

A PRACTICAL APPROACH TO
FAMILY LAW

TENTH EDITION

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FAMILY LAW PRACTICE—SETTING THE SCENE, THE FIRST INTERVIEW, AND NEXT STEPS

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A SETTING THE SCENE—PRELIMINARY POINTS

The scope of family law

Family law practice is becoming increasingly complex not only because of the sophisticated requirements of clients but also because of the need to comply throughout with protocols, regulations, and the detailed rules of procedure. Legal aid for family law cases faces an uncertain future, and has led to a greater expectation that a client will be required to fund family proceedings out of his or her own pocket. **1.01**

Traditionally, a 'family law case' concerned the position of parties to a marriage only. More recently, it has encompassed parties who are cohabiting (whether in an opposite-sex or same-sex relationship) and civil partners following the coming into force of the Civil Partnership Act 2004 and same-sex couples who have married under the provisions of the Marriage (Same Sex Couples) Act 2013. **1.02**

Family Procedure Rules 2010

The Family Procedure Rules 2010 ('FPR 2010', SI 2010/2955) came into force on 6 April 2011. They have been subsequently amended (SI 2012/3061 and SI 2014/843). **1.03**

- 1.04** The rules apply to family proceedings in the High Court and the Family Court (r 2.1, FPR 2010 as amended). However, the rules do not extend to civil proceedings (eg proceedings under the Trusts of Land and Appointment of Trustees Act 1996 or the Inheritance (Provision for Family and Dependents) Act 1975) which are heard in a family court.

The overriding objective

- 1.05** The rules modernize many aspects of procedure and are modelled on the Civil Procedure Rules 1998 ('CPR 1998', SI 1998/3132). Hence, as with CPR 1998, the rules are supplemented by Practice Directions and forms and begin by stating the overriding objective as follows:

- (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
- (2) Dealing with a case justly includes, so far as is practicable—
 - (a) ensuring that it is dealt with expeditiously and fairly;
 - (b) dealing with the case in ways which are proportionate to the nature, importance, and complexity of the issues;
 - (c) ensuring that the parties are on an equal footing;
 - (d) saving expense;
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases (r 1.1, FPR 2010).

The court must seek to give effect to the overriding objective when it exercises any power given to it by the rules or interprets any rule (r 1.2). Likewise the parties are required to help the court to further the overriding objective (r 1.3).

The principal changes

- 1.06** Set out below are some of the significant changes in the FPR 2010. The list is not intended to be exhaustive. Reference is made to the relevant chapter where the changes are discussed in more detail:

- (a) there is greater emphasis on the use of non-court dispute resolution, particularly mediation, in Part 3 and PD3A (Chapters 3, 18, and 30);
- (b) PD5A contains a table of forms applicable to each type of proceedings;
- (c) in divorce proceedings:
 - (i) the term 'special procedure' is abolished;
 - (ii) the petition for divorce now contains numerous tick boxes for completion;
 - (iii) PD7A, para 2.1 actively discourages the naming of a co-respondent where the petition is based on the respondent's adultery; and
 - (iv) the costs rules now require that any party wishing to be heard on costs must serve written notice to this effect on every other party at least two days before the hearing (r 7.21(2)) (Chapters 8 and 9);
- (d) nullity proceedings which are undefended are to be heard without an oral hearing (Chapter 16);
- (e) a statement in support of a divorce petition, a statement of information to support an application for a consent order dealing with financial provision, and a statement in support of an application for an occupation order and/or a non-molestation order under Part IV, Family Law Act 1996 are to be verified by a statement of truth (Chapters 9, 30, 36, and 37);
- (f) provisions found in Part 33 relating to enforcement of orders made in family proceedings now enable a party seeking to enforce an order to apply for 'such method of enforcement as the court may consider appropriate' (r 33.3(2)), thus abolishing the need to select a method of enforcement which may not be appropriate (Chapter 33).

Terminology

There are important changes in terminology to be noted:

1.07

- (a) decrees of divorce, nullity, and judicial separation are now known collectively as ‘matrimonial orders’, although the old terminology is retained at various points in the rules;
- (b) a decree of dissolution of a civil partnership becomes a ‘civil partnership order’;
- (c) ancillary relief is now known as ‘an application for a financial order/remedy’;
- (d) petitioner becomes ‘applicant’ (it should be noted, however, that there is no change to the wording of the Matrimonial Causes Act 1973 where the term ‘petitioner’ is found and the application form to seek a decree of divorce or judicial separation is still known as a ‘petition’);
- (e) leave to apply is now to be referred to as ‘permission to apply’.

