Aspects of Family Law
Family law is an area of law that affects both children and adults. Many of us will have experienced for ourselves or known people who have family lives that are not straightforward. When relationships in family life break down there is a set of regulations to help resolve disputes. These regulations are part of family law. Family law also sets out the types of adult relationship that are legally recognised, such as marriage, civil partnerships and cohabitation (living together), and how these are formed, ended or dissolved. Often people need to make arrangements for their children following the break-up of a relationship and to settle financial matters. Family law can help to resolve these issues, as well as ensure that the children’s own rights are protected.

In this unit you will examine the legal rules that apply to marriage, civil partnerships and cohabitation, and how courts may apply these rules. You will learn how the law affects adult relationships, both when they are formed and if they break down. You will examine the different ways in which a relationship between two adults can be legally ended, including looking at the reasons for this and how current law is applied. You will look at the rules concerning money and property on the termination of a relationship, and you will learn about financial and children orders in particular cases. You will examine how courts resolve disputes over children and you will learn how the law is applied with regard to parental responsibility and the rights of children.

How you will be assessed

This unit will be assessed by assignments set and marked by your tutor. You will need to work independently on these assignments. Keep all your notes and activities that you have completed together in one folder so that you are well prepared. You also need to to check the unit specification and assignment brief. This will help you to be clear about what is required when questions ask for explanation, analysis and evaluation. It may be helpful to practise the higher-level skills needed in order to achieve the Merit and Distinction grades, such as developing a point, analysing a situation or case study, and evaluating the law and its impact. Throughout this unit you will find activities that will develop your understanding of family law, which will help you prepare for your assignments. The recommended assessment approach for this unit is two assignments, to include the suggested criteria.

The assignments set by your tutor will consist of a number of tasks designed to meet the criteria in the table opposite. They are likely to include a written assignment but may also include activities such as:

- case studies where you make decisions about a case and provide legal advice
- presentations or scenarios where you can demonstrate your knowledge about legal practice and procedures.
### Assessment criteria

This table shows what you must do in order to achieve a **Pass**, **Merit** or **Distinction**, and where you can find activities to help you.

<table>
<thead>
<tr>
<th>Pass</th>
<th>Merit</th>
<th>Distinction</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Learning aim A</strong></td>
<td><strong>Merit</strong></td>
<td><strong>Distinction</strong></td>
</tr>
<tr>
<td>Explore the legal rules governing the formation of marriages, civil partnerships and cohabitation</td>
<td>Apply and analyse the law on marriage, civil partnerships and cohabitation in given case studies.</td>
<td>Evaluate the impact of the current law on the formation and dissolution of adult relationships.</td>
</tr>
<tr>
<td><strong>A.P1</strong> Apply the legal requirements for a marriage and civil partnership in given case studies.</td>
<td><strong>A.M1</strong></td>
<td><strong>A.B.D1</strong> Evaluate the impact of the current law on the formation and dissolution of adult relationships.</td>
</tr>
<tr>
<td><strong>A.P2</strong> Explain the difference between the rights and obligations of marriage/civil partnership and cohabitation and apply the law in given case studies.</td>
<td><strong>Assessment practice 4.1</strong></td>
<td><strong>Assessment practice 4.1 and 4.2</strong></td>
</tr>
</tbody>
</table>

| **Learning aim B** | **Learning aim C** | **Learning aim D** |
| **B.P3** Apply the law on annulment, divorce and dissolution of a marriage and civil partnership in given case studies, explaining the applicable grounds. | **C.P4** Explain and apply the financial and children orders and relevant factors taken into account on divorce/dissolution in given case studies. | **D.P5** Explain and apply the law on parenthood, parental responsibility and children’s rights in given case studies. |
| **B.M2** Apply the law on divorce, dissolution and nullity in given case studies, analysing the current law. | **C.M3** Analyse the financial orders and orders available for children in given case studies. | **D.M4** Analyse how the court resolves disputes over children in given case studies. |
| **Assessment practice 4.2** | **Assessment practice 4.3** | **Assessment activity 4.4** |
| **C.D2** Evaluate the law on financial and other orders that the court can make on the breakdown of relationships. | **Assessment practice 4.3** | **Assessment activity 4.4** |
| **D.D3** Evaluate the impact of methods used by the courts to resolve disputes over children. | | |
Explore the legal rules governing the formation of marriages, civil partnerships and cohabitation

The legal regulations governing marriages, civil partnerships and cohabitation vary in different countries. Here you will explore the definitions of these relationships and how the law of England and Wales applies to them.

Marriage and civil partnership

The types of legally recognised adult relationships in which individuals have the strongest legal rights are marriage and civil partnership.

Definition of marriage

Marriage is the legally recognised union of two people as partners in a personal relationship. Until 2013, marriage was specifically a union between a man and a woman. However, the Marriage (Same Sex Couples) Act 2013 made marriage legal for same-sex couples in England and Wales.

The right to marry

The right to marry is a human right, as stated in the European Convention on Human Rights (ECHR), Article 12: ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’ This is also part of English law under the Human Rights Act 1998.

Formation of a valid marriage

Marriage can only take place if:

- both parties have the legal capacity to get married
- the correct procedure is followed.

Getting married is a voluntary activity. There are safeguards in the law to help prevent marriage taking place through coercion or fraud.

Who you can marry

There are various rules governing marriage. These relate to, for example, age, gender, relationship to the other person and a person's marital status at the time of marriage.

- Age restrictions – both of the people who wish to marry must be over the age of 16 and have the mental capacity to consent to marry. If either of the two people is under the age of 18, then consent must be obtained from that person's parents or guardians. If permission is refused, in England and Wales you can apply to the Family Court for permission to marry. The law in Scotland has always been different, and couples wishing to marry used to flee to Gretna Green on the Scottish border.
- Prohibited degrees of relationship – you cannot marry a close relative or someone within the ‘prohibited degrees of relationship’. These are sometimes referred to as rules of consanguinity and affinity. Consanguinity means a relationship between
Aspects of Family Law

UNIT 4

Learning aim A

the intended marriage partners as a result of family ties through a blood relative. Affinity refers to ties developed as a result of marriage of one parent to a parent of the other party of the proposed marriage. These rules have been created on moral, social and genetic grounds, and are set out in the Matrimonial Causes Act 1973. This means a person cannot marry any of the following relatives:

▸ a child, including an adopted child
▸ a parent, including an adoptive parent
▸ a brother or sister, including a half-brother or half-sister
▸ a parent’s brother or sister, including a half-brother or half-sister
▸ a grandparent or a grandchild
▸ a brother’s or sister’s child, or a half-brother’s or half-sister’s child.

Cousins are permitted to marry under these rules despite the possible genetic difficulties that might arise.

Sometimes information may come to light at a later point, which can create difficulties, for example, if the true identity of a person’s relative is only discovered after the marriage has taken place.

PAUSE POINT

Explain the rules governing who a person is allowed to marry with regard to age and family relationships.

Hint
Discuss the possible problems that could result if these rules were not in place.

Extend
Research a case where consanguinity was discovered after marriage took place. What happened?

▸ Bigamy – bigamy occurs when a person goes through a ceremony of marriage while already married to someone else. This is most likely to occur when a person has not been divorced from an existing marriage and declares they have never been married. Bigamy is a criminal offence.

▸ Polygamy – in order for marriage to be recognised as valid in the UK, it must be monogamous. Monogamy means that a person can only have one partner at any one time. This contrasts with polygamy where more than one wife or husband is permitted. In some parts of the world, having more than one spouse is legal.

For some purposes, a polygamous marriage, or a potentially polygamous marriage, may be considered valid in the UK. This often results in complications with respect to immigration, benefits, pension rights, and divorce and subsequent property rights.

▸ Transsexuals – since 2004, transsexuals have been allowed to marry using their new established gender. An unmarried transsexual can apply to a Gender Recognition Panel to obtain a Gender Recognition Certificate (see Appendix page 338) under the Gender Recognition Act 2004. This allows the established gender to be used in a marriage and a new birth certificate to be issued.

▸ Same-sex marriage – the Marriage (Same Sex Couples) Act 2013 makes the marriage of same-sex couples lawful. This means that same-sex couples can now marry and have the same legal protections as a married man and woman.

Marriage procedures

There are set legal procedures regarding marriage, including how the ceremony is conducted, the venue and notices. These must be followed for the marriage to be lawful.

▸ The conduct of the ceremony – the two people getting married must exchange some formal wording, sometimes called wedding vows. They should discuss other wording they want in the ceremony with the person conducting it. In a civil
ceremony, readings, songs or music are allowed. However, this must not include anything that is religious, such as hymns or readings from a religious text. There must be at least two witnesses at the ceremony. The two people getting married and their two witnesses must sign the marriage register (see Appendix page 339).

- **Wedding venues** – the people getting married must give details of the venue in a special notice at their local register office. A ceremony can take place at:
  - a register office
  - any approved venue, for example, a stately home or hotel
  - religious premises where permission has been given by the organisation and the premises are approved by the local authority.

- **Notice requirements** – for most marriages both parties must give at least 28 full days’ notice at their local register office although in certain circumstances this can be reduced to 15 days by the issue of a special license. The two people must have lived in the registration district for at least the past seven days. They need to include details of where they intend to get married. Their notice will be publicly displayed in the register office for 28 days (see Appendix page 341).

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**Research**

Find out where your local register office is located. Check how it sets out its requirements. This information is usually found on your local council’s website, such as: [http://www.northyorks.gov.uk/article/29862/Legal-requirement---the-notice-of-marriage-or-civil-partnership](http://www.northyorks.gov.uk/article/29862/Legal-requirement---the-notice-of-marriage-or-civil-partnership)

Make a list of everything you would need to take with you to register your intention to get married. Would this list apply equally to your proposed marriage partner?

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**Pause Point**

Research a case where a marriage did not comply with legal requirements. Identify why the marriage was unlawful.

**Hint**

Highlight evidence to support why the marriage should not have taken place. Use the information given above.

**Extend**

Analyse the ways in which the law has been broken and mind map all the people directly and indirectly affected.

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**Distinction between marriage and civil partnership**

There are many similarities between a marriage and a civil partnership. A civil partnership can be easily converted to a marriage. This is done by signing a ‘conversion into marriage’ declaration at the local register office and paying a fee. Some of the differences between marriage and civil partnership are outlined in Table 4.1.

**Table 4.1: Some of the differences between marriage and civil partnership**

<table>
<thead>
<tr>
<th>Marriage</th>
<th>Civil partnership</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Relevant legislation</strong></td>
<td><strong>Civil Partnership Act 2004.</strong></td>
</tr>
<tr>
<td><em>Marriage Act 1949.</em></td>
<td></td>
</tr>
<tr>
<td><em>Matrimonial Causes Act 1973.</em></td>
<td></td>
</tr>
<tr>
<td><em>Marriage (Same Sex Couples) Act 2013.</em></td>
<td></td>
</tr>
<tr>
<td><strong>Formation</strong></td>
<td><strong>Civil partnerships are registered by signing the civil partnership document, with no requirement for words to be spoken.</strong></td>
</tr>
<tr>
<td><em>Marriages are solemnised by saying a prescribed form of words.</em></td>
<td><em>Civil partnerships can only be between two people of the same sex and cannot be between people of the opposite sex.</em>*</td>
</tr>
<tr>
<td><em>Marriage can be between two people of the same sex or two people of different sexes.</em></td>
<td><em>The formation of a civil partnership is an entirely civil event. Civil partners can choose to add a ceremony if they wish.</em></td>
</tr>
<tr>
<td><em>Marriages can be conducted through either a civil or religious ceremony.</em></td>
<td></td>
</tr>
</tbody>
</table>

Table 4.1: Continued

<table>
<thead>
<tr>
<th>Marriage</th>
<th>Civil partnership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other points</td>
<td>Civil partners cannot call themselves married.</td>
</tr>
<tr>
<td>• Married couples cannot call themselves civil partners.</td>
<td>• The details of civil partnerships are recorded in an electronic register.</td>
</tr>
<tr>
<td>• Marriages are registered on paper, in a hard copy register.</td>
<td>• Civil partnership certificates include the names of both parents of the parties.</td>
</tr>
<tr>
<td>• Marriage certificates include the names of only the fathers of the parties.</td>
<td>• Civil partnerships are ended by a dissolution order.</td>
</tr>
<tr>
<td>• Marriage is ended by divorce, by obtaining a decree absolute of divorce.</td>
<td></td>
</tr>
</tbody>
</table>

Formation of a valid civil partnership
As with marriage, there are regulations governing who is allowed to form a civil partnership and procedures that must be followed.

