*the requirement in the 2009 Regulations that the appellant and Mr McMullan should have made a nomination be disapplied and that the appellant is entitled to receive a survivor's pension under the scheme*"

58. The wider position on death is equally precarious. When a couple cohabit and one of them dies without leaving a will, the survivor has no automatic right under the intestacy rules to inherit any part of his or her partner's estate. It is sometimes possible for a surviving cohabitant to make a claim under the Inheritance Act if no provision (or inadequate provision) has been made for them either by will or by operation of the intestacy rules. However, a

[33] https://hansard.parliament.uk/Commons/2019-01-23/debates/3CC5D6E0-F5F6-4935-ADB6-05EF8FD5177E/WidowedParent%E2%80%99SAllowance?highlight=widowed%20parents%20allowance#contribution-66F4ACA2-121F-4F37-97F2-3134102F866F

[34] https://www.supremecourt.uk/cases/docs/uksc-2014-0180-judgment.pdf

cohabitant may only seek reasonable provision for their own maintenance. There is also unequal inheritance tax treatment as between married and cohabiting couples.

Proposals for reform

- *On separation*

59. On 31 July 2007, the Law Commission published a report, *Cohabitation: the financial consequences of relationship breakdown*[35]. The Law Commission did not consider that cohabitants should be given the *same* rights as married couples and civil partners in the event of their separation. Instead, the Report recommended the introduction of a new scheme of financial relief on separation based on the contributions made to the relationship by the parties (rather than on the respective financial needs of the parties as in divorce). First consideration would be given to any dependent children of the couple. Unlike in cases of divorce, cohabitants would not be expected to meet each other's future needs by means of maintenance payments, and there would be no principle that the parties should share their assets equally. Moving in with someone, by itself, would not automatically give rise to any entitlement to a remedy. The scheme would be available to eligible cohabiting couples. Couples who have had a child together or who have lived together for a minimum period would be eligible. The Law Commission recommended that the minimum period for couples without children should be set within a range of two to five years. Couples would be able to opt out of the scheme by a written agreement to that effect.

60. The key features of the scheme were summarised in the Executive Summary. This sets out how financial relief for cohabitants on separation would differ from the provision available on divorce:

60.1 It would not be sufficient for applicants simply to demonstrate that they were eligible for financial relief and that the couple had not made a valid opt-out agreement disapplying the scheme. In order to obtain a remedy, applicants would have to prove that they had made qualifying contributions to the parties' relationship which had given rise to certain enduring consequences at the point of separation.

60.2 The scheme would therefore be very different from that which applies between spouses on divorce. Simply cohabiting, for however long, would not give rise to any presumed entitlement to share in any pool of property. Nor would the scheme grant remedies simply on the basis of a party's needs following separation, whether by making orders for maintenance or otherwise.

61. Unfortunately, there has been no political appetite to move forward with reform:

[35] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc307_Cohabitation.pdf

61.1 On 6 March 2008, Bridget Prentice, who was then a junior Justice Minister, announced that no action would be taken to implement the Law Commission's recommendations until research on the cost and effectiveness of the scheme recently implemented in Scotland could be studied.

61.2 On 6 September 2011, Jonathan Djanogly, then a junior Justice Minister, announced that, having carefully considered the Law Commission's recommendations, together with the outcomes of research on the Family Law (Scotland) Act 2006, the then Government did not intend to reform the law relating to cohabitation in that Parliamentary term:

The findings of the research into the Scottish legislation do not provide us with a sufficient basis for a change in the law. Furthermore, the family justice system is in a transitional period with major reforms already on the horizon. We do not therefore intend to take forward the Law Commission's recommendations for reform of cohabitation law in this parliamentary term.

61.3 In April 2018, junior Justice Minister, Lucy Frazer, said that the Government would consider how to proceed in relation to proposals made by the Law Commission in the context of any further reforms to the family justice system.

- *On death*

62. In October 2009, the Law Commission published a consultation paper, *Intestacy and Family Provision Claims on Death*. One of the areas highlighted for potential reform was whether certain cohabitants should have a place in the intestacy rules the conditions which would have to be met, and how much of the estate they should receive. The consultation period ended in February 2010 and the Law Commission published its final report, *Intestacy and Family Provision Claims on Death* in December 2011. This included two draft bills, one of which was the draft Inheritance (Cohabitants) Bill. This contained provisions intended to give some unmarried partners, who had lived together for five years, the right to inherit on each other's death under the intestacy rules, without having to go to court. Where the couple had a child together, this entitlement would accrue after two years' cohabitation, provided the child was living with the couple when the deceased died.

63. The Law Commission acknowledged that views differed on how far the law should provide for cohabitants. However, it considered that the question of whether a cohabitant should inherit on his or her partner's death was very different from the treatment of cohabitants on separation.

64. The Law Commission also recommended that a surviving cohabitant who had a child with the deceased should be able to make a family provision claim even if the relationship had lasted for a shorter period than two years.

65. The Law Commission said that its recommendations *"reflect the growing prevalence and public acceptance of cohabitation"* and that they would also bring English law into line with the law in other Commonwealth jurisdictions. Cohabitants would still be able to make a will naming other beneficiaries (subject to making reasonable provision for those family members and dependants protected by existing family provision legislation).

66. In March 2013, the Coalition Government announced that it had decided that the Law Commission's recommendations regarding rights for cohabitants upon intestacy would not be implemented during that Parliament.

Advocates for change

67. Resolution has long been in favour of cohabitation reform. It is a key plank of our 2015 Manifesto for Family Law:

The problem

There are currently more than six million people who live together in the UK without being married or in a civil partnership - representing one in eight couples in 2018. Cohabiting couples are the fastest growing family type in the UK. And yet, in England and Wales, these people have little or no legal protection if they separate.

A recent survey showed 2 in 3 cohabiting couples were unaware there is no such thing as common law marriage.

It is possible to live together with someone for decades and even to have children together and then simply walk away without taking any responsibility for a former partner. This needs to change. Currently, a rapidly growing proportion of the population have limited rights or ability to access support if their relationship breaks down.

Other countries, such as Australia and Canada, and closer to home Scotland, recognise these relationships and provide legal protection. The Law Commission has recommended changes in this area. Find out more about your rights living together.

Our solution

Resolution calls for a legal framework of rights and responsibilities when cohabiting couples split up, to provide some legal protection and secure fair outcomes at the time of a couple's separation or on the death of one partner.

Resolution proposes that cohabitants meeting eligibility criteria indicating a committed relationship would have a right to apply for certain financial orders if they separate. This right would be automatic unless the couple chooses to 'opt out'.

The court would be able to make the same types of orders as they do currently on divorce, but on a very different and more limited basis.

Awards might include payments for child care costs to enable a primary carer parent to work

68. We responded supportively to the consultation which preceded the Law Commission's 2007 report[36] as well as the 2009 Law Commission consultation about cohabitants' rights on death[37].

69. Resolution engaged with Lord Lester when, in the 2008-09 Parliamentary session, he introduced the Cohabitation Bill[38] [HL] 2008-09,Cohabitation (No 2) Bill. More recently we have been involved with Lord Marks' attempts to progress the Cohabitation Rights Bill[39], which was intended to implement the Law Commission's 2007 proposals on separation and the 2011 proposals on intestacy.

70. Lord Marks has said that there is a "*powerful body of both professional and lay opinion in favour of these reforms: most of the family judiciary; Resolution; the Family Law Bar; and many others, including many in the church*". He also acknowledged the opposition to the proposals from Baroness Deech, who spoke against the Bill in the Second Reading debate.

71. Replying for the Government, Lord Ashton spoke of a "patchwork of legal rules" which might apply to individual cohabitants. He said that the Government had reservations about the Bill, although it would not oppose a Second Reading. The Government's priority in family law matters had been to improve the family justice system and that this work was continuing; and that "*Faced with this programme of work, we knew that we could not do justice with the resource available to the complex and far-reaching recommendations made for the reform of the law relating to cohabitants*".

72. The Bill has not made any further progress.

Civil partnerships

73. In England and Wales, as in Scotland, same sex couples have the option to marry or to register a civil partnership, to gain legal recognition for their relationship. [In Northern Ireland, same sex couples may register a civil partnership, but may not marry]. Across the UK, opposite sex couples may marry, but may not register a civil partnership.