The Family Court

A major development which came into effect on 22 April 2014 has been the introduction of the single Family Court. The Family Court is created by the Crime and Courts Act 2013 (s 17(3) and Sch 10) and by amendments to the Matrimonial and Family Proceedings Act 1984 by addition of ss 31A–31P.

1.08

The Family Division of the High Court remains separate from the Family Court and therefore the new Family Court embraces the jurisdiction of the Family Proceedings Court and the County Court. Nevertheless the Family Procedure Rules 2010 (as amended) apply to both the Family Court and the Family Division of the High Court.

The creation of the Family Court does not mean, however, that the functions of the court are entirely the same. For example, r 2.6, FPR 2010 describes the powers of a single lay justice in family proceedings. By contrast, PD2A, FPR 2010 sets out in considerable detail functions which a single lay justice is not permitted to perform. Further a single lay justice is not permitted to make a decision of the Family Court at a final hearing for a substantive order: para 1.2, PD2A, FPR 2010. (See Chapter 4.)

The Family Law Protocol

All practitioners need to be aware of the third edition of the Family Law Protocol, published by the Law Society in 2010. This offers invaluable guidance on dealing with commonly encountered family law problems together with good practical advice to avoid pitfalls. It also produces a range of guidance and online resources and contains a list of helpful contacts and addresses including Relate and National Family Mediation.

1.09

Copies of the Protocol are available from Law Society Publishing—tel: 0370 850 1422; email: http://lawsociety@prolog.uk.com; or online at <<http://www.lawsociety.org.uk/bookshop>>. Reference is made to the Protocol throughout the book and some of its guidance is quoted at length.

1.10

Solicitors Regulation Authority Handbook

From 6 October 2011 major changes to law firm regulation came into effect with the introduction of the *Solicitors Regulation Authority Handbook* (‘SRA Handbook’) and ‘outcomes-focused regulation’. While it is not the purpose of this book to discuss the regulations in details, reference will be made to relevant provisions in this chapter.

1.11

- 1.12** Copies of the latest edition of the SRA Handbook (October 2014) and *A Practical Guide to Outcomes-Focused Regulation* (to accompany the SRA Handbook) are available from Law Society Publishing (see para 1.10).

B THE FIRST INTERVIEW

- 1.13** The first interview with any client is extremely important. Family cases are no exception. It is important to recognize that, as far as the interviewee or prospective client is concerned, the first interview may have two distinct purposes:
- (a) as a fact-finding exercise to obtain information from the solicitor as to the steps open to the interviewee to resolve the family problems he or she is experiencing. In addition, the interviewee will be assessing whether he or she feels comfortable with the solicitor and would have confidence in the solicitor if instructed to act on the interviewee's behalf;
- or
- (b) to give formal instructions to act on the interviewee's behalf. This assumes that the interviewee already has a clear idea of the outcome he or she is seeking.
- 1.14** In any event, prior to the first interview, it is important to obtain sufficient information from the interviewee to check that there is no conflict of interest with an existing client.
- 1.15** Chapter 3 of the SRA Code of Conduct set out in the Handbook deals with the handling of conflict of interests. Solicitors are required to have in place systems that enable them to identify and deal with potential conflicts.
- 1.16** Solicitors are reminded that conflict of interests can arise between:
- (a) the solicitor and current clients ('own conflict of interest'); and
 - (b) two or more current clients ('client conflict').

Solicitors are prohibited from acting for a client where there is a conflict, or a significant risk of conflict, between the solicitor and a client.

- 1.17** If there is a conflict, or a significant risk of a conflict, between two or more current clients, the solicitor may not act for all or both of them unless the matter falls within the scope of the limited exceptions set out in Outcome 3.6 of the Handbook. This states:
- where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it you (that is, the solicitor) only act if:
 - (a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;
 - (b) all the clients have given informed consent in writing to you acting;
 - (c) you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests; and
 - (d) you are satisfied that the benefits to the clients of you doing so outweigh the risks.

It is submitted that in family cases the nature of the conflict of interests are such that it would never be appropriate to act for both parties.

- 1.18** It is also necessary to give details, in writing, to the interviewee of the name and status of the person who is to conduct the interview. Information should be given as to whether the interview is free or available at a fixed cost or that the cost of the interview is at a reduced cost of £X per hour pro rata. The interviewee should also be given details of whom to contact if the interviewee has a complaint.

Interviewees should sign and date the document and both the interviewee and the solicitor should keep a copy of the signed document. **1.19**

After the interview, the solicitor should keep a note of the interview with the signed document. This should be filed and kept for record purposes. **1.20**

How should the solicitor approach the first interview?