Who you can enter into a civil partnership with
A civil partnership is a legal relationship that can be registered by two people of the same sex. It cannot be registered between two people of different sexes. The advantage of registering a civil partnership is that the relationship is given legal recognition, resulting in certain rights and responsibilities.

Two partners can register a civil partnership providing:
▸ they are both 18 years old or over or, if 16 or 17, with written consent from both parents or guardians
▸ they have lived in the area of registration for at least seven days
▸ both are free to marry (no existing husband or wife or civil partner) and are not close blood relatives.

Civil partnership ceremonies
The Civil Partnership Act 2004 states that no religious activity may occur during the process of registering a union. The Act does not make provision for a ceremony; therefore a couple wishing to have a ceremony need to contact the registration authority where the union will be entered to see whether a ceremony is possible. Permission for a ceremony is usually granted.

Notice requirements
Notice must be given to the register office at least 28 days before the registration of the civil partnership (see Appendix page 340), following the same procedures as for marriage.

Cohabitation
In this section you will explore the legal rules governing cohabitation, as opposed to marriage or civil partnerships.

Definition of cohabitation and its legal recognition
Cohabitation is defined as living together with someone. People who are cohabiting have fewer rights than if they were married or in a civil partnership.

Some people make cohabitation agreements to try to allow for disputes or a split so that one party is not left without any assets. This is considered in more detail below.

Distinction between married couples/civil partners and cohabitants
Married couples have far more individual rights and obligations than cohabitants. The rights of married couples are much the same as those of people who are in a civil partnership. There are important distinctions between these rights and those of people living together, particularly when a relationship ends, outlined in Table 4.2

Discussion
In groups, think about the similarities and differences between marriage and the formation of civil partnerships. Then in pairs, discuss why you think some of these differences exist. Feed back your ideas to the group.

Key term
Cohabitation – living with someone.
(see page 187). Many aspects of a person’s life are affected, including their property, possessions, housing and financial arrangements, and whether inheritance tax is due on bequests to the other party. Parental rights with respect to children are considered later in this unit.

**Formalising status as a cohabitant – cohabitation agreements**

The rights of unmarried couples are often more difficult to enforce than those of people who are married or in a civil partnership. If a relationship breaks down between two people who have many assets, it can be expensive and time-consuming to resolve matters.

A cohabitation agreement is an option for a couple who do not want to marry or enter into a civil partnership. Like a prenuptial agreement, it comes into effect when a relationship breaks down. It can protect one person’s assets when that person has brought far more assets to the relationship than the other. The agreement protects each person’s rights and makes it clear how assets should be divided, and what should happen with regard to any children. Usually both parties are encouraged to seek independent advice before signing an agreement. This is so that there is less risk of coercion, which would make the agreement invalid.

**Steps in making a cohabitation agreement**

1. Agreement is reached on the following matters:
   - who owns and who owes what at the time of the agreement and how assets will be divided in the event of a split
   - where there are joint assets, what rights each person has to buy the other partner’s share of that asset
   - what happens to assets and debts acquired after the agreement has been made
   - what should happen with regard to existing and future children.

2. The cohabitation agreement is drawn up. Each party signs the document and the signatures are witnessed, usually by a solicitor.

**Other informal relationships – homesharers**

Homesharing involves older or disabled householders with a spare room sharing their house with someone. That person is known as a homesharer, and is typically a young adult looking for affordable accommodation. This arrangement has conditions attached:

- Householders must have a home that is suitable for sharing, and be in need of some support or companionship.
- Homesharers must be able to spare the time to give support or companionship to the householder.

Most organisations helping to arrange homesharing make it clear that there needs to be a written homesharing agreement that sets out each party’s legal rights. A homesharer may be expected to help with daily domestic tasks, for example, but should not have responsibility for the householder’s personal care.

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**Key terms**

**Bequest** – property given in a will.

**Prenuptial agreement** – a document drawn up before the parties marry that is designed to set out property rights in the event of subsequent divorce. This is sometimes called an antenuptial agreement.

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**PAUSE POINT**

In small groups, list the benefits of being a householder and a homesharer.

**Hint**

Think about any problems that could occur when a householder lives with a homesharer.

**Extend**

Research and find a homesharing agreement. Do you agree with the legal rights it sets out for each party?
Legal rights and obligations of marriage/civil partnership and cohabitation

The legal rights and obligations of married people and those in a civil partnership as distinct from the rights of cohabitants are outlined in Table 4.2 below.

Table 4.2: The legal rights and obligations of married couples/civil partners and cohabitants

<table>
<thead>
<tr>
<th><strong>Married couples/civil partners</strong></th>
<th><strong>Cohabitants</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Death and inheritance</strong></td>
<td></td>
</tr>
<tr>
<td>If no will has been made, the surviving spouse/partner will inherit all or some of the estate. Married couples/civil partners are exempt from inheritance tax for bequests made under a will to each other.</td>
<td>Where one partner dies without leaving a will, the surviving partner will not automatically inherit anything. Jointly owned property is transferred to the survivor. Inheritance tax is payable on anything received under a will.</td>
</tr>
<tr>
<td><strong>Ending a relationship</strong></td>
<td></td>
</tr>
<tr>
<td>A married couple/civil partners can separate informally but if they want to end the marriage/partnership formally, they will need to go to court and obtain a divorce/dissolution. Both partners have a right to stay in the home until either there has been a divorce/dissolution or the court has ordered one partner to leave.</td>
<td>An unmarried couple can separate informally without the need to go to court. The court does, however, have power to make orders relating to the care of the children.</td>
</tr>
<tr>
<td><strong>Financial support</strong></td>
<td></td>
</tr>
<tr>
<td>Each partner has a legal duty to support the other. A court can enforce this right and can make arrangements for payments after divorce/dissolution.</td>
<td>There is no legal duty to provide financial support for the partner, but there usually is an obligation for support to be paid for children. There may also be complications with respect to state benefits that may have been received while cohabiting.</td>
</tr>
<tr>
<td><strong>Housing</strong></td>
<td></td>
</tr>
<tr>
<td>Both partners have the right to live in the matrimonial/partnership home. It does not matter in whose name the tenancy agreement was made or who owns the property. This applies unless a court has ordered otherwise, for example, in the course of separation or divorce/dissolution proceedings. If both partners come to an agreement as to who should live in the home, this can be confirmed as a court order as part of the financial arrangements.</td>
<td>The unmarried partner of a tenant will usually have no right to stay in the property if the partner who has the tenancy agreement asks the other to leave. To get any protection they would have to go to court. Many tenancy agreements are in joint names so each partner has the right to remain and an agreement will have to be reached to decide who will continue to live there. If their partner is the homeowner, they would need to seek legal help to achieve any rights with respect to the property and any contribution they made towards it. See Burns v Burns (1984).</td>
</tr>
<tr>
<td><strong>Money and possessions</strong></td>
<td></td>
</tr>
<tr>
<td>Both partners are entitled to own anything in their sole name or in joint names. On divorce/dissolution, any property a partner owned before marriage/civil partnership is usually theirs. On divorce, all property is taken into account in a financial settlement (see later in the unit). Wedding presents usually belong to the person whose family or friends gave the present. An engagement ring or wedding ring is usually taken to belong to the person who has been given it.</td>
<td>Property a partner owned before they started cohabiting remains theirs. If they have a joint account with their partner, then any money in it or overdraft is usually shared equally, but the contract with a bank usually makes both partners liable for the full debt. This means that if one partner does not pay the debt, the other can be made to do so through the courts.</td>
</tr>
</tbody>
</table>

**PAUSE POINT**

Identify two areas where the rights of married couples or civil partners are different from the rights of cohabitants.

**Hint**
Discuss whether you think these differences are valid.

**Extend**
Evaluate whether the law should be changed with regard to these rights. What proposals would you make?
Beth and Ajay have been in a relationship for several years. After four months of seeing one another they began sharing a flat. Then two years later they got married. They have been married for seven years, and still live in the same flat. The tenancy agreement is just in Ajay's name, but Beth pays the rent. They have no children. Over the last six months their relationship has been deteriorating. Beth is sure that Ajay is spending a lot of money and getting into debt. Last Tuesday Beth received a voicemail message from Ajay telling her he wanted a divorce. He told her she must leave the flat in a week's time. Beth is upset but not surprised. She is worried about finding a new place to live. She is also concerned that Ajay will take things that belong to her, such as the jewellery she inherited from her mother. Beth wishes she had never married Ajay, as now she will have to go through expensive and stressful divorce proceedings.

To complete this task, you will need to show that you understand the legal requirements for a marriage and the difference in rights and obligations of marriage compared with those of cohabitation.

While considering your detailed advice for Beth, reflect on the requirements for a marriage or civil partnership. You remember your friend Alex who is in a same-sex relationship and is considering formalising this as either a marriage or a civil partnership.

It might be useful for Alex to have a simple guide as to the legal requirements for a marriage and for a civil partnership. You decide to produce a leaflet that includes an indication of how well the current law works in these situations to protect those entering the relationship and the distinctions between the two possible formal relationships.

### Plan
- What is the task? What advice am I being asked to give?
- Do I have enough legal information to complete the task?

### Do
- I need to list the rights and obligations of a married person and a civil partner, and the rights and obligations of a cohabitant.
- I need to compare these and identify the differences.
- I need to identify any information I am missing.
- I need to apply the information I have to a specific case and provide personal advice.

### Review
- I can explain what the task was and how I compiled the legal advice for my client and the guidance for Alex.
- I can identify what I have learned.
- I can explain why it is important to have comprehensive information in order to provide legal advice.
B Examine the various methods for dissolving a relationship

Nullity

The word **nullity** is used to describe something that is legally invalid or void, as though it never existed in the first place. It is often used with reference to a marriage. Annulling a marriage is a way of legally ending a marriage. It is different from divorce with different conditions and procedures. People who do not believe in divorce are usually prepared to have their marriage annulled if that is possible.

In both nullity and divorce court proceedings, the parties are known as **petitioner** and **respondent**. However, annulment is different from divorce in various ways.

- A **decree of nullity** can be applied for at any time, whereas an application for a divorce decree can only be started if the marriage is at least one year old.
- Instead of a decree of divorce from the court, the parties to the marriage are given a decree of nullity.
- A decree of nullity means that you have not been married, whereas a decree of divorce means that you have previously been married, but no longer are (until remarriage).

The distinction between void and voidable marriages/civil partnerships

A marriage can be annulled either because it is void or because it is voidable.

- A **void marriage** is not a valid marriage, and has never been valid. It is as though the ceremony had never taken place. This is sometimes called void _ab initio_, a Latin expression meaning ‘from the start’.
- A **voidable marriage** is a valid marriage until the final decree of nullity is made. Some people who are in a voidable marriage never seek to have the marriage avoided (made void).