74. Civil partnerships, although initially popular, fell after the introduction of marriage for same sex couples in England and Wales in March 2014 (in Scotland, in December 2014). Between

[36] http://www.resolution.org.uk/site_content_files/files/microsoft_word___resolutions_response_to_law_commission_consultation_on_cohabitation.pdf
[37] http://www.resolution.org.uk/site_content_files/files/response_to_law_commission___intestacy_and_family_provision_claims_on_death_february_2010.pdf
[38] https://services.parliament.uk/bills/2008-09/cohabitationhl.html
[39] https://services.parliament.uk/Bills/2017-19/cohabitationrights.html

the introduction of civil partnerships in December 2005 and the end of 2017, there were 71,925 civil partnerships formed in the UK. A link to the 2017 statistics is here: https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/civilpartnershipsinenglandandwales/2017. There were 908 civil partnerships formed in England and Wales in 2017, an increase of 2% compared with 2016 and the second annual increase since the introduction of marriages of same sex couples.

75. In 2014, the coalition government consulted on the future of civil partnerships in England and Wales, asking for views on opening up civil partnerships to opposite sex couples. In response to that consultation, it was announced that there was no united call for reform and the government decided not to do anything at that time.

76. In June 2018, Rebecca Steinfeld and Charles Keidan were successful in persuading the Supreme Court to rule that restricting civil partnerships to same sex couples is discriminatory[40]. This put pressure on the government to allow heterosexual couples to enter into such unions.

77. In May 2018, ahead of the Supreme Court's judgment, the Government Equalities Office published a Command Paper, *The Future Operation of Civil Partnership: Gathering Further Information*[41]. That paper set out how the government would gather additional information considered necessary to bring forward proposals for the future of civil partnership. At that time it was said that government anticipated being able to consult on the future of promotion of civil partnerships in 2020.

78. In the meantime, the Civil Partnerships, Marriages and Deaths (Registration etc) Bill 2017–19, a Private Member's bill introduced by Tim Loughton MP[42], passed through the House of Commons in late 2018 and is presently scheduled for its second reading in the House of Lords (at the time of dictation) later this week, 18 January 2019. The amended bill would require the Secretary of State to make arrangements for the preparation of a report "*assessing how the law ought to be changed to bring about equality between same sex couples and other couples in terms of their future ability or otherwise to form civil partnerships*" and setting out the government's plans for achieving that aim. The arrangements would have to provide for a public consultation.

79. Finally, on 2 October 2018, Theresa May announced[43] that the government would change the law to allow opposite sex couples in England and Wales to enter into a civil partnership; subsequently, the government has indicated that it intends to introduce legislation "*as soon as possible*".

[40] https://www.supremecourt.uk/cases/docs/uksc-2017-0060-judgment.pdf
[41] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705768/Future-Operation-Civil-Partnership.pdf
[42] https://services.parliament.uk/bills/2017-19/civilpartnershipsmarriagesanddeathsregistrationetc.html
[43] https://www.politicshome.com/news/uk/political-parties/conservative-party/news/98740/theresa-may-government-will-bring-civil

80. Rightly, Resolution was supportive of the then proposal to introduce same sex marriage back in 2012[44]; by the same token, when there was a consultation in 2014 about the future of civil partnerships in light of the introduction of same sex marriage, the Resolution position was in fact that civil partnerships should be abolished[45]:

"From a purely legal perspective, civil partnerships should not be retained. Although it seems likely that the number of people who would enter into such a partnership in the future would be much lower if civil marriage were an alternative option, there is no legal reason for preserving this as an option. The institution of civil partnership is legally equivalent to marriage and was introduced to provide equal rights for same sex couples. Indeed, if civil partnership were to be retained as an option for same sex couples, then it will be necessary to extend this by making the option available to opposite sex couples. Anything else would necessarily be discriminatory. This would then lead to a situation where a couple, whatever their sexual orientation, would be able to choose between marriage on the one hand and civil partnership on the other. Whilst this is already the position in a minority of jurisdictions, for example The Netherlands, Quebec and South Africa, it makes no sense where the legal status of each would be the same. It would be an unnecessarily complicated solution and must serve to exacerbate the already difficult issue of securing international agreement on the recognition of a range of possible partnership models. As the paper recognises, civil partnership was never intended for opposite sex couples as an alternative to marriage."

81. As such, although Resolution does not oppose the extension of civil partnerships to opposite sex couples per se (and, indeed, trailed 5 years ago that this must be the necessary consequence if civil partnerships were to be retained for same sex couples), we are not yet persuaded that there will be significant demand for civil partnerships for opposite sex couples (reflecting the position with same sex couples). Worse still, there is concern that by focusing on civil partnerships, a view will be formed (and indeed has already been expressed, in certain quarters) that cohabitation reform is no longer necessary, as people can choose to opt into civil partnerships as opposed to marriage and thereby acquire legal rights. Of course, the difficulty is that the vast majority of people who cohabit do so in ignorance of their lack of rights and will therefore not be aware of the need to form a civil partnership or get married in order to acquire rights.

Postscript:

81A. On 22 January 2019, a survey[46] was published by the National Centre for Social Research which showed that 46 per cent of people mistakenly believe that long-term cohabitation leads to common law rights and that this figure has not changed over the past 14 years. Cohabiting couples with children were more likely to believe in a common law marriage (55 per cent)

[44] http://www.resolution.org.uk/site_content_files/files/resolution_response_on_equal_civil_marriage_may_2012.pdf
[45] http://www.resolution.org.uk/site_content_files/files/resolution_response_civil_partnership_review_april_2014.pdf
[46] http://natcen.ac.uk/news-media/press-releases/2019/january/almost-half-of-us-mistakenly-believe-that-common-law-marriage-exists/

than single people (39 per cent). The research also found a disparity between age groups : only 28 per cent of those between 18 and 24 and 39 per cent of the over 65s thought that cohabiting meant those couples would have rights whilst 52 per cent of those aged 25 to 64 believed in common law marriage.

82A. In one sense, this survey told us nothing that we didn't know already. However, concerning was the reporting in some quarters[47] that the opening up civil partnerships to all is the panacea. The reality, of course, is that absent cohabitation reform, there will remain huge swathes of society sleepwalking into difficulties as they are ignorant of their lack of rights; or those who are fully aware of their vulnerability but unable to persuade their partner to commit to marriage (or indeed a civil partnership).

(iii) Financial remedies reform/Baroness Deech bill

82. The Resolution Manifesto for Family Law says of financial remedies reform the following :

The problem

The removal of legal aid has led to a rise in unrepresented litigants, with over 50,000 people representing themselves in family disputes in 2013.

Divorce law relating to finances is complex and difficult to understand. Outcomes can be difficult to predict, even for legal professionals. Section 25 of the Matrimonial Causes Act 1973, which determines how money is divided up on divorce, has fundamentally remained unchanged for the last 40 years. The concern is that people separate with little or no understanding of the financial consequences of their break up, making it more difficult for them to reach agreement and placing a greater burden on the court system.

With the average median household income at £32,600, most people do not have huge resources to divide on separation. The complexity of current law affects ordinary people, living in ordinary circumstances. Reform is needed to make sure they are fairly provided for after they separate.

Our solution

Resolution calls for clear guidance for people entering the court system, so that they are more aware of the potential outcomes and consequences, and for a wide-ranging reform of the financial provision system to achieve more clarity.

The reforms to Section 25 of the Matrimonial Causes Act 1973 that Resolution wants to see emphasise independence and greater certainty on the level and timescale for payment of maintenance, with children's interests at their heart.

Enforceable agreements (commonly known as 'pre-nups') should be permitted with suitable safeguards. This would provide certainty to people entering the courts that a previously-made agreement will generally be binding, unless it does not satisfy clearly identified criteria. The independent Law Commission has also called for change in this area.

[47] https://news.sky.com/story/government-urged-to-deliver-promise-of-heterosexual-civil-partnerships-11614178

Clear guidelines are needed on the division of capital resources and pensions. Resolution proposes a distinction between matrimonial property and non-matrimonial property in cases where resources exceed the needs of the separating couple.