The first interview provides the opportunity for the solicitor to gain the interviewee's confidence and to equip him or herself with much information which he or she will need if he or she is to act for the interviewee in the future. **1.21**

For example, the interviewee may have separated from her husband and not be receiving maintenance. It is for the solicitor to ascertain the interviewee's views, not only on her immediate problem, but also on related matters so that he or she may advise her properly. Where the interviewee has a maintenance problem, for instance, there are a number of different ways in which she might secure a maintenance order against her husband, one involving the issue of a divorce petition. In order to decide on the appropriate course of action, the solicitor needs to know whether the interviewee envisages getting divorced and whether there is any basis on which she can file a petition. **1.22**

It is important to recognize that the interviewee may be undecided about what she wants for the future and, in most cases, there is no harm in putting the options to her, explaining the implications of those options and suggesting that she go away and think things over for a few days, arranging another interview for the following week. **1.23**

Often the interviewee will be in a very distressed state at the first interview and care should be taken not to pressure her into a particular course of action. It must be remembered that when a marriage gets into difficulties, divorce is not the only option! **1.24**

C MATTERS TO BE COVERED WHEN TAKING INSTRUCTIONS

The basics

The guidance set out below assumes that the interviewee has decided to instruct you and will now be referred to as the client. **1.25**

At the outset, the solicitor must comply with the requirements of the Money Laundering Regulations 2007 by asking the client to produce two forms of appropriate identification, one at least of which must confirm the client's home address. The client's passport and utility bills for the home address will usually suffice for these purposes. **1.26**

Name, address, and telephone number

The client's full name and address must, of course, always be noted, as should his or her telephone number at home and at work so that he or she can be contacted urgently if necessary. It may also be necessary to note an address to which letters to a client may be sent, without the risk of the other party becoming aware of the contents. **1.27**

Every firm has its own system for noting routine information of this type, often on the file itself, on a printed label attached to it, or, commonly, on a computerized system. The client should be reminded to keep the solicitor up to date with any changes of address. If his or her address does change, the new address should be noted and the old address deleted from the file so that there is no danger of letters and documents being sent to the wrong address. **1.28**

- 1.29** If the case is one where the client's address is to be kept secret from his or her spouse, cohabitant, or civil partner (eg because it is feared that otherwise there will be violence), this should be noted clearly on the file with the address so that no member of the solicitor's firm inadvertently discloses the address.
- 1.30** Clear instructions should be taken from the client as to leaving messages on an answerphone or by any electronic means. Detailed messages may be accessed by the other party to the relationship, putting the client at considerable risk—the same may apply to the use of email.

Aspects of client care

- 1.31** Chapter 1 of the SRA Code of Conduct set out in the Handbook sets out the requirements as to client care.
- 1.32** The chapter explains how a solicitor is to provide a proper standard of service and client care which takes into account the individual needs and circumstances of each client. Outcomes and ways in which the solicitor may demonstrate that outcomes have been achieved are also set out.
- 1.33** Once formal instructions are received, the solicitor should write two letters to the client: the retainer letter, confirming that the solicitor is to act for the client, and the very important client care letter.
- 1.34** For the family law client, the client care letter should deal with the following:

Level of service

- 1.35** Throughout the transaction the solicitor is required to provide an 'appropriate level of service' to the client.
- 1.36** To achieve this initially the client care letter should:
- (a) provide in writing a summary of matters discussed clearly identifying the client's objectives in relation to the work to be undertaken;
 - (b) provide a summary of the options considered;
 - (c) summarize the specific advice given to date and the basis upon which that advice is given. It is sensible at this stage to:
 - (i) give a clear indication of how long the proposed steps are likely to take. Be pessimistic as opposed to optimistic. Avoid unrealistic expectations on the part of the client;
 - (ii) set out what steps the client needs to take. For example, it may be necessary for the client to compile relevant documents (especially in relation to financial matters or to obtain details of the value of his or her pension from the pension provider) or because of the way in which the client's matter is funded. Where appropriate, it should be emphasized that steps cannot be taken without further instructions or information from the client;
 - (d) record the specific instructions received from the client. This record must include an agreement as to the precise nature and scope of the work to be undertaken including, for example, the type and frequency of communication between solicitor and client.