As with a marriage, a civil partnership may be void or voidable. The equivalent to a divorce in marriage is the **dissolution of a civil partnership**.

Consequences of a void marriage/civil partnership

A marriage or civil partnership is void if the requirements for a valid marriage or civil partnership have not been fulfilled (see learning aim A). The reasons may be to do with the age of either of the partners, their family ties, that one of them is already married or that they are in a polygamous relationship. If the formal procedures have not been followed, then that too will make the marriage or civil partnership void. The consequence of this is that a decree of nullity can be issued, and financial and property arrangements can be made.

Occasionally the court may decide the marriage is so flawed that it is considered a non-marriage. The difference between a non-marriage and nullity is that the courts are not able to intervene and make an order with respect to property for a non-marriage. This could be where the ‘marriage’ is part of a play or dramatic reconstruction of an event and occasionally relates to a marriage that is missing important elements.
An example of a non-marriage can be seen in the case of Hudson v Leigh (2009).

**Key case**

**Hudson v Leigh (2009)**

**Facts**

Miss Hudson was a devout Christian, while Mr Leigh described himself as ‘an atheist Jew’. They had had a relationship for over ten years, during which time they had a daughter. They decided to get married. Miss Hudson believed that the only way she would feel properly married was if she had a religious ceremony, whereas Mr Leigh wanted a ceremony in a register office. They agreed to have a religious ceremony on the roof terrace of Mr Leigh’s home in Cape Town, South Africa. This would be followed by a civil ceremony at a register office in England.

However, shortly after the religious ceremony the couple split up, so the civil ceremony in England never took place. The religious ceremony did not in itself constitute a valid marriage in South Africa for many reasons. The English courts would therefore not recognise what had happened in South Africa as a marriage. If they had been married, she could have claimed financial support for herself. The court in England decided that this was an example of a new category, that of a non-marriage, so she was not able to claim financial support for herself.

**Legal principle** – a marriage can be considered a non-marriage when a ceremony that takes place is invalid and due legal procedures for a marriage are not followed.

**Grounds for a voidable marriage**

The grounds (the reason someone can apply) for a voidable marriage are listed in the Matrimonial Causes Act 1973, s12. These can be summarised as follows:

- non-consummation due to incapacity or wilful refusal
- lack of consent
- mental incapacity
- venereal disease
- pregnancy
- acquired gender.

**Non-consummation due to incapacity or wilful refusal**

Consummation means normal sexual intercourse after the parties have got married. In order to use this ground for nullity, the petitioner must prove that the marriage was not consummated for one of the following reasons:

- either party was incapable of consummating the marriage
- the respondent wilfully refused to consummate the marriage.

Neither of these grounds apply to marriages of same-sex couples.

**Lack of consent**

Consent to a marriage from both partners is essential, and it is a criminal offence to force someone to marry. This includes taking someone overseas to make them marry (whether or not the forced marriage takes place).

A forced marriage is when either or both participants have been pressured into it, without giving their free consent. This is not the same as an arranged marriage, which, for example, may have been set up by other family members, but the couple have
willingly agreed to it. If there is any **duress** on a person to enter into a marriage, this can be grounds for nullity.

**Key term**

**Duress** – similar to coercion. It involves threats, violence or other action that is used to force someone into doing something against their will. This invalidates consent to a marriage.

Sometimes there is a problem with providing sufficient evidence of duress. In the case of Hirani v Hirani (1983), the court decided that duress was evident, and the marriage was considered to be void.

**Key case**

**Hirani v Hirani (1983)**

**Facts**

The petitioner was a 19-year-old woman, who lived at home with her parents. She formed a relationship with a Muslim man. Her Hindu parents were horrified and immediately arranged for her to marry a Hindu man, while telling her that if she did not go through with it she would be thrown out of the house. She went to the ceremony reluctantly and cried throughout. The court decided that there was enough evidence of lack of consent.

**Legal principle** – the test for lack of consent to a marriage is whether the pressure and threats were sufficient to destroy any consent.

**Mental incapacity**

The petitioner must show that at the time of their marriage they did not have sufficient mental capacity to consent to the marriage due to suffering from a mental disorder within the meaning of the Mental Health Act 1983.

**Venereal disease**

If the respondent had a communicable venereal disease (sexually transmitted infection) at the time of the marriage and they were aware of this at the time, but did not tell the petitioner, then the marriage is voidable.

**Pregnancy**

There are grounds for nullity if the respondent was pregnant with another person’s child at the time of the marriage, and they were aware of this at the time but did not tell the petitioner.

**Acquired gender**

If the petitioner was unaware that the respondent’s gender was an acquired gender under the Gender Recognition Act 2004 at the time of the marriage, the marriage is voidable. This usually occurs when the petitioner did not know that the respondent was a transsexual. This is best established by production of a Gender Recognition Certificate (see Appendix page 338).

**Grounds for a voidable civil partnership**

A civil partnership is voidable for these same four reasons as a marriage:

- lack of consent
- mental disorder
- pregnancy
- acquired gender.

The other two grounds do not apply to civil partnerships.
In pairs, list the legal grounds for the nullity of a marriage.

For each of the grounds, explain what the petitioner must prove to the court.

For one of the grounds, discuss a possible scenario where the petitioner has not provided sufficient evidence. One scenario is the case of Steve and Ann. Steve and Ann have only been married for 6 months. They have started to have arguments about starting a family and the fact that Steve believes if they did so, Ann’s earning capacity as a freelance personal trainer would be compromised. Steve is now refusing to be with Ann until she agrees to ensure she does not become pregnant. Discuss whether Ann could petition for divorce now, and if so, on what fact. How might the scenario need to change to allow a divorce petition to be presented?

Key terms

Decree nisi – the first stage in getting a decree of nullity.
Decree absolute – the decree of nullity.

Designated Family Centre – a principal Family Court location in a Designated Family Judge (DFJ) area. A DFJ has the role of managing the workload of the Family Court across each of the distinct areas of England and Wales, known as DFJ areas.

Procedure for obtaining a decree of nullity

There is a procedure for obtaining a decree of nullity supported by guidance notes issued by the Department for Justice. The procedure is very similar to that for divorce or dissolution of a civil partnership.

The process involves the following steps:

- filing the petition
- giving a statement in support of annulment
- the decree nisi (see Appendix page 337)
- the decree absolute.

Filing the petition

A petitioner needs to give the court:

- three copies of their completed form D8N – the nullity petition (the petition contains a number of sections and the grounds for petition are set out in a series of tickboxes)
- an official copy of their marriage or civil partnership certificate
- the court fees (the petitioner may be able to apply for exemption).

The Designated Family Centre (DFC) will then send the petitioner form DH9 – ‘Notice of issue of petition’. This is a receipt for the fees they have paid (if relevant). The form will also tell them when the petition was sent to the petitioner’s spouse or civil partner, what to do if they do not reply to it and what the petitioner’s case number is.

Discussion

There are four levels of judge working for the Family Court with each level reflecting the complexity of the cases. Lay magistrates, district judges, circuit judges, and High Court judges will be housed in the same court building. This new structure is designed to create a more effective and efficient use of all judges’ time. Each DFC will have at least one Design DFJ who will be responsible for the administrative running of the family court.

What benefits do you think there will be of the judges all being in one court building for:

- the judges themselves
- those the judges are working with?

Giving a statement in support of annulment

The petitioner then has to give a statement in support of the petition, which outlines the facts. The petitioner may have to go to court to give further details, particularly if the respondent disputes any of the allegations the petitioner makes. The respondent may or may not agree with the facts stated.
As the law tries to prevent divorce or dissolution by encouraging reconciliation. There is only one ground for either divorce or dissolution – that the marriage or civil partnership has broken down irretrievably. A petition for divorce or a petition for dissolution of a civil partnership may be presented to the court by either party for that reason. No petition for divorce or dissolution can be issued until the parties have been married for at least one year.

Facts of irretrievable breakdown
The irretrievable breakdown of a marriage or civil partnership has to be evidenced by one or more relevant facts. The majority of these facts require a considerable period of time to have passed before the petitioner can apply for a divorce or dissolution.

While much of the detail of the law regarding these facts relates to both divorce and dissolution, there is one clear difference:

▸ For divorce there are five relevant facts that can serve as evidence that a marriage has broken down:
  • adultery and intolerability – the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent
  • behaviour – the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent
  • desertion – the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition
  • two years’ separation with consent – the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted
  • five years’ separation – the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

▸ For dissolution only four of these relevant facts can serve as evidence that a marriage has broken down:
  • behaviour
  • desertion
  • two years’ separation with consent
  • five years’ separation.

Adultery is not a fact on which a partner can rely, as the definition of adultery does not apply to a civil partnership.

Adultery and intolerability
Adultery requires proof of all of the following:

▸ the respondent spouse has voluntarily had sex with someone else of the opposite sex

The decree nisi
If the respondent agrees the details in the petition, then the petitioner can apply for a decree nisi (see Appendix page 337). A decree nisi literally means ‘a decree unless’. The ‘unless’ here means ‘unless there are objections to the petition’. So a decree nisi can be seen as a conditional order. Once there is a decree nisi, the court can consider financial arrangements, discussed later in this unit.

If it can be proved that the respondent spouse has been served with a copy of the petition, then the court can proceed without that party.

The decree absolute
Once a petitioner has obtained the decree nisi, they must wait six weeks and can then apply for the decree absolute, which is the final order. If the petitioner does not apply within three months of being able to do so, the respondent may apply for the decree absolute. The marriage or civil partnership is then formally ended.

Bar to annulment
A bar to annulment is a reason why a petition for annulment can be refused. There are two main bars to annulment. These are set out in the Matrimonial Causes Act 1973, T3: s13 and can be summarised as follows:

▸ The petition was not issued within three years of the marriage, unless the petitioner is relying on the grounds of incapacity or wilful refusal to consummate.

▸ The respondent can prove that the petitioner knew an application for nullity could be made but led the respondent to believe that no application would be made. This amounts to forgiveness of the other party and an indication of the desire for the relationship to continue.

Divorce and dissolution
The law governing the ending of marriage by divorce has many similarities with the law governing the ending of a civil partnership, referred to as dissolution.

▸ The law relating to divorce is set out in the Matrimonial Causes Act 1973 (for male/female marriages) or the Marriage (Same Sex Couples) Act 2013 (for same-sex marriages).

▸ The law relating to dissolution of a civil partnership is set out in the Civil Partnership Act 2004.

▸ Both divorce and dissolution are dealt with by the Family Court.

Most of the case law relating to dissolution comes from divorce cases as there have been far more divorces over the years than dissolutions of civil partnerships.
Desertion requires evidence that the respondent has abandoned the petitioner for a continuous period of two years or more and has left the household with the intention of not returning. Merely working abroad does not constitute desertion; there must also be evidence of an intention not to return.

The parties can have lived together for up to a total of six months in addition to this two-year period and still claim desertion. This could mean a period of two years and six months from the initial desertion. This means that, for example, a partner might desert the other partner for one year, but return and stay for a few weeks to attempt a reconciliation and then leave again. The few weeks that they returned are not counted in the two-year period required. This is to allow a chance at reconciliation and is consistent with the six-month time bar on behaviour as evidence of irretrievable breakdown of marriage.

Living apart for two years with consent of the other spouse

If the parties have lived apart for more than two years and both agree to divorce, this means that this fact is satisfied, and there is evidence of irretrievable breakdown of marriage. The parties can have lived together for a period or periods of up to a total of six months, as with desertion, and still claim this fact. This could mean a period of two years and six months of living apart. The petitioner must get the respondent’s agreement in writing for this fact.