83. Readers will be aware that, in England and Wales, the Family Court retains a broad jurisdiction as to how to divide assets, income and pensions on divorce. It does so (and has long done so) by reference to section 25(2) of the Matrimonial Causes Act 1973 which provides as follows:

> (2) As regards the exercise of the powers of the court under section 23(1)(*a*), (*b*) or (*c*), 24 [F5 , 24A [F6, 24B or 24E]] above in relation to a party to the marriage, the court shall in particular have regard to the following matters—
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
>
> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
>
> (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

84. In 2009, the Law Commission commenced a project to examine the status and enforceability of marital property agreements. A consultation was opened in January 2011. That project was extended in 2012, to cover two further issues of financial provision on divorce: financial needs and non-matrimonial property. A supplementary consultation was commenced in September 2012[48]. The project was not a full-scale reform project directed at the entirety of

[48] Resolution's response is here : http://www.resolution.org.uk/site_content_files/files/matrimonial_property_needs_and_agreements_resolution_response_dec_2012.pdf , as well as previous consultation responses in relation to marital agreements in particular http://www.resolution.org.uk/site_content_files/files/resolution_response_marital_property_agreements.pdf and http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf

the law of financial orders; instead, the aim is to bring clarity and predictability to areas of the law that cause particular difficulties.

85. The Law Commission's report, *Matrimonial Property, Needs and Agreements* was published in February 2014. It made recommendations to clarify the law of financial needs on divorce and to introduce qualifying nuptial agreements in England and Wales.

86. Recommendations for reform were intended to:

86.1 Clarify, through the provision of guidance by the Family Justice Council, the law relating to "financial needs" to ensure that the law is applied consistently by the courts.

86.2 Give guidance to give litigants in person access to a clear statement of their responsibilities and the objective of a transition to independence that a financial settlement should achieve.

86.3 Investigate the possibility of whether an aid to calculation of "financial needs" could be devised; specifically, it was envisaged that formally if developed, would take the form of non-statutory guidance and give a range of outcomes within which a separating couple might negotiate.

86.4 Introduce "qualifying nuptial agreements", enforceable contracts enabling couples to make binding arrangements for the financial consequences of divorce, subject to certain procedural safeguards having to be met.

87. Although (as referenced elsewhere in this paper) the Family Justice Council has produced guidance on needs, and the Ministry of Justice undertook some scoping work on the feasibility of developing non-statutory and numerical guidance on the calculation of financial needs, no substantive steps were taken as the government considered that there is unlikely to be time for matters to progress (and, particularly, the nuptial agreements bill appended to the report) before parliament was dissolved in March 2015. There have been no subsequent developments.

88. However, practitioners have long had their eye on the Divorce (Financial Provision) Bill 2017-19. That Bill, brought by Baroness Deech, completed its House of Lords stages in December 2018 and was presented to the House of Commons on 19 December 2018. The Bill is expected to have its Second Reading debate on a date to be announced.

89. That Bill does not have much (if any) support among practitioners in England and Wales and is not understood to have government support. To summarise reasons for opposition to the bill, I have set out below the text of a letter I sent to Peers in November, which details (broadly) the scheme of the bill and Resolution's/others' objections to it:

Dear [INSERT NAME]

Divorce (Financial Provision) Bill Committee stage: House of Lords 23 November

I write to you as Chair of the Family Law Reform Group of Resolution. Resolution's 6,500 members are family lawyers, mediators and other family justice professionals committed to a non-adversarial approach to family law and the resolution of family disputes.

I am aware that on Friday, the Divorce (Financial Provision) Bill goes to Committee Stage in the House of Lords. I wanted to write to convey the profound misgivings that Resolution has about the Bill, which we know are shared by other membership bodies representing specialist family practitioners (such as the Family Law Bar Association).

Resolution's concerns about the Bill

Whilst we agree with the need for the reform of the law on financial remedies on divorce, we consider the scheme of this Bill to be fundamentally flawed in that:

(a) There is *no evidential basis* of the need for reform along the lines proposed. The need for reform is said to derive from the current law leading to uncertainty and significant legal costs. Yet there is a body of evidence (including a study undertaken by Emma Hitchings of Bristol University and Joanna Miles of Cambridge University, summarised in August's Family Law - copy attached) that the vast majority of divorcing couples reach agreement on financial matters, without recourse to contested court proceedings. Of actual financial orders made in 2017, and focusing on spousal maintenance and lump sum orders (the key focus of the Bill), there were 11,153 spousal maintenance orders of which only 830 (7.4%) were contested; and 26,420 lump sum orders of which only 6.6% (1,753) were contested. This shows that the present law works reasonably well, with over 90% of financial remedy orders reached by consent. It is dangerous to base reform on those cases (invariably involving high levels of wealth) which garner press headlines for all the wrong reasons and are not representative of the vast majority of "run-of-the-mill" cases. Where people are represented, it is rare for lawyers not to be on the same page about the bracket of outcome. Where there is no representation, greater guidance about the operation of the law is proving useful.

(b) It *risks causing grave financial hardship on divorce*; the changes suggested by the Bill represent an abandonment of the consideration of a spouse's financial needs on divorce, the determining factor in most cases at present, in favour of an arbitrary equal division of "matrimonial property" as defined in and limited by the Bill; limited spousal maintenance, whatever the effect of that; and binding nuptial agreements, again without reference to fairness of outcome or the ability of the financially weaker party to meet her needs. All of this disregards the nature of the marital partnership and the choices made during a marriage, often leading to financial disadvantage for one and generating identifiable

financial needs on divorce, most obviously for housing and future financial support (i.e. income).

(c) It *ignores many aspects of the Law Commission's report, "Matrimonial Property, Needs and Agreements"* published in 2014, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc343_matrimonial_property.pdf and following an extensive and wide-ranging consultation. Among other things, that report advocated a move towards more principled discretion in relation to spousal maintenance, aided by the development of formulae as non-statutory guidance; and legislation to introduce "qualifying nuptial agreements", subject to procedural safeguards.

(d) One of the aims of the Bill is said to be to create greater certainty, enabling unrepresented litigants to reach sooner agreements and keeping legal costs within reasonable bounds where parties are represented. *The effect of the Bill will be not to rid this area of the law of disagreement, but to change the nature of the potential areas of disagreement*.

The extent of our misgivings is such that it is not possible to give a line by line commentary but our main concerns include:

Agreements Clause 3

Agreements should be binding, with suitable safeguards. The Bill lacks essential safeguards, especially fairness.

There is no express reference to "needs" at all, which is of huge concern to us.

Matrimonial property Clause 4

By drawing a hard line between matrimonial and non-matrimonial property, irrespective of needs, the Bill risks causing grave financial hardship. There can be no resort to non-matrimonial property when making a financial provision order in any circumstances, even in the case of significant financial need relating to children. The provision at s4(5) of the Bill does allow the court to make an order involving unequal sharing *having regard to the needs of any children of the family aged under 21*, but this concession is limited only to the unequal sharing of the *matrimonial* property. There are many cases where the value of the non-matrimonial property far exceeds the value of the matrimonial property and its absolute ring-fencing risks causing significant financial hardship on divorce. What is more, it may be appropriate to have an unequal sharing of matrimonial and non-matrimonial property for reasons other than the few set out at s4(5).

By focusing on "matrimonial property", the Bill risks opening up every case to a detailed examination of what falls within and without the definition of matrimonial property, however significant or not the size of the assets; this is unlikely to be tempered by s2(3).

The Bill provides at s3(2)(c) that if any matrimonial property belonging to one party is used or applied so as to increase the value of an asset belonging to the other party, or (at s3(2)(d))that if a contribution by exceptional personal skill increases the value of an asset belonging to the other party, a

proportionate share of that asset shall be treated as matrimonial property. Measuring the contribution, and the extent of the matrimonial property thereby created, is likely to lead to disagreement.

Periodical payments Clause 5

We are not persuaded that the answer to providing more independence and certainty is to limit the term for which spousal maintenance would be paid.