This means that one client may require the solicitor to provide regular written progress reports. Conversely, the client may wish to provide initial instructions and then hear no more until a particular point in the transaction has been reached. It goes without saying that the precise instructions will affect the costs estimate;
 - (e) clearly indicate what the solicitor will not be dealing with. For example, if tax is not the solicitor's area of expertise, the solicitor should let the client know that he will not be dealing with any tax matters in the work being undertaken but give help as to where reliable advice might be obtained. Where, for instance, an accountant has

already been instructed by the client, it is sensible to have a copy of the accountant's retainer letter to ensure that all aspects of the client's case are being dealt with.

Who is dealing with the case?

Chapter 1 of the SRA Code of Conduct set out in the Handbook makes it clear that in providing services to the client it is important that the client is informed in the client care letter of the name and status of the person(s) dealing with the matter and the name and status of the person responsible for its overall supervision. **1.37**

The need to indicate clearly the status of the person within the law firm who is to have conduct of the case was highlighted by the Court of Appeal in *Pilbrow v Pearless de Rougement* [1999] 2 FLR 139. Here the court held that there was total non-performance of the contract, thus relieving the client of the obligation to pay the bill of costs, where the client had asked to see a solicitor to discuss some personal problems and after the conclusion of the case learned that the person who had carried out the work on his behalf was not a solicitor. **1.38**

Proceeds of Crime Act 2002 and the Money Laundering Regulations 2007

These are discussed in more detail at paras 1.49 ff but the solicitor should warn the client in the client care letter of the solicitor's duties under the 2002 Act and Regulations and the duties of disclosure of the client's financial affairs to the other party. **1.39**

Costs

Chapter 1 of the SRA Code of Conduct set out in the Handbook makes it clear that both in the client care letter and when appropriate as the matter progresses, the client should receive the best possible information about the likely overall cost of the case. **1.40**

Further, the client must be informed of his or her right to challenge or complain about a bill and the circumstances in which he or she may be liable to pay interest on an unpaid bill. **1.41**

As a minimum, at the outset the client must be informed of the overall likely cost of carrying out his or her instructions including a breakdown of fees, VAT, and disbursements and whether the charging rate is likely to be increased and, if so, when. The client is entitled to know the time likely to be spent in dealing with a matter, if time is a factor in the calculation of the fees. **1.42**

Where it is not practicable to give a precise figure for the likely cost, an explanation of why this is the case should be given to the client together with as realistic an estimate as possible. This is especially relevant to a client involved in proceedings for financial provision where it is generally impossible to predict at the beginning of the case whether the matter may be dealt with by agreement or only by a full court hearing at a later stage. **1.43**

The client care letter should reflect the discussions between the solicitor and the client as to whether the likely outcome will justify the expense or risk involved including, if relevant, the risk of having to bear an opponent's costs. Although the general principle in family cases is that each party is to be responsible for his or her own costs with limited opportunities to recover costs from the other party (the significance of this is explained in Chapters 9 and 30), costs may nevertheless be awarded against a party for litigation misconduct. However, even where such an award is made the client needs to understand that, in reality, such costs may never be recovered from the liable party. **1.44**

In any event, the build-up of costs needs to be monitored throughout the proceedings, with the client being regularly updated, to ensure that, in proceedings relating to financial provision, the costs remain proportionate to the value of the claim: *Piglowska v Piglowski* [1999] 1 WLR 1360. **1.45**

Funding the case

- 1.46** Discussions as to how the case is to be funded should be confirmed in the client care letter. While it is important to remember that a solicitor is not permitted to enter into a conditional fee arrangement in family cases, sources of funding may include:
- (a) legal aid—in the exceptional circumstances where this is likely to be available, the client must be informed that a contribution from the client to the cost of legal aid may be required and that the statutory charge may apply at the conclusion of the proceedings (Chapter 2);
 - (b) insurance schemes;
 - (c) assistance through a trade union or employer arrangement.

Complaints handling

- 1.47** The client care letter must also inform the client of the right to complain and the written complaints procedure available. (Chapter 1 of the SRA Code of Conduct set out in the Handbook makes it clear that complaints must be dealt with promptly, fairly, openly, and effectively.) In addition to details about the law firm's internal complaints procedure, the client must be informed of the right to complain to the Legal Ombudsman, the time frame for doing so, and contact details for the Legal Ombudsman (email: enquiries@legalombudsman.org.uk; tel: 0300 555 0333).
- 1.48** It is sensible to ensure that the client receives all the above information in duplicate with a request to retain one copy and return the other copy to the solicitor, duly signed and dated.