As with adultery, it must be shown that the petitioner and respondent have not lived together for more than six months following the incident relied upon in the divorce petition. Living together for more than six months after discovery of adultery, or during the period of living apart, resets the clock or means the fact cannot be relied upon.

Sex that someone has been forced into, whether a man or a woman, is not adultery. Rape is therefore not adultery. Similarly if the spouse has consented to the sex, then this cannot be evidence for adultery.

Adultery requires the sex to be with someone of the opposite sex, so homosexual activity is not adultery. This is why this fact does not apply to dissolution of a civil partnership. Adultery can be grounds for divorce in same-sex marriage but the infidelity must involve a member of the opposite sex. If the infidelity is with someone of the same sex, then the petition would be based on unreasonable behaviour.

Proof of adultery often takes the form of an admission from the person who has committed the adultery. If that is not forthcoming, adultery can be inferred from other evidence. Where there is no admission of adultery by the petitioner’s spouse, the petitioner may instead decide to use unreasonable behaviour as grounds for their petition.

Research

Research two decided cases that have considered the question of unreasonable behaviour. One example is that of O’Neill v O’Neill (1975): http://www.bailii.org/ew/cases/EWCA/Civ/1975/1.html

In small groups list any evidence of unreasonable behaviour by the respondents, or reasons why you think the behaviour was not considered unreasonable. Do you agree with the decisions of the court?

▸ the petitioner finds it intolerable to live with the respondent any longer
▸ the petitioner and respondent have not lived together for more than six months after discovery of the adultery.

Examples that on their own probably cannot be classed as unreasonable behaviour include:
▸ a catalogue of relatively minor incidents
▸ financial difficulties
▸ one incident of drunkenness
▸ a low sex drive.

As with adultery, it must be shown that the petitioner and respondent have not lived together for more than six months following the incident relied upon in the divorce petition. Living together for more than six months after discovery of adultery, or during the period of living apart, resets the clock or means the fact cannot be relied upon.

▸ one very serious incident such as a conviction for a serious criminal offence
▸ an incident of drug taking that has serious consequences for the petitioner.

What amounts to unreasonable behaviour, therefore, covers many different types of action. What is critical is how the behaviour affects the petitioner.

Examples of unreasonable behaviour include:

What constitutes unreasonable behaviour?
Living apart for five years
This is much the same as living apart for two years except that the other party’s consent is not required. A possible objection to this by the respondent is that divorce would result in extreme financial or other hardship.

PAUSE POINT
Make a list of the five facts evidencing irretrievable breakdown of marriage, and consider which is most likely to cause a hostile divorce. You might consider whether hostility might make the process more expensive and might try to create misleading evidence.

Hint
Think about the evidence involved in each fact.

Extend
Discuss this question: ‘How might a hostile relationship between two partners affect their divorce proceedings?’

Bars on petitions for divorce and dissolution
A bar to divorce or dissolution is a reason why a petition for divorce or dissolution can be refused. There are various bars on petitions for divorce and dissolution including the following:

▸ A petition for divorce or dissolution cannot be made during the first year after marriage or the creation of the civil partnership.

▸ Some of the facts of irretrievable breakdown have minimum requirements of time that must have lapsed in order for these to be used as evidence for a petition of divorce or dissolution. These include desertion, two years’ separation with consent and five years’ separation.

▸ The failure to agree financial arrangements or matters with respect to children can constitute a bar to divorce. (These are considered later in this unit.)

Encouraging reconciliation
The law on divorce has always encouraged reconciliation and counselling. Court proceedings can be adjourned at any time if there is a chance of reconciliation. If a solicitor is acting in a divorce case, a reconciliation certificate must be given to the court stating whether this has been discussed. While a solicitor is not required to discuss reconciliation and the help that is available, it is usually mentioned early on.

Apart from preserving the relationship, attempts at reconciliation can make it easier for the parties to come to an agreement about financial arrangements and the arrangements with respect to the children of the family. In most cases, it is a legal requirement to attend a MIAM (Mediation Information and Assessment Meeting) if you are going to take your case to court. The other person involved is also expected to attend a MIAM, but they do not have to go to the same meeting as you.

There are some cases where attending a MIAM would not be appropriate and the requirement is waived. These include the following situations:

▸ There is clear evidence of domestic violence.

▸ You do not know where the other party is or it would not be wise to let the other party know where you are. An example of this can be seen in the murder of seven-year-old Mary Shipstone by her estranged father in September 2016. He had been accidentally given the girl’s safe house secret address by a solicitor in the case.

▸ The dispute is about money and one of the parties is bankrupt.

▸ Both parties are in agreement and there is no dispute.

Procedure for obtaining a divorce or dissolution
The procedure for obtaining a divorce or dissolution of a civil partnership is similar to that for a decree of nullity.
Procedure for obtaining a divorce
There are three stages to obtaining a divorce:
▸ filing a petition for divorce
▸ obtaining a decree nisi of divorce (see Appendix page 337)
▸ obtaining a decree absolute of divorce.

As with nullity, if the respondent agrees with the details of the petition, the petitioner can apply for a decree nisi. If the respondent spouse does not reply, but it can be proved that they have been served with a copy of the petition, the court can proceed without that party.

Procedure for obtaining a dissolution
There are three stages to obtaining the dissolution of a civil partnership:
▸ issuing a petition for dissolution of a civil partnership
▸ obtaining a conditional order of dissolution of a civil partnership
▸ obtaining an absolute order of dissolution of a civil partnership.

Defended and undefended divorce/dissolution
▸ If both parties agree to the divorce, this is an undefended divorce. If one of the parties does not agree to the divorce, it is a defended divorce. The vast majority of divorces are undefended.
▸ If both parties agree to the dissolution of a civil partnership, this is an undefended dissolution of a civil partnership. If one of the parties does not agree to the dissolution of a civil partnership, it is a defended dissolution of a civil partnership.

Decree of presumption of death and dissolution of the marriage
Any missing person is generally assumed to be alive. Each year in the UK around 130,000 people are reported missing. Most of them are found but a significant minority each year remain missing. As well as being very distressing to friends and relatives, this can cause a number of problems, such as dealing with financial matters of the missing person. It also affects their spouse or partner in terms of any new relationships: the missing person is still their legal spouse or partner so they cannot remarry or enter into a new civil partnership.

The process for obtaining a death certificate of a missing person can be very lengthy. For example, Richey Edwards, lyricist and guitarist of the group Manic Street Preachers went missing and was presumed dead. It took his sister, Rachel Elias, 13 years to register her brother’s death.

The Presumption of Death Act 2013 allows the High Court to issue a decree of presumption of death. This states that the missing person is presumed to be dead. The decree will confirm the ending of a marriage or civil partnership and can also deal with property matters. The date of the presumed death is the latest date in the seven years since the missing person was last known to be alive, or the end of any window of time in which death is known to have taken place.

Should the missing person return, any marriage or civil partnership is not

Richey Edwards, lyricist and guitarist of the group Manic Street Preachers was missing, presumed dead
automatically revived. The process would have to be gone through once more, assuming both were still free to marry or enter a civil partnership.

**Judicial separation**

Judicial separation is an alternative to divorce. It is rarely used except in cases where the couple have moral objections, cultural reasons or religious beliefs for not wanting to obtain a divorce. For a civil partnership, this is known as a separation order.

**Difference between judicial separation and divorce**

The effect of a decree of judicial separation is that the parties remain married or in a civil partnership. However, the parties no longer have a duty to live together. The court can make financial orders as it can with divorce, with a few minor exceptions. Orders can be made with respect to children. The main differences between judicial separation and divorce or dissolution are outlined in Table 4.3.

<table>
<thead>
<tr>
<th><strong>Table 4.3</strong>: Differences between divorce or dissolution of a civil partnership and judicial separation</th>
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</thead>
<tbody>
<tr>
<td><strong>Divorce or dissolution</strong></td>
</tr>
<tr>
<td>Must prove irretrievable breakdown</td>
</tr>
<tr>
<td>Time for application for decree</td>
</tr>
<tr>
<td>Stages of making the order</td>
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<tr>
<td>Initial court fee (2016)</td>
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</tbody>
</table>

**Requirements for a judicial separation**

There is no requirement for a judicial separation to show that the marriage or civil partnership has irretrievably broken down. Otherwise, the requirements to obtain a decree of judicial separation are the same as the facts for divorce or dissolution of a civil partnership with insignificant differences in procedure. So for a judicial separation one of the five facts needs to be evidenced; for a separation order one of the four facts needs to be evidenced.

**Legal effects of judicial separations**

The legal effect of a decree of judicial separation is that the couple remains legally married. However, their normal marital obligations cease and they no longer have to go on living together. If they decide to resume their marriage, they can apply to the court to have the decree of judicial separation rescinded (ended).

**Reasons for seeking a judicial separation**

Judicial separation is rarely used except in cases where the couple:

- have moral objections, cultural reasons or religious beliefs for not wanting to obtain a divorce
- have been married for less than one year
- would have difficulty in proving that the marriage has irretrievably broken down.

---

**PAUSE POINT**

Identify the main difference between the requirement for judicial separation compared with the requirement for divorce or dissolution of a civil partnership.

**Hint**

Write down the legal effects of judicial separation for both parties.

**Extend**

List and discuss the reasons why a couple may choose judicial separation over divorce or dissolution.
You are doing a work placement in a law firm. The partner who manages the family law work wants to update the literature that is produced for clients so that it both reflects current law and is easily understandable. She would like you to prepare an informative and practical leaflet to give to clients on the formation of marriage and civil partnership and the ways in which these relationships may end. This should include promoting opportunities for reconciliation. The partner has suggested that you research decided cases, and provide simple analyses of these, so that clients can see how the law works in practice. Where relevant, this leaflet should refer to areas of the law that you feel are problematic, to show that it is not always easy to have laws that effectively and fairly cover any given scenario. You can also mention any legislation that is currently under consideration and evaluate how this might affect existing law if it is passed.

When undertaking this task, you need to think carefully about what information you include and how it is presented. The leaflet needs to be user-friendly but comprehensive and accurate. You need to show that you understand the law on the formation and dissolution of relationships, and how this applies to given situations. You should be able to explain the grounds for divorce, dissolution, nullity and judicial separation, including any bars to obtaining these, and the legal procedures involved. Use legal terminology where appropriate, and refer accurately to the cases you use as examples.

Having produced your leaflet, consider how the law might be applied in the following situations:

1. Guido and Lella are Italian students who were living together in London. When Lella’s parents learned about their cohabitation, they immediately arranged to go through a valid ceremony of marriage in London. Her parents drove over to the wedding but immediately after the ceremony, Lella left in a car with her parents and was driven back to her hometown in Italy. She and her parents will not allow Guido to see her or communicate with her in any way. Guido wants to annul the marriage.

2. Anja and Virat have been married for ten years. Virat has become increasingly violent towards Anja. Police have been called on several occasions and she has now left the matrimonial home for a women’s refuge. He wants to divorce her because he claims she would not cook his food as he liked it and objected to him drinking alcohol.

3. John and Ben are in a civil partnership. They have split up and have now lived apart with new partners for three years. Ben now wants to marry his new partner, Charles.