The Bill founds entitlement to spousal maintenance on economic advantage/disadvantage, rather than needs; dependency "to a substantial degree" by one party on the other; and support to adjust to the loss of payments for no more than 5 years, that period not to be exceeded unless the court is satisfied that there is no other means of making provision for the other party and she would otherwise likely suffer serious financial hardship. If there were to be absolute limits on the term of spousal support imposed (against our view), we would want there to be a very careful exploration, which may well take time, of (a) the likely impact of this and (b) all of the other alternatives, as advocated by the Law Commission. The Law Commission came down firmly against the introduction of a rigid limit on spousal maintenance because of its potential to operate unfairly. Some may say that people would recalibrate the way they lead their married lives if they were aware that the law had changed, and would not allow themselves to become financially dependent. Resolution does not share that optimism in light of what we know about the limited state of knowledge of most cohabitants who come to see Resolution members, completely ignorant as to their lack of financial protection/rights.

Spousal maintenance cannot endure for longer than 5 years *"unless...there is no other means of making provision for a party to the marriage and that party would otherwise be likely to suffer serious financial hardship".* The question of what is "significant hardship" for these purposes is likely to become fertile ground for litigation.

Lawyers' perspective

I understand that it may be said that it is in the interests of family lawyers to keep the current discretionary regime and oppose change, not least reform that leads to greater certainty. However, that view is misguided. Even with a discretionary system, those cases that can settle, do. Resolution members take great pride in resolving cases for clients.

We aren't opposed to reform per se. Opposition to the Bill is predicated on huge concerns about the lack of protection for vulnerable people who will be left with outcomes which are unfair and which do not meet even their most basic needs. Many spouses (usually wives) would be left in a state of real financial hardship if this law were enacted.

If lawyers' motivation in opposing the Bill was to be able to keep litigating, I have referred to the fact that there would remain scope for litigation under the Bill.

Scotland

It may be asked - given that a less discretionary, more strait-jacketed system works in Scotland, why not south of the border?

The President of the Supreme Court, Baroness Hale, spoke to this topic at Resolution's National Conference in April. She acknowledged that an alternative view is that marriage is a partnership which should be dissolved with equal sharing of assets accumulated during the marriage but no provision for future needs unless there would otherwise be grave financial hardship (in line with Scottish law and the Bill). She pointed to the fact that this is unsurprising in Scotland as (a) there was no history there of long term periodical payments, whereas periodical payments were the typical form of provision south of the border; and (b) the Scottish Law Commissioner, Professor Eric Clive, had long held the view that there is "something fundamentally repulsive about the whole idea of dependent women".

Baroness Hale highlighted that whereas research had found widespread satisfaction with the Scottish law *among lawyers and judges,* there is no research telling us what the parties think or what happens to discarded home makers will little hope of returning to the job market on the same terms as when they left it. As such, Baroness Hale concluded that to adopt a Scottish style system would not be a way to strengthen family responsibilities in England and Wales.

I hope that that helps to clarify our concerns about the Bill and why we cannot support it. We would welcome an opportunity to discuss matters further, if you consider that that would be helpful.

With kindest regards,

Jo Edwards

Chair, Resolution's Family Law Reform Group

November 2018

90. In terms of the concerns about the lack of evidential basis for reform, in August 2018 Emma Hitchings and Joanna Miles, respectively of Bristol and Cambridge Universities, wrote a paper setting out their findings from a mixed methods study of financial settlements on divorce, drawing on data from a Court filed survey of c.400 cases[49]. Also of interest is an article by Sharon Thompson of Cardiff University, "*In defence of the "Gold-Digger*""[50].

91. It may be said (and indeed, often is) that those south of the border should adopt the Scottish model in relation to financial provision on divorce. However, and with the greatest of respect, we feel strongly that that is not the right answer. The reasons for this are neatly enunciated in a speech which Baroness Hale gave to the Resolution Conference in April 2018[51]:

An alternative view is that marriage is a partnership which should be dissolved with equal sharing of assets accumulated during the marriage but no provision for future needs unless there would otherwise be grave hardship. This is more or less the law in Scotland and Baroness Deech's Bill would introduce something very similar for England and Wales. It is unsurprising in Scotland, for two reasons. There was no history there of long term periodical payments, whereas periodical payments were the typical form of provision south of the border. And the highly-respected Scottish Law Commissioner, Professor Eric Clive, who was responsible for most of the Commission's work in family law, had long held the view that there is 'something fundamentally repulsive about the whole idea of dependent women'.[28] Research by Mair, Mordaunt and Wasoff[29] has found widespread satisfaction with the Scottish law among lawyers and judges; but it is not able to tell us what the parties think or what happens in practice to discarded homemakers with little hope of returning to the job market on the same terms as when they left it.

I agree entirely that it should not be assumed that the highest aspiration for a woman is to become dependent upon a man. It was that assumption which meant that my mother, a trained teacher, had to give up work when she married my father in 1936. But that assumption has long gone and women have the possibility of independence both during and after marriage. However, we cannot ignore the fact that marriage is a partnership in which the spouses (whatever their sex) often play different roles – and often varying over time - for their mutual benefit and that of their children and elderly parents. There are some men who happily undertake the housekeeping and child caring responsibilities traditionally undertaken by women. There are some women who pursue exactly the same working pattern as men have traditionally done. Most are probably somewhere in between. Research has clearly shown that a person who gives up work, even for a few years, in order to concentrate on child care or other family responsibilities will never make

[49] http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf
[50] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887022
[51] https://www.supremecourt.uk/docs/speech-180420.pdf

up what they have lost.[30] *It is a dilemma for us all, but particular those in the professions who would dearly love to 'have it all'.*

My own view is that the goal of divorce settlements should be, as I said in Miller, 'to give each party an equal start on the road to independent living'.[31] *But that equal start is bound to involve, for most couples, an element of compensation for the disadvantage, often the permanent disadvantage, resulting from the choices made by both parties during the marriage. Sometimes, but not always, the only way to do this is by open-ended periodical payments. To refer to this as a 'meal ticket for life' is indeed patronising and demeaning, but making an award for those reasons is not.*

I wonder whether Scottish wives are sometimes worse off after divorce than Scottish cohabitants are after separation? Or whether we should prefer to add section 20(2)(g) of the Family Law (Divorce) Act 2006 in Ireland to the check-list in section 25(2): this requires the court to take into account 'the effect on the earning capacity of each of the spouses of marital responsibilities assumed by each during the period when they lived with one another and in particular the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family'. One thing I am fairly sure of is that simply to adopt a Scottish style solution would not be a way to strengthen family responsibilities south of the border.

D. 2019 - the year ahead

92. So what of the year ahead? After a fast-paced year of change in 2018, family law practitioners are looking ahead to 2019 with a sense of anticipation. Putting to one side the ongoing uncertainties over Brexit, what may we see on the horizon?

93. Arguably the most significant development in 2018 was the consultation on no fault divorce, which ended in mid-December. As referred to above, the government is expected to respond by March. The Lord Chancellor has already indicated that people were broadly supportive of the proposal to remove fault and supporters' attention is now focused on voices in opposition and how to ensure that this change becomes a reality.

94. The way in which society forms relationships will likely continue to be a major focus, with particular attention on civil partnerships for opposite sex couples. Rebecca Steinfeld and Charles Keidan's success in the Supreme Court, followed by ONS stats showing a second year on year increase in the number of same sex civil partnerships formed, preceded the October announcement that government would be extending civil partnerships to all. Tim Loughton MP's private members' bill has passed through the House of Commons and has its second reading in the House of Lords on 18 January.

95. Unfortunately, there have been fewer positive developments for cohabiting couples and it is hoped that 2019 will see change. The Cohabitation Rights Bill fell with the last election and although it had its first reading in the House of Lords in July 2017, a second reading is yet to be scheduled. 2018 saw success in the Supreme Court for a cohabitant whose partner passed away, Siobhan McLaughlin, over bereavement benefits. Although the Minister made a statement soon afterwards, it remains for the government to decide when and how to change the law. 2019 must see positive developments for cohabitants.

96. Another area which is in urgent need of attention in 2019 is the cross-examination of domestic abuse victims in the family courts by alleged perpetrators. It is now two years since Sir James Munby highlighted the need to address this issue. The Prisons and Courts Bill fell with the 2017 election and despite a Westminster Hall debate last July and a joint call from organisations like Women's Aid and Resolution to ban cross-examination of victims by alleged abusers, the issue remains at large. 2019 must see the practice end.