Money laundering*Introduction*

- 1.49** The Proceeds of Crime Act 2002 ('PCA 2002'; as amended by the Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007 (SI 2007/3287)) has been the source of considerable uncertainty since it came into force in 2003. Fortunately, the Court of Appeal decision in *Bowman v Fells* [2005] EWCA Civ 226 sought to clarify many of these difficulties.
- 1.50** The Act and the accompanying Regulations are complex and are largely beyond the scope of this book. What follows is intended to be a basic guide to those parts of PCA 2002 and the Regulations which are most likely to affect a lawyer working in family law. Additional guidance may be found in the Law Society Anti-Money Laundering Practice Note of 29 October 2009. It can be accessed at <<http://www.lawsociety.org.uk/antimoneylaundering>>.

Becoming involved in 'an arrangement'—s 328, PCA 2002

- 1.51** *Bowman* confirms that the criminal offence of 'becoming involved in an arrangement' involving money laundering under s 328, PCA 2002 does not apply to the conduct of litigation in general or to the settling of a dispute in a litigious context. Legal advisers involved in such work therefore no longer need to make an 'authorized disclosure' under PCA 2002 to the National Crime Agency.
- 1.52** The decision did not, however, consider 'transactional work' involving work outside a litigious setting, such as conveyancing. Section 328 continues to apply to such work although, following *Bowman*, it is now clear that common law legal professional privilege has not been overridden by PCA 2002, as had previously been thought. Useful and detailed guidance provided by the Law Society in relation to transactional work and s 328 in the light of

Bowman can be found at <<http://www.lawsociety.org.uk/productsandservices/antimoney-laundering.page>>.

The duty to disclose in the 'regulated sector'—s 330, PCA 2002

Section 330, PCA 2002 continues to apply to those working in the 'regulated sector' and makes it a criminal offence to fail to disclose where the 'professional legal adviser' has knowledge or a suspicion of money laundering or reasonable grounds for suspicion. The 'regulated sector' is defined in para 2(2) of the Money Laundering Regulations 2003 (SI 2003/3075), as amended and updated by the Money Laundering Regulations 2007 (SI 2007/2157). The generally accepted view is that family solicitors and legal executives do fall within this category. **1.53**

Section 330(6) provides a defence to a failure to disclose where the information came to the professional legal adviser in 'privileged circumstances'. It is important to note, however, that this exemption does not apply where the 'intention' behind the communication of the information is to 'further a criminal purpose' (s 330(11)). The 'purpose' can be that of either the client or a third party. This can place the legal adviser in a difficult position in knowing whether to protect the client's confidentiality and legal professional privilege or risk prosecution if the s 330(6) defence is not available. Amendments to s 330, PCA 2002 confirm that a legal adviser can speak openly with the firm's nominated money laundering officer without affecting the client's right to confidentiality. The Law Society guidance, referred to earlier, again provides a useful step-by-step guide in these circumstances. Guidance is also provided by the Law Society's Professional Ethics money laundering helpline (tel: 0870 606 2577). **1.54**

Further general information

Having considered the client care matters above, the solicitor may find it helpful to use a checklist during the interview to ensure that all relevant matters are covered. The following checklist is merely a suggestion. No doubt the solicitor will need to add other matters which he regularly wishes to cover with clients. **1.55**

Checklist: General information required from matrimonial clients

1. Name (identification documents produced)
2. Date of birth
3. National Insurance number
4. Current address (including email address, if appropriate)
5. Correspondence address (if necessary)
6. Telephone (landline and mobile)

Home
Work
7. Fax number
8. Occupation
9. Eligible for legal aid?
10. The Legal Aid Agency's statutory charge explained?
11. Legal Aid applied for?
12. Arrangements made for referral to mediation? Role of mediation explained—willingness to participate in mediation?

13. Status; if married (opposite or same sex), date of marriage. If civil partnership, date of registration
14. Name, address, occupation, and date of birth of spouse/cohabitant/civil partner
15. Spouse/cohabitant/civil partner's solicitors, if any
16. Children (names, dates of birth, and status)
17. With whom do children live?
18. Previous proceedings

Nature

Outcome

Solicitors who acted

Solicitors who acted for other

spouse/cohabitant/civil partner

19. Nature of problem
 20. Wants divorce/dissolution of civil partnership
 21. Reconciliation discussed?
 22. Any agreement with spouse/cohabitant/civil partner?
 23. Conciliation service involved?
 24. Schedule of basic financial details of client and spouse/cohabitant/civil partner
 25. Advice given on need for a will or to change the terms of an existing will?
-