4. Graham went through a ceremony of marriage with Belinda. Belinda is now horrified to find that Graham is married to Svetlana. He says he is not really married to Svetlana as he only married her so she could fulfil the requirements to stay in the UK. He did know the authorities suspected it was a sham marriage, so they lived together for three weeks. Belinda has just discovered that Svetlana had Graham’s child which was conceived in that three weeks they were living together.
Investigate the legal rules governing the distribution of money and property on the breakdown of a relationship

Financial orders available to the court on divorce / dissolution

In the case of a divorce or a dissolution of a civil partnership, the court can deal with financial matters and make a financial order with respect to:

▸ money orders
▸ property orders
▸ pension orders.

Another financial order the court can make is maintenance pending suit, which requires a spouse or partner to make payments in order to provide for the other party until a settlement has been reached.

For most couples, living apart requires more income than living together. The most hostile battles are usually about money and assets, often linked to the support of their children. For this reason, in nearly all cases, family mediation or arbitration takes place. Usually, a person who applies for a financial order will need to prove that they have considered mediation; exceptions are where domestic abuse has been present or the whereabouts of one partner is unknown. Financial matters are only settled in court when agreement has not been reached through mediation.

Family mediation and family arbitration

Family mediation

To use mediation, both partners must go along voluntarily. One of the parties may go by themselves, but will probably be referred to family mediation by a solicitor or other advisor. If there are children involved, the parties are likely to be referred to a CAFCASS (Children and Family Court Advisory and Support Service) officer.

A mediator can help to understand and resolve issues that face a family

An independent, trained mediator will meet the couple (either separately or together) to understand the issues they have and help them reach an agreement. The mediator will write up any proposed agreement.

Key terms

Financial order – a court order that deals with the assets of a separating couple.

Money order – a court order for the payment of money from one party to the other, either as regular payments or a lump sum.

Property order – a court order for the transfer of specific assets from one party to the other.

Pension order – a court order for the transfer of specific pension rights from one party to the other.

Maintenance pending suit – an order for periodic money payments to a spouse or partner until the financial aspects of divorce or dissolution proceedings are finalised.

Family mediation – an independent, trained professional helps a couple to work out an agreement about issues such as arrangements for children or their finances.

Family arbitration – enables couples going through family breakdown to resolve disputes more quickly, confidentially and in a more flexible and less formal setting than a courtroom.
The benefits of mediation are as follows.

- It gives couples a greater say in what happens.
- It is less stressful and involves less conflict than going to court.
- It improves communication between couples.
- It is quicker and cheaper than court action.
- Agreements can be changed when circumstances change.
- It considers the needs of children above the feelings of the parties.
- It is less upsetting for children involved and helps them continue important family relationships.

**Family arbitration**

Family arbitration also allows couples to reach an agreement about family disputes without going to court. However, it is a more formal process and is similar to court proceedings. An arbitrator’s award is final and binding, whereas any agreement reached through mediation must be incorporated into a court order or other legal agreement to be binding.

### PAUSE POINT

In pairs, list the benefits of family mediation for a couple with two children.

#### Hint

Which of these benefits will impact on the children most?

#### Extend

List any disadvantages to resolving disputes through mediation rather than through the courts.

---

**Maintenance pending suit**

Maintenance pending suit is set out in Matrimonial Causes Act 1973, s22. It can be applied to help spouses and children in cases of nullity, divorce and judicial separation. Similar legislation exists with respect to civil partners under the Civil Partnership Act 2004.

Maintenance pending suit is defined as an order requiring either party to the marriage/civil partnership to make periodical payments to the other party or with respect to children. Payments continue until final arrangements are made. Typically an order is made when the parties to the relationship have separated prior to the start of proceedings. It can be helpful in dealing with short-term cash flow problems.

**Money orders**

Most cases do not require maintenance pending suit. The real need is to sort out long-term financial arrangements between the parties. Money orders are made in most cases: either as a periodical payments order or a secured periodical payments order.

Other orders are called property orders and include lump-sum payments and transfer of other property such as a house, car or specific item or investment. The primary objective is that, where possible, there is a clean break between the couple. This avoids the need for continuous contact even if only by bank transfer.

In this section you will only look at financial arrangements with respect to a spouse or civil partner. Orders for the support of children are considered later.

**Periodical payments order**

A periodical payments order is a payment made out of income by one spouse or civil partner to provide for the other. It is usually known as *maintenance*.

A periodical payments order is a weekly, monthly or annual payment (this is why it is called ‘periodical’). It can be for any amount and is sometimes for a nominal amount of, say, £1 per year. This is to acknowledge the right to a money order. Any money order can be varied later by the court if there have been significant changes in one party’s circumstances.

Where periodical payment orders have been made with respect to children, most will last until a child is 18.
Secured periodical payments order

With a secured periodical payments order, the order is secured on the assets of the payer. This means that the order is backed up by any possessions or assets of the person who is paying. These orders are rare as the court will need to be satisfied of two conditions:

▸ There are reasons to believe the spouse getting the periodic payment needs protection against the paying party going bankrupt, disappearing or dying.
▸ There is an asset against which the payments can be secured.

This order requires the paying party to secure the annual amount of the periodical payments against a capital asset such as a lump sum deposit in a bank. As with a periodical payments order, a secured order will end on the death, remarriage or formation of a civil partnership by the receiving party. It will not end, however, on the death of the paying party.

<table>
<thead>
<tr>
<th>PAUSE POINT</th>
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<tbody>
<tr>
<td>Research several cases in which money orders were made by the court.</td>
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<tr>
<td><strong>Hint</strong></td>
</tr>
<tr>
<td>Identify how the decision of the court varied depending on the circumstances of the case.</td>
</tr>
<tr>
<td><strong>Extend</strong></td>
</tr>
<tr>
<td>Did you agree with the decision of the court in each case? Justify your reasons.</td>
</tr>
</tbody>
</table>

Property orders

Lump sum order

A lump sum order is an order requiring one party to pay a lump sum of money to the other. This could be:

▸ savings that were held in the name of one spouse only
▸ investments that are in one name only
▸ money from the sale of property whose ownership is not clear – for example, a work of art
▸ a sum payable by one party to the other to buy out the rights of the other in the former matrimonial home.

A lump sum can be made instead of periodic payments, when the spouse who is paying has sufficient money to make one substantial payment.

Property adjustment orders

A property adjustment order is an order requiring one party to transfer an interest in property to the other, such as a house, land, stocks and shares, car or other physical or non-physical asset. This kind of order, once made, cannot be varied. Typically, an order of this type will be made when there is a need to allow each spouse a share in the capital value of the family assets, especially the matrimonial home. It is very significant when dealing with high-value divorce cases, for example, when the transfer of shares in a business could affect control of a company. Similarly, it may well settle a dispute about the ownership of investment assets such as gold or a painting.

There are many forms and matters to consider with respect to property adjustment orders:

▸ Postponing the sale of the home

The court can order that the sale of the family home will not take place until a certain time, for example, when the youngest of the children reaches 18 years old.

▸ Orders for sale

The court usually only makes an order for sale of the matrimonial home if the marriage or civil partnership has been short and there are no children to consider. The court will not make such an order if that would leave either party homeless. This could also be
ordered if the sale of the matrimonial home will produce enough money to allow both parties to buy another home or if neither party can afford to buy out the other party. Where there is negative equity in the house, the court will not make an order for sale. The mortgage lender will usually require the house to be sold anyway if the parties cannot agree to continue to pay the mortgage.

Property adjustment orders may also cover:

- Transfer of property – the court can order that the ownership of the family home is transferred from one party to the other. The court can also order that the property is transferred and sold when a particular event takes place, and the proceeds of sale divided in particular proportions. This is often the case when it is agreed that one party shall remain in the former matrimonial home along with their children. The sale might take place when the children have finished education or reached a certain age.

- Settlement of property – this is an order requiring one party to transfer specified property for it to be held on trust. The trustees will hold the property for the benefit of the beneficiary (usually either the other party or the child of the marriage), in accordance with the terms of a trust deed. This type of order is not common and factors such as the child’s welfare, the income, earning capacity, property and other financial resources that each parent has or is likely to have in the foreseeable future will be taken into account. It might be used, for example, to provide for a disabled child, with the assets under the trust being transferred to someone else on the death of the child.

- Variation of settlement – where a trust (which is sometimes called a settlement) is already in existence, the court can vary the terms of that trust or settlement. This is usually only relevant when the couple have had the benefit of a family trust and they are now getting divorced.

**Pensions**

Pensions are increasingly complex and important in cases of relationship breakdown. Often one party will have a large potential pension and the other may have little or nothing. Current law allows a person who has a pension pot to take some of it in cash rather than as a regular pension payment. This gives an opportunity for one party to withdraw a lump sum and reduce the income that they will get in later life.

If a person gets divorced, or has their civil partnership dissolved, the court will take their pension assets into account when making any financial order. Both parties will have to list the value of their individual pension pots. These will be calculated according to how much the pension benefits are worth at the date of divorce or dissolution of the civil partnership.

The court can make several types of order relating to pensions:

- Pension attachment order – this is an order requiring a proportion of a pension lump sum and/or pension income or a death in service payment to be paid. The order is set out as a percentage or fraction of the lump sum or income and is different to a pension sharing order as it applies to the value of the pension at the date of actual retirement. It therefore provides the recipient with a guaranteed pension or lump sum or payment when the pension holder reaches retirement age.

- Pension sharing order – the pension is split at the time of divorce or dissolution so that each party receives a separate pension pot to build for the future.

- Pension offsetting order – each party keeps their own pension benefits but the proportion of other assets is adjusted to balance things up.

- Pension earmarking order – this order ensures that when one person’s pension benefits start to be taken, it will be paid directly to the other person.

**Key term**

**Negative equity** – the amount owed on the mortgage of a house is more than the value of the house.
Factors the court will take into account when deciding what order to make

Statutory factors and relevant case law

The court will take into account all relevant statutory factors when deciding which financial order to make. These factors should have been considered when coming to any agreement about financial matters before seeking a court order and before mediation. The factors referred to in the Matrimonial Causes Act 1973 and subsequent cases include:

- financial means
- financial needs
- lifestyle of the parties
- age of the parties
- duration of the marriage or civil partnership
- choices made in the relationship
- disability
- contributions
- conduct.

Financial means

This takes into account both parties’ income, earning capacity, property and other financial resources. These are considered with respect to their current position as well as their situations in the foreseeable future. So if one party is currently unemployed but is looking for employment that will be taken into account. Otherwise, one party might choose to be unemployed and after the divorce revert to a highly paid job. A good example of this is a Premier League football manager.

In 2016 the Family Justice Council published guidance on this, called ‘Sorting out Finance on Divorce’, which:

- focuses on those cases where the available assets do not exceed the parties’ needs
- provides a summary of the law as explained and developed in leading cases
- includes a number of helpful case studies of common scenarios.

The courts have dealt with many cases on this, most famously with the contrasting cases of Miller v Miller (2006) and McFarlane v McFarlane (2006). An appeal on these cases was taken to what is now the Supreme Court. The idea of fairness was discussed, and the following three important points were highlighted:

- the financial needs of the parties
- whether financial disadvantage had been caused by the way the parties arranged things in the marriage, including giving up work to look after children
- the principle of ‘equal sharing’, seen in the case of White v White (2000), which entitles each partner to an equal share of the assets of the partnership, unless there is a good reason to the contrary.
Financial needs
There is a difference between financial needs and financial wants. The parties and the court have to consider the needs, obligations and responsibilities that each party has now and in the foreseeable future. The first consideration is the need for somewhere to live.

These needs focus on providing a home for the children and the person who is going to be the primary carer for the children. Consideration for the other partner to the relationship comes after that, together with consideration of others for whom the couple have assumed responsibility during the marriage or civil partnership. This might include an elderly parent who has been living with the family.