97. Finally, the legal aid cuts. As referred to elsewhere, evidence has been gathered but the review publication delayed. Family law has been especially badly hit by the cuts, with huge decline in publicly funded mediation starts, a significant increase in the number of litigants in person and unquantifiable numbers of people giving up their rights to pursue money or children claims. Practitioners will be looking closely at the review publication and hoping for some funding for much-needed early legal advice and signposting.

98. Other topics for 2019 will include the ongoing courts modernisation programme (and the continued move to online divorce); the Divorce (Financial Provision) Bill, which has now cleared its passage through the House of Lords but continues to be opposed by practitioners (and is understood not to have government support); ongoing case law developments (including spousal maintenance and the treatment of nuptial agreements); and modern families/surrogacy developments (including, from the start of January, the ability of single parents to apply for a parental order to become their child's legal parent). All in all, it looks set to be another interesting year.

E. Miscellaneous other strands

(i) *Brexit*

99. Your speakers decided to be a Brexit-free zone as the bases that (a) there is Brexit-itis; (b) we could not do such a complex topic justice in the limited time available; and (c) at the time of preparing this talk, there were more questions than answers. For those wanting reading material on the subject, I commend to you the following:

    99.1 Resolution's note (prepared in conjunction with the FLBA and IFLA) on Brexit and Family Law, dated October 2017

http://www.resolution.org.uk/site_content_files/files/brexit_and_family_law.pdf

99.2 No deal Brexit guidance for family law, published by the Law Society on 8 November 2018 https://www.lawsociety.org.uk/support-services/advice/articles/no-deal-brexit-family-law/

99.3 The Bar Council's Brexit Working Group paper published June 2017

https://www.barcouncil.org.uk/media/575181/brexit_paper_6_-_family_law.pdf

99.4 https://www.familylawweek.co.uk/site.aspx?i=ed191796

99.5 Handling civil legal cases that involve EU countries if there's no Brexit deal", September 2018 https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal

(ii) Alternatives to court

100. I repeat below excerpts from the text underpinning some training I gave to judges recently about mediation in England and Wales and the legal framework for it/"hot topics".

The legal framework around dispute resolution and court of England and Wales

(i) The rules - Family Procedure Rules 2010

The court's duty to consider non-court dispute resolution

3.3

(1) The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.

(2) In considering whether non-court dispute resolution is appropriate in proceedings which were commenced.

by a relevant family application, the court must take into account –

(a) whether a MIAM took place;

(b) whether a valid MIAM exemption was claimed or mediator's exemption was confirmed; and

(c) whether the parties attempted mediation or another form of non-court dispute resolution and the outcome of that process.

When the court will adjourn proceedings or a hearing in proceedings

3.4

(1) If the court considers that non-court dispute resolution is appropriate, it may direct that the proceedings, or

a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –

(a) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and

(b) where the parties agree, to enable non-court dispute resolution to take place.

(2) The court may give directions under this rule on an application or of its own initiative.

(3) Where the court directs an adjournment under this rule, it will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.

(4) If the parties do not tell the court if any of the issues have been resolved as directed under paragraph (3), the court will give such directions as to the management of the case as it considers appropriate.

(5) The court or court officer will –

(a) record the making of an order under this rule; and

(b) arrange for a copy of the order to be served as soon as practicable on the parties.

(6) Where the court proposes to exercise its powers of its own initiative, the procedure set out in rule 4.3(2) to (6) applies.

MIAM exemption not validly claimed

3.10

(1) If a MIAM exemption has been claimed, the court will, if appropriate when making a decision on allocation, and in any event at the first hearing, inquire into whether the exemption was validly claimed.

(2) If a court finds that the MIAM exemption was not validly claimed, the court will –

(a) direct the applicant, or direct the parties to attend a MIAM; and

(b) if necessary, adjourn the proceedings to enable a MIAM to take place; unless the court considers that in all the circumstances of the case, the MIAM requirement should not apply to the application in question.

(3) In making a decision under Rule 3.10(2), the court will have particular regard to –

(a) any applicable time limits;

(b) the reason or reasons why the MIAM exemption was not validly claimed;

(c) the applicability of any other MIAM exemptions; and

(d) the number and nature of issues that remain to be resolved in the proceedings.

(ii) The case law in the family sphere.

***Mann v Mann [2014] 2 FLR 928**, FD per Mostyn J:*

[24] Given the precedent established by the FDR procedure there ought to be a power to compel parties to engage in ADR in those proceedings not covered by the Part 9 procedure. Specifically, the court ought to be able to order participation in ADR in enforcement proceedings. However, for reasons that I will explain, I am doubtful whether the rules permit such an order to be made.

[25] ADR has its own berth in Part 3 of the FPR 2010. There is no counterpart in the CPR. Rule 3.2 provides that 'the court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate.'

This applies across the full range of family proceedings, whether the subject matter is money or children. Rule 3.3 provides that:

'(1) If the court considers that alternative dispute resolution is appropriate, the court may direct that the proceedings,

or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate—

(a) to enable the parties to obtain information and advice about alternative dispute resolution; and

(b) where the parties agree, to enable alternative dispute resolution to take place.'

[26] It can be seen that this rule differs slightly from CPR r 26.4(2A). That latter rule talks of staying a case while r 3.3 of the FPR talks of adjourning it. That is a distinction without a

difference. More importantly, the power under r 3.3(1)(b) of the FPR, while capable of being exercised on the court's own initiative, can only be exercised if the parties agree. In contrast, under the CPR counterpart the court can impose a stay in favour of ADR whether Mediation - working towards a closer collaboration between the judicial and mediation communities the parties agree or not.

[27] If the parties have made an agreement to engage in ADR then I am of the view that the court can exercise its powers under r 3.3(1)(b) of the FPR, even if one party is trying to back out of that agreement. However, if there has never been an agreement to engage in ADR I cannot see that the rule can be invoked. And if the rule cannot be invoked then it is hard to see how a separate power could exist to order the parties to engage in ADR in those proceedings not governed by Part 9, and thus subject to the FDR process.

[28] In my respectful opinion the Rules Committee should give consideration to deleting the words 'if the parties agree' from r 3.3(1)(b) so that it is put on the same footing as its CPR counterpart.

[29] As I have stated, if there is a written agreement to engage in ADR before going ahead with a Part 8 or an enforcement application then I consider that the rule may be invoked to adjourn the application for a specified period to enable ADR to take place, even if one party is trying to back out of the ADR agreement. Such an adjournment may be coupled with an Ungley order to make clear that an unreasonable refusal to participate in the ADR may well attract a costs sanction. But an indefinite adjournment could not properly be ordered. Not only would this amount to a denial of the right of access to justice but it would be giving effect to the ADR agreement in a way that falls foul of the terms of s 34(1)(a) of the Matrimonial Causes Act 1973 (MCA 1973) (which renders void any agreement which purports to restrict the right to apply to the court for an order containing financial arrangements).

[36] I cannot compel the parties to engage in the mediation. But I can robustly encourage them by means of an Ungley order. I shall therefore make a further order in the following terms:

(i) If either party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the enforcement proceedings, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.

(ii) The party considering the case unsuitable for ADR shall, not less than 7 days before the commencement of the adjourned enforcement hearing, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable.

[nb. Mann v Mann [2014] EWCA Civ 1674 – 19th December 2014 – is an appeal from Mostyn J's subsequent orders of 12th May 2014 and 12th June 2014].

H v W (Cap on Wife's Share of Bonus Payments) (No 2) [2015] 2 FLR 161, FD *per Eleanor King J:*

[3] In setting out the procedural history of the case, I said as follows in the judgment:

'[8] In the course of his judgment Mostyn J gave a strong "steer" that in his view the right solution was for there to be a cap on the share received by W on H's bonus. To this end he directed that the parties engage in mediation to see if the matter could be resolved consensually and H agreed to bear the costs of the mediation in the first instance. In the event that the mediation was unsuccessful, Mostyn J directed that he would deal with an application by W for a legal costs order in relation to the appeal on paper.

[9] The mediation did not take place as agreement could not be reached as to the identity of an appropriate mediator and W accordingly made an application for a legal costs order. On 30 October 2013 Mostyn J refused her application, saying in his ruling that the W had been unreasonable in her approach to the mediation; first in her insistence on using a top-drawer and top-price mediator and secondly that her insistence on attendance of legal representatives at mediation was neither necessary nor reasonable; in my experience this would be unusual and arguably unhelpful. Mostyn J pointed out that there was still time for mediation to take place. Unfortunately it has not done so and out of this modest matrimonial pot H's costs of the appeal are £22,320 and W's £25,372.'