Reconciliation

- 1.56** The solicitor should always find out from the client whether there is any prospect of a reconciliation. He should be alive to the possibility that the purpose of the visit to the solicitor may not actually be the stated purpose, for example to obtain a divorce or dissolution of a civil partnership. The real claim may be, for instance, to encourage the other party to mend his or her ways by forcing upon him or her the realization of what will happen if he or she does not.
- 1.57** The solicitor is not expected to offer practical assistance in bringing about a reconciliation, nor is he qualified to do so. However, there are numerous agencies that do offer such assistance and the solicitor should be in a position to advise on some of the agencies available and how to contact them should the client be interested in pursuing the possibility of a reconciliation. The largest national organization offering help with marital problems is:

Relate
 Premier House
 Carolina Court
 Lakeside
 Doncaster DN4 5RA
 Tel: 0300 100 1234/0845 130 4010
 Email: <http://enquiries@relate.org.uk>
 <<http://www.relate.org.uk>>

Relate has local counselling centres, the addresses and telephone numbers of which appear in the telephone book. They not only deal with reconciliation; they are also prepared to help people who are in the process of getting divorced come to terms with the divorce and make decisions about the future.

There are various religious organizations offering counselling, for example the Jewish Marriage Council and the Catholic Marriage Advisory Council. The local Citizens' Advice Bureau should have a file listing other organizations offering help and support, particularly those with branches in the area. **1.58**

Conciliation

Reconciliation is concerned with helping the parties to overcome their difficulties and make a fresh start together. **1.59**

Conciliation, however, becomes important once it is accepted that the marriage or civil partnership has finally broken down. The more bitter and protracted the aftermath of a broken marriage or civil partnership, the more difficult it is likely to be for the spouses or civil partners and the children to put the relationship behind them and start to build a new life. Conciliation aims to make the breakdown of a marriage or civil partnership as painless as possible by assisting the parties to reach agreement over matters such as the family home and other property, finances, residence orders, and contact orders, thus reducing the areas of conflict to a minimum. **1.60**

The solicitor has a distinct role to play in conciliation. His own attitude to the case will, to some extent, condition that of his client. If he treats the case as a personal vendetta against the other spouse, cohabitant, or civil partner or his solicitor, this will encourage his own client to dig in her heels and refuse to negotiate or to reach agreement over contested matters unless her precise demands are met. On the other hand, if the solicitor remains objective about the matter, he can encourage his client to give careful consideration to any proposals made by the other spouse, cohabitant, or civil partner and it is much more likely that agreement will be reached. **1.61**

In addition to the solicitor's own role in conciliation, there is an increasing number of local conciliation services being established to offer mediation and counselling. The exact nature of the facilities offered varies from service to service. The solicitor should be able to find out the addresses and telephone numbers of any services operating in his area through the local divorce court. If he feels that a conciliation service may be able to help he should encourage the client to contact them as soon as possible before 'battle lines' are drawn up. **1.62**

As well as the independent conciliation services, many courts offer conciliation appointments as part of financial provision and/or Children Act 1989 ('CA 1989') proceedings at which the Children and Family Court Advisory and Support Service (Cafcass) officer will often be in attendance to assist. **1.63**

Mediation services

Mediation is a refinement of the conciliation process. It is a form of alternative dispute resolution. There are a number of independent mediation services available. Both National Family Mediation and the Family Mediators Association have established centres nationwide and they operate under a common Code of Practice. These services provide a private and informal venue for separating couples to discuss issues relating to their children, property, and the divorce itself in the presence of a trained mediator or mediators. **1.64**

Increasing use is now being made of the mediation process and therefore it is important for the solicitor to understand how the process works and to be prepared to support it and recommend it where appropriate. In many instances it is necessary to refer a client to a mediation information and assessment meeting (or 'MIAM') and to establish the outcome **1.65**

of that process before a solicitor may commence proceedings in court. The detailed provisions relating to mediation and legal aid are discussed in Chapter 2. How mediation works in practice is explained in Chapter 3.

D NEXT STEPS—TAKING ACTION ON THE CLIENT'S BEHALF

Possible courses of action

- 1.66** The matters covered in the checklist at para 1.55 above are fairly general. This general information should enable the solicitor to decide what course of action might be appropriate. The following table is designed as a reminder of the principal remedies available for most of the problems commonly encountered in family work.