Lifestyle of the parties
This factor involves a consideration of the standard of living before the split. In most cases, it is inevitable that the same standard of living cannot be maintained for both parties after the split. Even with wealthy couples, it is likely that some reduction of standards will follow a separation.

In the divorce cases of certain extremely wealthy people, there have been demands for very high settlements to enable petitioners to maintain their previous lifestyles. In the case of Preston v Preston (1982) it was said that a wife of 23 years of a millionaire could expect a very high standard of living. In the case of Christina Estrada (2006), her demands totalled £238 million; the estimate for the final settlement was £75 million. To avoid publicity, most divorces of very wealthy people never come to court and financial matters are settled in private.

Age of the parties
Age affects a person’s earning capacity, particularly where the person has been caring for children rather than pursuing a career for many years. This is taken into account when deciding on a financial settlement.

Duration of the marriage or civil partnership
The duration of the marriage or civil partnership is an important factor. Normally any period of cohabitation prior to the marriage or civil partnership is ignored. Under exceptional circumstances, an earlier period of cohabitation can be taken into account. This might be the case when considering cohabitation before legislation allowed a civil partnership or same-sex marriage. In the case of Kokosinski v Kokosinski (1980), the husband had a wife in Poland from whom he could not get a divorce. That marriage was finally ended 25 years later during which time he had been cohabiting with the petitioner. Some months after they married, the relationship broke up and the court took their 25 years of cohabiting into account when considering financial arrangements.

Choices made in the relationship
This factor includes choices such as the decision for one spouse to stop working and bring up the children. The court considers financial and non-financial contributions to be of equal weighting.

Disability
Physical or mental disability is an important factor. This can have an effect on foreseeable financial needs and earning capacity as well as reduced life expectancy.

Contributions
Whether or not the couple have children is an important factor, and can affect one party’s contribution to the finances as well as the overall financial state of the parties. Other contributions could include a party self-building a house or helping their partner develop their business while sacrificing their own career.
Aspects of Family Law

UNIT 4

Learning aim C

Conduct

Until the principle of no-fault divorce was brought in in the 1970s, fault had a significant bearing on financial arrangements. Now fault can only be taken into account if it would be unfair – or in legal terms not equitable – not to.

This includes circumstances where there has been ‘gross and obvious misconduct’. This often refers to financial deception, such as:

- hiding funds prior to a divorce
- other financial deception on a large scale.

It does not take into account adultery or unreasonable behaviour; these are seen only as evidence that the marriage has irretrievably broken down.

The following cases show how the law was applied:

- In H v H (1999), the court decided that it was inequitable to disregard the husband’s financial dishonesty during the last three years of cohabitation and thereafter.
- In Kyte v Kyte (1987), the court took into account the wife’s conduct in actively assisting, or at least taking no steps to prevent, the husband’s attempts at suicide together with her wholly deceitful conduct in relation to her association with another man.
- In Evans v Evans (1989), the wife was sentenced to four years’ imprisonment for inciting others to murder the husband. This was taken into account.
- In H v H (1994), the husband’s conduct in brutally assaulting the wife, resulting in his arrest and loss of employment, was taken into account.

Key term

Equitable – fair.

Miller v Miller (2006) and McFarlane v McFarlane (2006)

Mr and Mrs Miller were engaged in July 1999 and they married a year later, on 14 July 2000. They did not live together before their marriage. They separated in April 2003 and the marriage was childless. When they separated, the husband was aged 39 and the wife was 33. At the time of the hearing, Mrs Miller had assets worth £100,000, of which half were in pension funds. She had legal costs outstanding in excess of £250,000. Mr Miller had assets of £17.5 million at the date of the first hearing, compared with £16.7 million when the parties married in July 2000 and £17 million when they separated in April 2003. The husband’s basic salary was £181,000. He received a bonus of £3 million for 2003 and one of £1.2 million for 2004.

In the case of McFarlane v McFarlane, the couple were married for sixteen years and had three children. They were both aged 46 at the time of separation. They had both had successful careers but before the birth of their second child they agreed that the wife should abandon her career and bring up the children. This would allow them to concentrate on the husband’s career. The husband’s career flourished and by the time of the separation his gross annual income was nearly £1 million. However, there was insufficient capital available for a clean break between the parties.

Identify the differences between these cases, considering the following:

- the financial needs of all parties
- the contributions each party has made over the course of the relationship
- any capital or other assets at the time of separation
- the needs of any children.

In each case, examine whether it was possible for the court to make a judgment that was fair to both parties. Give reasons for your answers.

Now consider other cases such as Paul McCartney v Heather Mills-McCartney (2008).

Clean break

Most divorce settlements have three main parts:

- periodical payments
- capital orders
- pension orders.
These can be replaced by a one-off settlement, called a clean break settlement. On divorce the court can make a clean break order. The result of this order is that each person's financial affairs are completely cut off from each other. The court is keen to ensure that, where possible, there is a clean break between the couple.

**Advantages of a clean break**
- The parties will have no financial ties once the order is agreed or ruled upon by a court.
- There are no periodical payments as they are covered by a lump sum.
- There is no danger of a payment being missed or arguments about timing or method of payment.

**Disadvantages of a clean break**
- There are some court costs involved.
- The parties cannot go back to court if there is a change of circumstances such as hard times or remarriage. Remarriage would normally end periodical payments.

**Factors that will make a clean break appropriate or inappropriate**
A clean break settlement is appropriate where there is a short, childless marriage or where the couple's resources are greater than their needs. Where there are children, one party is in poor health or where the parties are older, it may be less appropriate. This is largely a case of dependency of one party on another.

An example of not having a clean break order can be seen in the case of Kathleen Wyatt, ex-wife of Dale Vince. Wyatt won her case to get a 'modest lump sum payment' reputed to be £300,000 from her ex-husband's £100–million fortune. The case was brought more than 30 years after their divorce. At the time of divorce, no clean break order had been made as Mr Vince was a traveller and unable to provide any financial support for his ex-wife and child.

**Prenuptial agreements**
A prenuptial agreement, sometimes called an antenuptial agreement, is a document drawn up before the parties marry and is designed to set out property rights in the event of subsequent divorce.
- A prenuptial agreement can help to keep a divorce and a couple's financial affairs secret.
- A prenuptial agreement is not legally binding. However, in the event of divorce, the courts usually uphold the arrangement that has been outlined, provided the agreement was made freely and after independent advice offered to both parties.
- The law concerning prenuptial settlements is unclear at present. Such agreements have some value where there is little change in the overall situation between the parties at the time of divorce. The birth of a child may well change things, particularly where not envisaged in the prenuptial agreement.
- A prenuptial agreement should be drawn up by a solicitor and is likely to cost upwards of £900.

**Variation of orders and appeals**
The law on these orders and appeals can be found in the Matrimonial Causes Act 1973, s31. This section of the Act allows for some orders to be varied by the court at a later date.

**Variation of orders**
The usual reason for an application to vary a periodical payment order is because of changed circumstances. These orders automatically end in the following situations:
- if the recipient dies
- if the recipient remarries
Aspects of Family Law

UNIT 4

Learning aim C

▸ if the recipient enters into a registered civil partnership
▸ if the recipient cohabits with another partner for more than six months.

Property adjustment orders and lump sum orders cannot be varied.

When there is an application to vary a periodical payments order, the court must consider whether a clean break order is possible. This means, for example, being given a lump sum that is expected to generate £3,000 per annum (every year).

Appeals

Appeals are only allowed if the appeal is started soon after an order was made (usually a few days). Otherwise, court proceedings could be dragged out over a long period of time. This could have serious consequences for the parties, such as for a mother looking after children who is without a source of income or a place to live.

For an appeal to be successful, the party making the appeal must be able to point to a dramatic unforeseen change of their circumstances, which fundamentally changes the basis on which the order was made. This has become known as the Barder test, following the case of Barder v Barder (2007).

Key case

**Barder v Barder (1988)**

**Facts**

In divorce proceedings, an order was made, by consent, that the husband should transfer his interest in the family home to the wife within 28 days. Before the order had been executed, the wife killed the two children and committed suicide.

**Legal principle – appeals and rehearings in divorce cases can only be allowed in exceptional circumstances.**

Orders are generally unchangeable and the Barder test is very difficult to pass, so appeals and rehearings are very rare. Recent cases show that an unforeseen financial windfall, such as an unexpected inheritance, are not generally sufficient for a rehearing.

**PAUSE POINT**

List the advantages of a clean break for a couple who are in divorce proceedings.

**Hint**
Under what circumstances might a clean break be a disadvantage for either party?

**Extend**
Do you think the courts are right to try to ensure a clean break for divorcing couples?

Orders for children

When a child’s parents are no longer together, the welfare of the child is of paramount importance, and the law strives to reflect this. In this section, you will learn about financial orders with respect to children in the event of a breakdown of a relationship.

The best solution is to come to an agreement without the necessity for the court to intervene. Usually the parents propose the most satisfactory arrangement possible under the circumstances. Mediation can often help the couple come to such an arrangement.

**Duty to maintain a child**

If a person has parental responsibility for a child, they have a duty to:

▸ provide a home for the child
▸ protect and maintain the child.
Parents have to ensure that their child is supported financially, whether they have parental responsibility or not.

**Who child maintenance applies to**

A mother automatically has parental responsibility for her child from birth. A father usually has parental responsibility if he is either married to the child’s mother or named on the birth certificate. They both keep parental responsibility if they later divorce.

In the event of a divorce, a periodical payment for a child is paid to the parent who lives with that child, by the parent who does not live in the same home. This is known as **child support**. This periodical payment is made to assist the parent with the costs of raising a child. This payment can also be made to another family member or legal guardian if the child lives with them.

The payment is made to provide financial support and to confirm responsibility for the welfare of the child. These payments also help to minimise the need for other forms of periodic payments.

**Powers of the courts**

The Child Support Act 1991 contains the relevant law. The courts only have limited powers with respect to payment for a child, such as making a lump sum order for a specific purpose.

The best way to settle child support is if the parties agree on payments. This is called a family-based agreement. If this cannot be done, then the parties need to use the Child Maintenance Service. This service can work out payments and help ensure that the recipient receives the payments.

Where payments for a child are not made, the court has power to collect the money by various means. This will include:

- taking money from a paying parent’s earnings or benefits
- taking money from a bank or building society account – either regular payments or a one-off payment
- taking court action over unpaid child maintenance, such as:
  - sending bailiffs to the non-paying parent’s home to take and sell their belongings to get the child maintenance owed
  - sending the non-paying parent to prison
  - collecting money that is owed to the non-paying parent by someone else, such as money owed for work done where the non-payer is self-employed and using this to pay the child maintenance owed or forcing the sale of a house and using the money to pay the child maintenance owed.

There are also methods that can be used to undo attempts to hide assets that could be used to cover the payments.

**Orders for a child of the family**

Apart from financial orders, the court can make the following orders under the Children Act 1989:

- a child arrangements order, which can include:
  - a residence order
  - a contact order
- a specific issue order
- a prohibited steps order.

Each of these orders can be applied for separately or can be combined, depending on what the couple can or cannot agree on. These will be looked at again later in learning aim D of this unit.
### Assessment practice 4.3

Kamala is divorcing David because of his frequent affairs and his regular use of Class A drugs. David works for a film company. He earns £100,000 (plus bonus) with a generous pension scheme. Kamala earns £30,000 as a teacher. They have been married for ten years. The house is in David’s name and has been valued at £550,000. Kamala wants to remain in the house with their two children aged eight and six. They own two cars, each worth £25,000, and many works of art. Kamala has evidence that one year ago they had joint savings worth £80,000. She also thought the mortgage on the house was £100,000. However, David's solicitor has disclosed that David recently extended the mortgage by an extra £150,000 and that the savings have disappeared. The mortgage has not been paid for three months. David will not say where the money has gone or why the mortgage is not being paid.