[4] I allowed the husband's appeal on Ground 1 and set a 'cap' on the level of top-up maintenance to be paid by H from his annual bonus; a course predicted by Mostyn J, who had done all in his power to steer the parties towards, what to him, was an obvious outcome of the case. The husband for his part did as the court had suggested and had been willing not only to mediate but to pay the costs of both sides in order for such mediation to take place.

[5] Mostyn J regarded W's approach to mediation as having been unreasonable. He refused her application for a legal costs order to fund the appeal and, as I mention in the judgment, emphasised that there was still time for mediation to take place. Notwithstanding his observations the case progressed to a fully contested appeal here.

[6] At the conclusion of the hearing of the appeal I made it clear that I was of the view that the wife's approach to the litigation (even disregarding the fact that she had lost the appeal), meant it likely that the court would make an order for costs against her. Each party has filed lengthy submissions on the issue of costs.

[24] I share the view of Mostyn J that W was unreasonable in relation to the costs of mediation and that for her to expect the husband to pay £2,500 + VAT to have legal representation at the mediation as well as £2,000 + VAT for the mediator was unreasonable. I am puzzled as to how the husband's refusal to pay an additional £3,300 + VAT over and above the quotation that he

had of £300.00 per hour + VAT for an experienced solicitor mediator can properly be argued as being 'hardly suggestive of a desire to compromise'.

[25] The whole point of Mostyn J's strong steer, and invitation to H to pay for mediation, was to allow the parties to consider the imposition of a cap as a solution to the problem of how to provide a fair level of maintenance in the broadest sense. It was against the backdrop of Mostyn J's steer that the husband agreed to participate in this process and to pay for it; W's insistence upon a mediator and legal team at excessive cost effectively deprived H of an opportunity to resolve matters without the cost of an appeal.

See also:

- *S v P (Settlement by Collaborative Law Process) [2008] 2 FLR 2040, FD per Coleridge J*
- *S v S (Financial Remedies: Arbitral Award) [2014] 1 FLR 1257, FD per Munby P*
- *AI v MT (Alternative Dispute Resolution) [2013] 2 FLR 371, FD per Baker J*
- *D (A Child) Hague Convention : Mediation), Re BL v TC, OD [2017] EWHC 3363 (Fam) (re the confidentiality of the mediation process).*

[iii] Other topics.

(a) Mediation Information Assessment Meetings ("MIAMs")

Since April 2011, there has been a requirement (with some exceptions) that anybody wanting to go to court should attend a meeting (called a MIAM) with an appropriately qualified mediator to find out about mediation and other non-court options. Since April 2014, that requirement has been enshrined in statute. Publically funded mediators will also assess eligibility for financial assistance and explain charges if someone is not eligible.

There are certain exceptions to the MIAMs requirement : see the following guidance to clients on the Family Mediation Council website

- *You, or the other party, has made an allegation of domestic violence against the other supported by clear evidence, for example either a police investigation or an injunction being issued within the last 12 months.*
- *The application you want to make to the court relates to other family law matters which you are currently involved in.*
- *An application to the court needs to be made urgently because there is a risk to the life or safety of the person who is making the application (the applicant) or his or her family (for example, their children) or his or her home.*

- *The dispute is about money and you or your husband, wife or civil partner (the respondent) is bankrupt.*
- *You and your husband, wife or civil partner are in agreement and there is no dispute.*
- *You do not know where your husband, wife or civil partner is.*
- *You wish to make an application to the court but for certain reasons you don't want to tell your husband, wife or civil partner in advance.*
- *You are currently involved with social services because there are concerns about the safety and wellbeing of your child or children.*
- *You can't find a mediator within 15 miles of where you live, or you have contacted three mediators based within 15 miles of where you live and you are unable to get an appointment with any of them within 15 working days.*
- *You or your partner cannot access a mediator's office because one of you has a disability. However, if the authorised mediator can provide the appropriate facilities then you will both still be required to attend the meeting.*
- *A mediator shows on the court form that mediation isn't suitable, for example the other person isn't willing to attend a MIAM.*
- *In the past four months you've tried mediation but it hasn't been successful. A mediator has to confirm this and state that mediation is not the best way for you to resolve your dispute.*
- *You or your partner do not normally live in either England or Wales and therefore cannot be considered as "habitually resident".*

The MIAMs process is acknowledged to have difficulties as presently structured. Its timing, just at the point someone is planning to issue, means that by that point they are invariably set on issuing proceedings. The lack of ability to compel attendance of a respondent is also problematic. It remains to be seen whether a shortage of the new FMCA mediators will mean that there are MIAMs deserts in certain parts of the country.

The cumulative effect is that there are still a significant number of cases where a party issues without attending a MIAM; and that, even where there has been attendance at a MIAM, conversion to mediation is still relatively infrequent. As such, the mediation community needs all the assistance it can get from the judicial community, both at the gatekeeping stage but also at every stage of the court process, to ensure that appropriate cases are being deterred from entering the court system at all, or being weeded out along the way, to go to mediation.

(b) FMCA mediators

During the course of 2014 Family Mediation Council board members worked together with – and on behalf of all – mediators to review standards for mediators. The FMC's main focus was to put in place profession-wide standards which will be fit for purpose following legislative changes and the enhanced public profile of mediators and the mediation profession.

With effect from 1st January 2016, only Family Mediation Council Accredited ("FMCA") mediators are able to conduct statutory MIAMs. Details are available on the FMC website[4]. As at May 2016, there is a family mediation community in England and Wales of about 1,600, of whom around 1,100 have registered with the FMC and about half are accredited (the other half working towards accreditation).

All mediators can conduct pre-mediation and initial meetings with potential clients whether or not they are accredited. It is only a 'statutory' MIAM (when a potential client makes contact and they have an immediate and settled intent to issue proceedings) that has to be conducted by an FMCA mediator.

(c) Drafting the consent order following mediation?

A thorny topic, and one much-debated within Resolution, is whether a mediator should be permitted to draft a consent order. The long-accepted mantra is that to do so goes against the grain of mediation and the neutrality of the process. However, in the post-LASPO era, when many are no longer eligible for legal aid and struggling to meet legal fees, it is mediators' experience that more and more clients are asking for mediators to draft consent orders as they do not have the stomach for further legal fees.

It is only right that the services offered to separating couples should be consumer-driven. SRA guidance in August 2015 permitted the practice in certain circumstances: see attached.

Question of ethics

August 2015

Mediation retainers

Q. I am a solicitor mediator. I regularly get requests from the parties in mediation, who do not wish to take legal advice or instruct separate solicitors to draft a court order reflecting the agreement they have reached as a consequence of mediation. Can I do this by way of a new restricted/limited retainer once the mediation retainer is complete?

Yes, there are obvious benefits in doing so. In limited circumstances where you are not advising the clients as to their legal position but simply reflecting the agreement they have reached it may be possible to agree a very specific and defined retainer. You should bear in mind that it is a joint retainer and contact with either of the parties must be transparent to the other.

Before making the decision to accept the new retainer, you need to bear in mind Principle 1(administration of justice) and Principle 6 (public confidence). It would not be appropriate for you to act, if to do so would put you at risk under either principle.

You are likely to be at risk if you are not satisfied on the following:

- there has been no undue influence or duress
- no imbalance of bargaining power
- no vulnerability on the part of either client
- both parties have been advised to take legal advice, have taken legal advice separately or have been clear they do not wish to take legal advice
- both parties understand the limits of your agreed retainer, in that you will not be providing legal advice and are simply reflecting the agreement they have freely reached.
- both parties have given clear written consent
- the court order is drafted for the parties to file with the court and you do not place yourself on the court record as acting.

You also need to be satisfied, taking into account all the circumstances, that having completed the retainer to provide mediation services, it is reasonable for you to take on joint instructions to draft the court order. This will require very clear terms, understood by the parties and will not be suitable for everyone. You should decline the instructions if you have concern about potential unfairness to either party.

Questions of Ethics reflect real life scenarios that have been raised on our helpline. They are popular with the profession as they often provide very practical solutions to unusual queries. If you have any questions you would wish published, then please send them to the Professional Ethics Team.