Client's problem	Principal remedies available Remedies to be considered
Wants divorce (whether opposite or same-sex marriage)	Divorce proceedings (though bear in mind that very occasionally, nullity proceedings may be more appropriate)
Wants dissolution of civil partnership	Dissolution order under Civil Partnership Act 2004 ('CPA 2004')
Maintenance problems—self (married client or civil partner)	Welfare benefits Maintenance pending suit and periodical payments under Matrimonial Causes Act 1973 ('MCA 1973') if intending to seek divorce/nullity If not intending to seek divorce/nullity, consider judicial separation (same financial provision as divorce) <i>or</i> application under ss 2, 6, and 7, Domestic Proceedings and Magistrates' Courts Act 1978 ('DPMCA 1978') <i>or</i> s 27, MCA 1973 Please note that the DPMCA 1978 is not now included in this book because of its infrequent use in practice. Orders for civil partners under Sch 5, CPA 2004
Maintenance problems—self (unmarried client or same-sex partnership where the partnership is not registered)	Welfare benefits. No court procedure for obtaining maintenance for self
Maintenance problems—children (married client)	Welfare benefits can include a sum in respect of children. Maintenance for child can be ordered in the course of divorce/nullity/judicial separation proceedings or under ss 2, 6, and 7, DPMCA 1978 as it can for a spouse <i>alternatively</i> maintenance can be ordered in proceedings under Sch 1, CA 1989. However, the effect of the Child Support Act 1991 ('CSA 1991') must be taken into account

(Continued)

Client's problem	Principal remedies available Remedies to be considered
Maintenance problems—children (unmarried client)	Welfare benefits. Maintenance orders can be made under Sch 1, CA 1989 but most child maintenance is likely to be dealt with under the CSA 1991
Dispute over property (married client or civil partner)	Financial order under MCA 1973 if divorce/nullity being sought. Section 17, Married Women's Property Act 1882 if divorce not intended Lump sums can be ordered under DPMCA 1978 and s 27, MCA 1973. For civil partner, if dissolution or nullity being sought, financial relief available under Sch 5, CPA 2004 Schedule 6, CPA 2004 if dissolution or nullity not applied for. Where children are involved, Sch 1, CA 1989 enables the court to make periodical payments (in limited circumstances), lump sum orders and property adjustment orders
Dispute over property (unmarried client or same-sex partnership where the partnership is not registered)	Normal principles of contract, tort, trusts, and property law apply, eg proceedings under ss 14 and 15, Trusts of Land and Appointment of Trustees Act 1996 for order for sale of real property, proceedings for declaration of trusts, etc. Where children are involved, Sch 1, CA 1989 enables the court to make periodical payments (in limited circumstances), lump sum orders, and property settlement or transfer orders
Child arrangements (married client)	Can be resolved in course of divorce/nullity/judicial separation proceedings If financial order sought under DPMCA 1978, the court can exercise its powers under CA 1989 with respect to child <i>alternatively</i> CA 1989 <i>or</i> wardship (if unusual features, eg international element)
Child arrangements (civil partner) can be resolved in course of proceedings for dissolution, nullity, or separation order	If financial order sought under DPMCA 1978, the court can exercise its powers under CA 1989 with respect to child <i>alternatively</i> CA 1989 <i>or</i> wardship (if unusual features, eg international element)
Child arrangements (unmarried client or same-sex partnership not registered)	CA 1989 <i>or</i> wardship (if unusual features, eg international element)
Violence or molestation (married client, registered civil partner, or unmarried client or same-sex partnership not registered)	Non-molestation order under Part IV, Family Law Act 1996 ('FLA 1996')

(Continued)

Client's problem	Principal remedies available Remedies to be considered
Difficulties over occupation of home (married client or civil partner)	Occupation order under Part IV, FLA 1996
Difficulties over occupation of home (unmarried client or same-sex partnership not registered)	Occupation order under Part IV, FLA 1996

Note: If there is agreement between the parties, the solicitor should not overlook the possibility of a separation/maintenance agreement as an alternative to proceedings. There is no reason why an unmarried couple should not make a binding agreement on matters such as maintenance, property, etc in just the same way as a married couple.

Preparing to commence proceedings

- 1.67** In some cases, the solicitor will have to commence proceedings without delay, for example where the client has been subjected to serious physical violence and requires a court order to prevent repetition.
- 1.68** The solicitor should ensure that he takes down all further information from the client that he needs to start proceedings. One good way of ensuring that nothing is missed is for the solicitor to have in front of him at the interview a precedent of each of the documents required to commence proceedings. He then works through each document asking the client for the particulars required to draft each paragraph. So, for example, if divorce proceedings are to be commenced, the solicitor will work through a blank form of divorce petition with the client.
- 1.69** The solicitor should also bear in mind what additional documents he or she will need to file when commencing proceedings so that he or she can ask the client for any required documents that may be in his or her possession. For example, in divorce cases the client must be asked for a copy of the marriage certificate.