You are helping Kamala's solicitor to compile information on this case. Create a file note that lists the statutory factors that the court can take into account and note which details in this case are relevant for each factor. Which financial orders do you think would be most advantageous for Kamala and why? Who is responsible for the children and who will pay for their maintenance? Finally, evaluate the law with regard to this case: do you think Kamala can get a fair deal?

To complete this task, you need to understand the legal rules governing the distribution of money and property on divorce.

<table>
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<tr>
<th>Plan</th>
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<tbody>
<tr>
<td>What is the task? What information am I being asked to compile?</td>
</tr>
<tr>
<td>Do I have sufficient knowledge on statutory factors and court orders to complete the task? Do I need to undertake any further research?</td>
</tr>
<tr>
<td>How can I structure the information clearly and logically?</td>
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<th>Do</th>
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<tbody>
<tr>
<td>I need to spend sufficient time looking at the details of the case.</td>
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<tr>
<td>I need to identify the relevant statutory factors, and financial and children orders.</td>
</tr>
<tr>
<td>I need to identify any areas that require more information or analysis.</td>
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<tr>
<th>Review</th>
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<tbody>
<tr>
<td>I can explain the stages I went through to compile the information required.</td>
</tr>
<tr>
<td>I can explain what a court needs to take into account when making decisions on how property and assets should be divided.</td>
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### Examine how the courts resolve disputes over children

Those looking after children, whether they are parents or have parental rights with respect to a child, do not always agree on what is in the best interests of a child. When a dispute is brought to court, the interests of the child are of paramount importance. The law is concerned with safeguarding and promoting the child's welfare.

### Parenthood and parental responsibility

#### Difference between being a parent and having parental responsibility

Being a parent means that there are certain legal duties such as a duty to maintain the child. Most parents also have parental responsibility for their children. However, as detailed in the Children Act 1989, parental responsibility may belong to someone other than the biological parents, including:

- a local authority with children in its care
- a child's legal guardian
- a child's step-parent
- others who may be able to acquire parental responsibility.

If a family dispute involves children, it is their interests which are of paramount importance.
Definition of parenthood

There are many different meanings of the word ‘parent’. The most obvious one is a biological parent of the child, sometimes called a natural parent. In most cases the biological parents are those with parental responsibility, but there are also many children whose ‘parents’ are not their biological parents. Examples of this include:

- where the child has been legally adopted
- where the child was conceived through egg or sperm donation
- where the child lives with adults acting as ‘parents’ who have informally taken on responsibility for the child.

Laws on surrogacy and assisted reproduction

Surrogacy is when a woman carries a baby for a couple who are unable to conceive or carry a child themselves. There are two different types of surrogacy:

- Straight surrogacy – the surrogate mother uses an insemination kit using the intended father's sperm. In this case, the surrogate mother is genetically related to the conceived child.
- Host surrogacy – when IVF is used, either with the eggs of the intended mother, or with donor eggs. The surrogate mother therefore does not use her own eggs, and is genetically unrelated to the baby. This has potential legal consequences for parental rights because, in law, the woman who gives birth is always treated as the mother.

Surrogacy is permitted under the Surrogacy Arrangements Act 1985. Surrogacy arrangements are not legally enforceable. It is illegal to make a surrogacy arrangement on a commercial basis or to advertise that a surrogate is available. Only the expenses of the surrogate can be paid.

The Human Fertilisation and Embryology Acts 1990 and 2008 regulate other aspects of who is the parent and who can acquire parental rights. This extends to married couples, civil partners and others.

The legal mother in surrogacy

The legal mother of a child born through surrogacy is always, at birth, the surrogate mother. This means that the intended mother is not recognised as a parent, even if she is her child’s biological mother.

The surrogate mother has the legal right to keep the child, even if it is not genetically related to her. The surrogate will be the legal mother of the child until parenthood is transferred to the intended mother through a parental order or adoption after the birth of the child.

The legal father in surrogacy

If the surrogate mother is married, the legal father at birth is usually the surrogate’s husband. This is irrespective of the biological relationships. This means that the intended father has no automatic claim to legal parenthood. However, the surrogate’s husband may be able to show that he did not consent to the surrogacy arrangement. This also applies to a surrogate’s wife when they are married or in a civil partnership. Her same-sex partner will be the child’s second parent. This excludes both intended parents.

If the surrogate mother is not married or in a civil partnership at the time she conceives, the intended father may be treated as the legal father at birth.

The birth certificate of a child born to a surrogate mother

Where the birth is registered in the UK, only those who qualify as legal parents can be named on the birth certificate. The surrogate mother is responsible for registering the birth, and she is recorded as the child’s mother. If she is married, her husband is recorded on the birth certificate as the father. If the surrogate mother is in a civil partnership, her same-sex partner is recorded as the second parent.

If the surrogate mother is single, the intended father (or whoever else is the second parent) can be named on the birth certificate, although he must attend the birth registration in person together with the surrogate mother.

The laws on assisted reproduction

Assisted reproduction is where medical help is taken to enable a couple to have a baby but does not involve another woman carrying and giving birth to a baby for the couple who want to have a child.

The laws on assisted reproduction are quite complex, but can be summarised as follows:

- Heterosexual couples conceiving with donor eggs only – in this situation, the woman who carries and gives birth to the child is the legal mother and the mother’s husband or partner whose sperm is used with the donor egg is the legal father.
- Heterosexual couples conceiving with both donor eggs and sperm – as before, the woman who carries and gives birth to the child is the legal mother. The mother’s husband is the legal father. If the mother is unmarried, the mother’s partner is the legal father only if:
  - the fertility treatment takes place at a licensed UK clinic
  - the man in question is alive at the time of the treatment
  - written signed notices are given to the clinic by the mother and father stating that they both wish for the man to be treated as the father.
- Heterosexual, lesbian or gay couples using a surrogate mother – the surrogate mother is the legal mother. If the surrogate is married, her husband is the legal father. If the
surrogate is not married, the male whose sperm is used (usually the intended father) is the legal father. The intended parents need to apply for a parental order within six months of the child’s birth to be registered as the legal mother and father.

**Definition of parental responsibility**

According to the Children Act 1989 Section 3, parental responsibility means ‘all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property’.

**Key elements of parental responsibility**

**Duty to maintain a child**

As mentioned earlier in this unit, someone who has parental responsibility has a duty to maintain their child. They must:

▸ provide a home for the child
▸ protect and maintain the child.

**Decisions relating to the child**

In practical terms, parental responsibility also means making important decisions in relation to a child such as:

▸ the religion (if any) with which the child should be brought up
▸ matters with respect to the child’s education, such as where the child goes to school
▸ choosing, registering or changing the child’s name
▸ appointing a child’s guardian in the event of the death of a parent (one of the most important reasons why parents should make wills)
▸ giving consent to a child’s vaccination, dental treatment or surgical operation
▸ giving consent to taking the child abroad for holidays or extended stays
▸ representing the child in legal proceedings.

**Rights that are not included**

It is important to remember that parental responsibility does not mean that a parent has the automatic right to:

▸ have contact with their child – a parent can apply to the court for a contact order as part of a child arrangements order
▸ know the whereabouts of other people with parental responsibility or where the child is living. In practice, this means that if the child lives with one parent the other parent does not have an automatic right to know the address of that parent. The parent can apply to the court for this to be disclosed, and it may be disclosed if it is in the best interests of the child.

<table>
<thead>
<tr>
<th>PAUSE POINT</th>
<th>Explain what parental responsibility means and identify its key elements. What does it not include?</th>
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<tbody>
<tr>
<td><strong>Hint</strong></td>
<td>List the typical decisions that a parent needs to make with regard to their child.</td>
</tr>
<tr>
<td><strong>Extend</strong></td>
<td>Is the principle of parental responsibility useful?</td>
</tr>
</tbody>
</table>

**Automatic parental responsibility**

Automatic parental responsibility is held by:

▸ the mother (the person who gives birth to the child)
▸ the father, if he is married to the child’s mother and/or listed on the birth certificate.
  • If the parents of a child are married when the child is born, or if they have jointly adopted a child, both have parental responsibility. They both keep parental responsibility if they later divorce.
Losing parental responsibility and its effects
Parental responsibility terminates:

▷ when a young person reaches the age of 18
▷ when a holder of a parental responsibility order dies
▷ when a child or young person is adopted (this applies to both parents but is the only way a mother can lose parental responsibility)
▷ when parental responsibility had been obtained by a residence order or a child arrangements order and that order has been discharged or has expired
▷ through a court order – when parental responsibility has been granted to a female (same-sex) partner or step-parent through a parental responsibility agreement or a parental responsibility order, it can only be ended through a court order. Unmarried fathers can apply to the court for a parental responsibility order or agreement to be ended.

The effects of losing parental responsibility
Without parental responsibility you cannot make the decisions about a child’s life, such as choice of school, religion, surname or guardian on your death. In other words, all the rights and responsibilities set out above end.

Discussion
At what age should parental responsibility end? Is it right that it should end on the child turning 18 years old or should a range of factors determine when parental responsibility ends? In small groups, list what these factors could be. Then share your findings.

Children’s rights
Definition of rights
A right is an entitlement and a duty is an obligation. Any right must have a corresponding duty. Some rights are recognised at the international level through agreements between governments. The UK has signed up to the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC), both of which set out a number of children’s rights.

The UNCRC defines a child as anyone under 18 years old. There has been much legislation to ensure that the rights of children are protected, including the Children Act 1989 and the Children Act 2004.

Some may view the restrictions on what a child may do as being restrictive and against a basic right of freedom, but the law in these cases is there to protect the child. For example, a child is protected by the law with respect to their freedom to work. The youngest age a child can work part-time is 13 years old, except children involved in areas such as television, concerts or modelling, when they can work if they have a performance licence. The person in charge of running the event must apply to the child’s local council
for a child performance licence. However, the question remains as to whether working under 13 years old ever benefits a child, given the well-documented problems some child performers have had in later life.

### Development of children's rights in the law

#### The right to protection

The right to protection has been developed over many years. In Victorian times, much of this related to child labour and the workhouse. Over the years, a great deal of legislation has been passed with varying degrees of success in protecting children.

The Children Act 1989 sought to address the failings. Subsequent legislation such as the Children Act 2004 widened the scope of safeguarding and protection. Further guidelines on safeguarding were published by the government in 2015.

The Children Act 1989 made it the general duty of every local authority to safeguard and promote the welfare of children in need within their area. In addition, local authorities are now required to promote the upbringing of children in their families. In order to do this, they must provide a range of appropriate services. Problems can arise when deciding who is a child ‘in need’ and what services are available.

#### The right to autonomy

Autonomy is the right to make your own decisions. As a child gets older, they have more independence and autonomy but protection is still needed. Teenagers usually have a great deal of autonomy but still need protecting. People often have different opinions on how far protection should extend and whether this infringes a child’s autonomy.

The case of Gillick v West Norfolk and Wisbech Area Health Authority (1986) illustrates how the court upheld the right of doctors to give contraceptives to teenagers under 16 years old, under certain conditions, thereby allowing them a degree of autonomy.

### Key case

**Gillick v West Norfolk and Wisbech Area Health Authority (1986)**

**Facts**

Mrs Gillick had five daughters under the age of 16. She challenged advice given to doctors in her local health authority allowing them to give contraceptive advice to girls under 16, and the right of doctors to act upon that advice. She objected that the advice infringed her rights as a parent, and would lead to what would be an unlawful assault on her daughters. She claimed it would be unlawful for a doctor to prescribe contraceptives to girls under 16 without the knowledge or consent of the parent.