Many mediators are now drafting consent orders. In November 2016 the FMC published a consultation on the topic[52]. Resolution's response dated January 2017 is here[53]. In May 2017 the FMC published an overview of the consultation responses[54].

[52] https://www.familymediationcouncil.org.uk/wp-content/uploads/2016/11/Consultation-Family-Mediators-Drafting-Consent-Orders-30.11.16.pdf
[53] http://www.resolution.org.uk/site_content_files/files/resolution_response_to_fmc_mediators_drafting_consent_orders_january_2017.pdf
[54] https://www.familymediationcouncil.org.uk/wp-content/uploads/2017/05/FMC-Overview-consultation-responses-family-mediators-drafting-consent-orders.pdf

The spectre of more mediators drafting consent orders raises various issues including:

- *Whether mediators are appropriately qualified to draft consent orders. All Resolution mediators are also lawyers; there are four other family mediation organisations in England and Wales, with a mix of lawyer- and non-lawyer mediators. Questions have sometimes been raised about whether non-lawyer mediators are appropriately qualified to draft financial consent orders and there would be he concern about the impact on the mediation brand of poorly-drafted orders being commonplace.*
- *Mediators cannot give legal advice, although they will impart information about what they feel is within the bounds of what the court will do. The judge considering the consent order is the ultimate arbiter of whether the order proposed meets the section 25(2) criteria. However, following S v P (Settlement by Collaborative Law Process) [2008] 2 FLR 2040, FD per Coleridge J, and S v S (Financial Remedies: Arbitral Award) [2014] 1 FLR 1257, FD per Munby P, there is concern among the mediation community that a mediator-drafted consent order, without legal advice, may simply be fast-tracked by a busy judge when s/he sees that it is an agreement reached in a DR process. At the very least, therefore, there may need to be a means of signifying to the court a consent order which is drafted by a mediator and upon which the parties have not taken legal advice.*

- *Resolution's present guidance on this is set out in the Guide to Good Practice for Mediation, pages 66-67*[55]

101. Those with an interest in this area may also wish to read Resolution's responses to the Family Procedure Rule Committee consultation about the draft practice direction for MIAMs in January 2014[56]; the report of the Family Mediation Task Force (set up after the Family Justice Review) dated June 2014[57]; and work around the Mapping Paths to Family Justice project[58].

(iii) Domestic abuse/cross-examination of victims in family proceedings

102. Whilst measures to protect victims of abuse giving evidence in court are in place for criminal proceedings, the same measures are not currently imposed on the family court, which can leave vulnerable witnesses open to traumatic experiences in court. This is despite the setting up of a Children and Vulnerable Witnesses Working Group following the Family Justice Review and an interim report published in July 2014[59]. Resolution responded to the interim report in September 2014[60].

103. A Guardian investigation in 2016[61] found that the family court:

[55] http://www.resolution.org.uk/site_content_files/files/resolution_good_practice_guide_on_mediation___may_2017.pdf
[56] http://www.resolution.org.uk/site_content_files/files/resolution_response_to_fprc_on_miams_january_2014.pdf
[57] http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf
[58] http://socialsciences.exeter.ac.uk/law/research/groups/frs/projects/mappingpathstofamilyjustice/
[59] https://www.judiciary.uk/wp-content/uploads/2014/08/pfd-consultation-interim-report-of-children-vulnerable-witnesses-working-group.pdf
[60] http://www.resolution.org.uk/site_content_files/files/resolution_response_to_the_children__vulnerable_witnesses_working_group_interim_report_oct_2014.pdf
[61] https://www.theguardian.com/society/2016/dec/22/revealed-how-family-courts-allow-abusers-to-torment-their-victims

103.1 Had allowed even those with criminal convictions for abusing their ex-partners to directly question their victims (sometimes repeatedly);

103.2 Is able to ignore restraining orders imposed by the criminal court; and

103.3 Has failed to adequately protect vulnerable victims of domestic and sexual abuse.

104. In February 2017, the Prime Minister announced plans to transform the response to domestic abuse. Following that announcement, a 12-week nationwide consultation was launched in March 2018, aimed at harnessing the knowledge of survivors, as well as charities, specialist organisations and experts across policing, criminal justice, health, welfare, education, social services, employment and local authorities who deal with domestic abuse on a daily basis. The consultation received over 3,200 responses and engaged over 1,000 people through events held across the UK. Shockingly, it was estimated that the cost of domestic abuse to the nation was £66 billion in 2016-17.

105. Many have been calling for reform, including Peter Kyle MP, who has spoken forcefully in Parliament about the "glacial" progress made. He tweeted on 18 December 2018 that the government had failed to take any measures to address the issue since promising to reform the law two years ago.

106. Sir James Munby also centred his 16th View from the President's Chambers (published in January 2017)[62] on the issue, expressing his dismay at the "maddening lack of progress". He had previously addressed the matter in his 12th View in June 2014 and then again in August 2014 in his judgement of Q v Q, Re B (A Child), Re C (A Child) [2014] EWFC 31, where he had called for urgent attention for the creation of a statutory provision that would forbid a litigant-in-person from cross-examining a witness in family proceedings. Despite continued calls for reform, there is no draft legislation yet in place.

107. Over the past 4-5 years Resolution have responded to a raft of consultations about domestic abuse and vulnerable witnesses; I have linked them below[63][64][65][66][67].

Postscript:

107A. On 21 January 2019, the government published its response to the consultation and a draft Domestic Abuse Bill[67].

107B. The response to the consultation identified nine measures that require primary legislation to implement:

[62] https://www.familylaw.co.uk/news_and_comment/16th-view-from-the-president-s-chambers-children-and-vulnerable-witnesses-where-are-we
[63] http://www.resolution.org.uk/site_content_files/files/resolution_response_strengthening_law_on_domestic_abuse_october_2014.pdf
[64] http://www.resolution.org.uk/site_content_files/files/resolution_response_part_3a_fpr_2010_september_2015.pdf
[65] http://www.resolution.org.uk/site_content_files/files/resolution_response_pd_3aa_march_2017.pdf
[66] http://www.resolution.org.uk/site_content_files/files/resolution_response_transforming_the_response_to_domestic_abuse_may_2018.pdf
[67] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf

- provide for a statutory definition of domestic abuse
- establish the office of Domestic Abuse Commissioner and set out the Commissioner's functions and powers
- provide for a new Domestic Abuse Protection Notice and Domestic Abuse Protection Order
- prohibit alleged perpetrators of domestic and other forms of abuse from cross-examining their alleged victims in person in the family courts (and prevent alleged victims from having to cross-examine their alleged abusers) and give the court discretion to prevent cross-examination in person where it would diminish the quality of the witness's evidence or cause the witness significant distress
- create a statutory presumption that complainants of an offence involving behaviour that amounts to domestic abuse are eligible for special measures in the criminal courts
- enable domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody
- place the guidance supporting the Domestic Violence Disclosure Scheme on a statutory footing
- ensure that, where a local authority, for reasons connected with domestic abuse, grants a new secure tenancy to a social tenant who had or has a secure lifetime or assured tenancy (other than an assured short hold tenancy), this must be a secure lifetime tenancy
- extend the extra-territorial jurisdiction of the criminal courts in England and Wales to further violent and sexual offences

107C. The four main objectives of the Bill, published in draft form on 21 January 2019, are to:

- promote awareness – to put domestic abuse at the top of everyone's agenda and raise public and professional awareness
- protect and support – to enhance the safety of victims and the support that they receive
- transform the justice process – to prioritise victim safety in the criminal and family courts, and review the perpetrator journey from identification to rehabilitation
- improve performance – to drive consistency and better performance in the response to domestic abuse across all local areas, agencies and sectors

107D. The draft Bill includes the first statutory definition of domestic abuse as behaviour by a person ("A") towards another person ("B") that is abusive, if A and B are over 16 and personally connected. Abusive behaviour is defined to include physical or sexual abuse, controlling or coercive behaviour and economic abuse. Economic abuse is further defined as any behaviour that has substantial adverse effect on B's ability to acquire, use or maintain money or other property or obtain goods or services. The inclusion of economic abuse has been welcomed, as the introduction of universal credit means that benefits are now paid into one bank account per family, which is thought to potentially make it more difficult for people in abusive relationships to leave.