Negotiating

- 1.70** Although it is sometimes necessary to issue proceedings without delay (eg in a domestic violence case), it will not always be desirable to launch proceedings straight away. It is often a good idea to attempt to negotiate a settlement of disputed matters without proceedings first. Obviously some remedies, such as divorce or a dissolution order, can only be obtained through the courts. With other matters, such as maintenance, the solicitor may be open to criticism if he embarks upon proceedings without first seeing whether agreement can be reached. In the first place, the proceedings may place added strain on relations between the parties concerned and reduce the chances of settling things amicably. Secondly, the party commencing proceedings may find him or herself responsible for extra costs (of his or her own and possibly of the other side) as a result of his or her precipitate action.
- 1.71** The solicitor is free to write to the other party, or to his or her solicitor if he or she is already represented, asking whether he or she is willing to consent to a particular course (eg to give his or her consent to a divorce decree based on two years' separation and consent) or to make his or her own proposals for settlement (eg an offer of maintenance) or indeed, asking the other party to desist from a particular course of action (eg from harassing the client).
- 1.72** However, if the other party is not represented, it is good practice to suggest in the letter that he or she might like to seek independent legal advice, particularly if the issue is complex. A copy of the letter should be enclosed, to be passed on to any solicitor who is instructed.

The Family Law Protocol reminds solicitors of the need to communicate in a non-confrontational and constructive manner. The letter should be clear and free of jargon. Consideration should be given to the impact of any correspondence on its reader. It is sensible to send to the client a draft letter for checking before it goes to the other party. Indeed, copies of all but routine letters should be sent to the client for approval unless there is a specific reason not to do so: see Chapter 1 of the Protocol. **1.73**

Letter writing

Apart from writing to the other party or his or her solicitor, there may also be other letters to be written. For example, if the client is being pressed for payment of gas and electricity bills or for mortgage instalments it can be helpful for the solicitor to write a letter on his or her behalf explaining the family difficulties and asking for forbearance until matters are resolved. There may be witnesses to contact (eg in support of an application for a non-molestation order). **1.74**

Advising the client

The client will no doubt be anxious about matters and have his or her own questions to ask. In particular he or she will want to know what is going to happen next. In addition to giving the client the information he or she requests, the solicitor should be alive to other matters of which the client will not be aware but of which he or she should be informed or warned. For example, a client seeking a divorce should be warned of the dangers of prolonged cohabitation in the run-up to the divorce (eg more than six months' cohabitation after discovering the respondent's adultery will debar the petitioner from relying on the adultery). **1.75**

The client will be understandably nervous at the first interview and may forget to ask all the questions that he or she had intended to raise with the solicitor. The solicitor should therefore be prepared to clarify matters and to respond to questions at the second and subsequent interviews when the client feels more at ease. **1.76**

Miscellaneous other steps

Depending on the nature of the case, the solicitor will find there are a number of other jobs to do. For example: **1.77**

- (a) if the family home is in the sole name of the other spouse or civil partner, he or she should register a Class F land charge or a notice to protect the client's home rights under Part IV, FLA 1996;
- (b) he or she should consider whether to serve a notice of severance of joint tenancy if the parties are joint owners of the family home;
- (c) he or she should consider the question of the client's will;
- (d) he or she should advise on the availability of welfare benefits.

All these topics are covered in later chapters.

Other issues that may require consideration at an early stage include the need to consider whether there is a risk that a child may be removed from England and Wales without the knowledge or consent of the client and the need to limit access to credit cards. The solicitor should also give relevant leaflets to the client as an aide-memoire, for example leaflets on public funding and court procedure. **1.78**

Preparing a statement and proof of evidence

- 1.79** After the first interview with the client, it is customary to prepare a statement setting out all the relevant information he or she has provided about the case in a readable manner for future reference.
- 1.80** Should it ever become necessary for the client to give oral evidence in court, it is good practice to prepare a proof of evidence from the client's statement, setting out the matters that are relevant to the particular proceedings in a convenient order. The proof can then be used as an aide-memoire when taking the client through his or her evidence-in-chief.

Keeping the client up to date

- 1.81** It may be a statement of the obvious but clients become frustrated if they are not kept up to date; a short telephone call, email or letter setting out the up-to-date position may avoid difficulties. Regular diary and file checks should ensure that cases are not forgotten.

E KEY DOCUMENTS

- 1.82** *The Family Law Protocol*, 3rd edn (The Law Society, 2010) (<<http://www.lawsociety-shop.org.uk>>)

Solicitors Regulation Authority Handbook (SRA, 2014)

Solicitors and Money Laundering: A Compliance Handbook, 3rd edn (The Law Society, 2008) (<<http://www.lawsocietyshop.org.uk>>)

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