107E. The draft Bill requires the Secretary of State to appoint a Domestic Abuse Commissioner (the Commissioner) whose primary focus will be the prevention of domestic abuse and identification of those who are carrying out or are victims of domestic abuse with the help of staff and an advisory board. The Commissioner will also assess information and services

provided to victims, make recommendations to public authorities, undertake and support research, provide training and education and consult and co-operate with public authorities and voluntary organisations. The Commissioner will report to the Secretary of State and make recommendations to public authorities, who would have a duty to respond to the recommendations. The Commissioner will produce an annual report which will include an assessment of the extent to which their objectives have been met.

107F. The draft Bill proposes the creation of domestic abuse protection notices (DAPN), given by a senior police officer to a person over the age of 18, prohibiting the person from being abusive towards a person to whom they are personally connected. The DAPN would prevent the person to whom it is given from contacting the person for whose protection it is given and could also prohibit the person from evicting or excluding the protected person, prohibit the person from entering the protected person's premises or require the person to leave such premises. Breach of the notice would allow the person to be arrested without warrant. The draft Bill also proposes a domestic abuse protection order (DAPO), which would aim to prevent a person from being abusive by prohibiting them from doing or requiring them to do certain things described within the order. A DAPO could be applied for by a person suffering abuse, a police officer or another person granted leave by the court.

107G. Part 4 of the draft Bill addresses the issue of protecting witnesses in the family court, by prohibiting cross-examination of victims and alleged victims in person. Any person who has an injunction enforced against them would not be allowed to cross-examine a person who is protected by that injunction. The Bill also proposes that secure tenancies be given to victims and would enable domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody.

107H. There has been a lot of early commentary on the proposals. Much of it has been positive, but the devil is in the detail and many are concerned that without adequate funding, the proposals will not have as much of an impact as hoped for even if they do become law. Writing in The Telegraph[68] on the day the draft Bill was published, Katie Ghose, CEO of Women's Aid, welcomed the draft legislation but said that, fundamentally, the resources needed to make an impact were lacking. She pointed to the amount spent by the government last year on supporting victims of domestic abuse (£724 million or just £362 per person) in comparison with the estimated total cost of domestic abuse to the nation (£66 billion), which is more than the total estimated cost of all crime. She called for sustainable funding in order that the projects currently in place, such as women's refuges run by Women's Aid, could meet current demands. She also predicted that, in raising awareness through this Bill, demand for such services would increase.

[68] https://www.telegraph.co.uk/women/politics/governments-domestic-abuse-bill-doesnt-go-far-enough/

(iv) Transparency in the Family Courts

108. James Munby, the then President of the Family Division, published practice guidance on transparency in the family courts and the publication of judgments in January 2014[69]. Munby had previously identified transparency as one of three strands in the reforms of the family justice system that needed attention, the other two being the creation of the family court and the work done on the Children and Families Bill. The guidance stated that there was a need for greater transparency in order to improve public understanding of the court process and confidence in the court system, as too few family court judgments were made available to the public. The difficulty lay in the need to protect children and vulnerable adults, often the subject of family law cases.

109. In an August 2014 consultation[70], Munby invited comments and debate on the increase of published judgments, stating that he wanted the process of reform to be "incremental and informed" by those who would be affected. He noted that the impact of the practice guidance had already been significant, with the number of published judgments increasing significantly. He also invited suggestions on how the listing of cases could be clearer, as he feared the case number system was not well-understood outside legal practice; asked for further guidance on disclosure to the media of certain documents; and sought preliminary views about the possible hearing of certain family cases in public.

110. In response to Munby's consultation[71], Resolution raised concern that insufficient attention had been given to the effect transparency reforms might have on the adults involved in private matters. Resolution pointed out that the media is not an appropriate watchdog of the family court and argued that increased media access was not the way to maintain public confidence and give balanced insight into family court decision making.

111. Resolution also expressed concern that the family court should be a place of protection and safety. They questioned, for example, whether children would withhold information during proceedings for fear of it becoming public knowledge. The more cases that were published, the more that the margin for error and risk of identification of individuals or a family increased. Resolution therefore called for clearer guidelines about how to correctly and uniformly anonymise judgments. They also pointed out that there was no evidence available about the views of parents and adult parties on the increased availability of judgments. A standard information sheet explaining the practice guidance available at court was suggested.

112. Resolution questioned whether the disclosure of certain documents to the media was in advocates' and parties' best interests, particularly litigants in person, and stressed that whatever was published should not detrimentally impact on the children and adults involved. They queried whether there was a genuine demand for hearings to be heard in

[69] https://www.judiciary.uk/wp-content/uploads/2014/01/transparency-in-the-family-courts-jan-2014-1.pdf
[70] https://www.judiciary.uk/wp-content/uploads/2016/05/transparency-the-next-steps-consultation-paper.pdf
[71] http://www.resolution.org.uk/site_content_files/files/resolution_response_transparency_next_steps_october_2014.pdf

public, pointing out that the Munby had not actually set out the case for changing the procedure and ultimately argued that the disadvantages outweighed the advantages.

113. Since 2014, the trail has gone cold. It is understood that there was a lot of negative feedback in response to the August 2014 consultation and that this led to the brakes being put on. However there remains clamour in certain quarters for greater transparency.

114. An especially interesting resource is the website of the Transparency Project, a charity set up with the aim of explaining and discussing family law and family courts in England and Wales, and signposting to resources to help people understand the system and the law better, working towards improving the quality, range and accessibility of information available to the public both in the press and elsewhere. They held an especially illuminating evening in April 2017, 'Reporting family courts – are we doing it justice?'. Whilst there was inevitable tension between journalists' and lawyers' viewpoints, it was a rich discussion. I attach a link to a summary of the event[72].

F. Joining Resolution

115. Lawyers from other jurisdictions are very welcome to join Resolution as associates, and they enjoy access to the vast majority of our resources. Join our network of over 6,500 family law professionals and boost your career with Resolution's wide range of professional benefits and support. Resolution membership doesn't just mark you out as someone committed to our Code of Practice. We support our members to be the best they can be, by providing resources to support you and your firm, and opportunities for professional development.

By joining Resolution, you can benefit from:

- Exclusive discounts and access to a broad range of **training**, publications and **events**.
- Our bi-monthly magazine *The Review*, written by members covering the key developments in family law.
- Access to our online members' area and digital tools, including our **Precedents for Consent Orders**.
- Opportunities and support to raise your professional profile through access to promotional Resolution logos and by getting involved in our campaigning work.
- Discounts on loan products to help low to middle income clients fund their proceedings.
- Access to our **accreditation scheme**, allowing you to stand out from the crowd as a Resolution Accredited Specialist.
- Regularly updated **Guides to Good Practice** and Guidance Notes help you keep the Code at the heart of your work.
- Your own listing in Resolution's **online directory** of practitioners – visited by hundreds of thousands of potential clients each year.
- Insight on the direction of travel and key trends in family law to help future proof your business and plan for the future. Opportunities to shape the profession and learn from others by getting involved in our regional and national committees.

[72] http://www.transparencyproject.org.uk/transparency-project-news-reporting-family-courts/

- Use of the HSSF Mark which is part of the Government's Help and Support for Separated Families initiative. Members of our Dispute Resolution section and Resolution accredited specialists can apply.

You'll also be joining the largest professional network for family law professionals in England and Wales:

- Regional groups meet regularly bringing you together with likeminded professionals in your area, and offer regular training and networking opportunities.
- **YRes groups** for those with up to 10 years' PQE provide additional support for those at the early stages of their career.

This is a time of unprecedented change within family law - there has never been a more important time to join Resolution.

Info on how to join here: http://www.resolution.org.uk/howtojoin/

And there's a PDF of our join us leaflet here: http://www.resolution.org.uk/site_content_files/files/membership_flyer_2017.pdf

JCE

24.01.2019

Jo Edwards **Partner**
Head of Family

T: +44 20 7863 8360
M: +44 7584 528768
E: joanne.edwards@forsters.co.uk

Key contact details:

Jo Edwards
Partner and Head of Family

DD: +44 (0)20 7863 8360
M: +44 (0)7584 528 768
E: joanne.edwards@forsters.co.uk