The court stated that the law recognises that there is a right and duty of parents to determine whether or not to seek medical advice in respect of their child and, having received advice, to give or withhold consent to medical treatment. Nevertheless, the health authority’s policy was capable of being lawful. A doctor could give such advice to a girl under 16 where she would understand it, where she could not be persuaded to involve her parents, she was likely to have sex irrespective of advice, her health was at risk, and it was in her best interests. A parent’s rights of control over a child diminished as that child’s understanding grew approaching adulthood.

**Legal principle** - the ‘Gillick competence test’ can be used to determine a child’s competence in making decisions contrary to their parent’s wishes.
In the case of Axon v Secretary of State for Health (2006), a mother sought to challenge guidelines that would allow doctors to protect the confidentiality of girls under 16 who came to them for assistance, even if the sexual activities they might engage in would be unlawful. The challenge was unsuccessful and the guidelines remained in place.

**The right to be heard**

Every child’s right to express their views and have them taken seriously is enshrined in Article 12 of the UN Convention on the Rights of the Child. However, most children are not included in discussions about issues that affect them. In the case of D (a child) (2016), the court established that the decision of whether a child should be involved in a court case was one for the courts, not the parents. In some cases, welfare implications might necessitate the child being excluded from the proceedings.

There are many ways to involve a child affected by court proceedings, and to ensure that their opinion is heard:
- full-scale legal representation of the child
- a report of an independent CAFCASS officer or other professional
- a face-to-face interview with the judge
- an invitation to the child to write a letter to the judge, setting out their views.

This is equally applicable in other matters where a child’s views might be relevant. As the child gets older, their wishes and autonomy are more relevant.

**Disputes over children**

As you have seen, the Children Act 1989 deals with most aspects of decision-making with respect to children. There are a number of relevant orders relating to non-financial matters. These need to be explored along with the factors the court will take into account in making an order. Finally, you need to consider who can apply for an order.

**Orders that can be made to resolve disputes over children**

There are four main orders to consider in resolving disputes over children:
- A residence order – this specifies which person the child normally lives with, as well as how much time the child spends with each parent and when.
- A contact order – this specifies whether any contact should take place, and if so, what type of contact and when.
- A specific issue order – this specifies questions relating to how the child should be brought up.
- A prohibited steps order – this prevents one parent from making decisions about a child’s upbringing.

A child arrangements order decides the usual arrangements for a child of the family. A residence order and a contact order often form part of a child arrangements order.

**Residence order**

A residence order decides which parent a child should live with. Each parent may wish to provide a home for the children of the family, but may not be able to agree about the detailed arrangements. In some cases, other relatives or foster parents may also be involved in the arrangements. The idea of a residence order is misleading as the order relates to the person or persons with whom the child will live rather than the place. A condition that a parent should live at a certain address has been seen by the courts to be an unjustified interference, as the parent has the right to choose where they live. This means that a named person can take the child abroad for a period of up to one month without seeking the agreement of the court or anyone else.

A residence order names the person or people with whom the child is to live. This could be:
- one person, for example, the child’s mother
- two people who live in the same household together, such as the child’s parent and step-parent
- two people who live in different households (usually both parents). In this case, the order will set out how long the child will live in each household. This will be clearly defined so as to make settled arrangements for the child that will not confuse the child. A court can order shared residence under a child arrangements order to say that the child shall spend a period of time with one parent and a period of time with the other.

**Contact order**

An order regulating contact arrangements can form part of a child arrangements order. This is important when the couple cannot agree on when and how often contact with a child of the family should take place. It is also essential when one party refuses unreasonably to allow the other party to have contact with the child. The order normally continues until the child is 16 years old.

The court may order different types of contact arrangements:
- Direct and indirect contact arrangements
  - Direct contact arrangements involve the child having contact with a named person by staying with or visiting them.
  - Indirect contact is where the contact takes place indirectly. This could include email, Skype or similar software, instant message or phone. Indirect contact arrangements are ordered by the court if it is impractical or not appropriate for the child to see the person directly. This might be because of a risk to the child’s well-being that cannot be managed.
- Overnight and visiting contact arrangements
  - Direct contact arrangements can involve the child visiting the person named for a fixed number of hours or staying overnight. This is particularly relevant when the child is a baby or very young. Often this means shorter but more frequent periods of contact.
• For older children, as they become more able to care for themselves, overnight contact arrangements are often ordered. Sometimes contact arrangements are gradually extended to longer periods of time as the relationship rebuilds.

■ Supervised and unsupervised contact arrangements
  • In the majority of cases, the contact is unsupervised. However, if the court considers that there is a risk to the child’s welfare, it can order contact arrangements to be supervised by a third party. This is to ensure the safety and well-being of the child.

Specific issue order
A specific issue order is used to determine a specific question about how the child is being brought up, such as the school the child should go to or the church the child should attend. It can be used for medical issues such as immunisation or with respect to a specific operation.

Prohibited steps order
A prohibited steps order can be made to stop the other parent from making a decision about the child’s upbringing. For example, the order can prevent the other parent from taking the child out of the country or changing the child’s surname. It can also stop the child associating with certain people.

Is the range of orders to resolve disputes concerning children useful?

<table>
<thead>
<tr>
<th>Hint</th>
<th>Identify any area you think should not be regulated through the courts.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extend</td>
<td>How else could disputes be resolved effectively?</td>
</tr>
</tbody>
</table>

Factors the court takes into account in making an order
The Children Act 1989, s1 states that the child’s welfare is of paramount consideration. This applies to all proceedings where the child’s welfare is directly affected. Various different principles are set out in the Act.

Welfare principle
The principle of the child’s welfare is central to all types of order with respect to a child. Welfare is not measured by money or physical comfort. It is a much wider concept encompassing all aspects of a person’s well-being. It is ‘a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable’, as the court stated in the case of Re C (Internal Relocation) (2015). This case decided that a ten-year-old child should be allowed to move to Cumbria with her mother from London for her well-being, despite objections from the father.

No delay principle
A second very important principle set out in the Children Act 1989, s1(2) is that delay is presumed to be harmful for a child. This is evident in the strict time limits there are for applications to the court and the ability of the court to make emergency orders. The law says that there must not be any unnecessary delay in a case that concerns a child. Therefore, the court will decide a timetable for a case at the directions hearing (a court hearing where the judge sets out the case management plan) and can make a temporary order.

Presumption of continued parental involvement
The courts presume that both parents wish to continue to be involved with the upbringing of their child. This presumption can be overturned and access to the child can be legally prevented by a court order, if it can be shown that the parent (or parents) will affect the welfare of the child because of:

■ criminal activity
■ domestic abuse
■ drug/alcohol misuse
■ any other inappropriate behaviour that puts the child at risk.
**Welfare checklist**

The welfare checklist under the Children Act 1989 has seven criteria for the courts to consider when making a decision concerning a child, as follows:

1. The wishes and feelings of the child concerned – consideration is given to the age and level of understanding of the child in this criterion.
2. The child’s physical, emotional and educational needs – in most cases this means that the child should stay with its natural parents even if all parties involved could provide equal care.
3. The likely effect on the child if circumstances would be changed as a result of the court’s decision – in other words, the court will usually make an order that has the least impact or effect on a child’s life.
4. The child’s age, sex, background and any other characteristics that will be relevant to the court’s decision – this may include religion, cultural background and lifestyle.
5. Any harm the child has suffered or may be at risk of suffering.
6. The capability of the child’s parents (or of any other person the courts find relevant) at meeting the child’s needs – this again may include lifestyle.
7. The powers available to the court in the given proceedings.

**No order principle**

The no order principle set out in the Children Act 1989, s1(5) states that the court should not make any order with respect to a child if it would be better for the child if there was no order at all. It could be more accurately described as the no ‘unnecessary’ order principle.

**Scenario**

**Mistrust and the use of court orders**

A husband and wife are in the process of getting divorced. Both are well-paid professionals but are functioning alcoholics. They cannot agree on anything. Each is suspicious of the other’s conduct with respect to the children as each fears the other will remove the children from the country and make access to them impossible. During the summer holidays, the mother wants to take the children to Ireland so that they can attend a summer school and visit her family during their free time. The couple finally agrees to this happening on specific dates at a chosen residential summer school, which the husband will pay for. On the second day at the school, the children are collected by the mother to ‘go and see their grandparents’ with a promise that they will be returned at 7 p.m. that evening. The children are not brought back to the school.

1. Identify and explain the types of court orders that resolve disputes over children. Which apply particularly to this case, and why?
2. What decisions do you think a court would make with regard to the children’s welfare?
3. Do you think the arrangements will be weighted in favour of the mother or father, or neither?
4. Where possible, illustrate your arguments using statutory provisions or examples of relevant case law.

**Key term**

**Discharge** – termination of an order.

**Who can apply for an order to resolve a dispute over a child**

Table 4.4 sets out who can usually apply to the court for an order with respect to a child, or for the variation or discharge of such an order.

<table>
<thead>
<tr>
<th>Type of Order</th>
<th>Who Can Apply</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child (with permission from the court)</td>
<td>✓</td>
</tr>
<tr>
<td>Mother</td>
<td>✓</td>
</tr>
<tr>
<td>Father</td>
<td>✓</td>
</tr>
<tr>
<td>Step-parent</td>
<td>✓</td>
</tr>
<tr>
<td>Guardian</td>
<td>✓</td>
</tr>
<tr>
<td>A person with a residence order for the child</td>
<td>✓</td>
</tr>
</tbody>
</table>

Table 4.4: Types of orders for resolving a dispute over a child and who can apply for them.
## Table 4.4: Continued

<table>
<thead>
<tr>
<th>Who can apply</th>
<th>Child (with permission from the court)</th>
<th>Mother</th>
<th>Father</th>
<th>Step-parent</th>
<th>Guardian</th>
<th>A person with a residence order for the child</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibited steps order</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Financial order</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Parental responsibility order</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Special guardianship order</td>
<td>✓</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>

### Assessment practice 4.4

Rob and his wife Sally are in the middle of divorce proceedings. Rob is a police officer and Sally is a nurse. They have a son named Josh who is aged ten. Rob and Sally both wish to continue playing a part in Josh’s life and to make joint decisions about his education and future. However, they are finding it difficult to come to a satisfactory arrangement about contact and residence, as they both have jobs that involve shift work, including at weekends. Rob’s parents have offered to pay for Josh to go to boarding school, and Rob thinks this could be the perfect solution. However, Sally is opposed to this idea. Josh wants to stay in the family home with his mum and go to the local secondary school with his friends. Rob’s parents are concerned that if this happens they will not be allowed to visit Josh and their relationship with him will deteriorate.

You are working for a law firm and have been asked to assess this case in a report. You need to outline the orders that a court might make with respect to Josh, and the reasons why. You should also evaluate the impact of any orders on Josh and other members of his family. In order to complete this task, you need to show that you understand the law regarding disputes over children, the factors that a court takes into account when reaching its decision and who can apply for what kind of court orders. How would your report vary if Rob and Sally were an unmarried couple who were splitting up?

### Plan
- What is the task? Have I understood what information my report must contain?
- Do I need another look at any aspects of the law about disputes over children?

### Do
- I need to decide how to structure a case report.
- I need to identify the orders that a court can make to resolve disputes about children and the factors that it takes into account.
- I need to apply the law to a given case and evaluate its impact on relevant parties involved.

### Review
- I can explain what the task was and the skills I used.
- I can explain what I have learned and why it is important.

### Further reading and resources

- Information on polygamy.
  www.parliament.uk/briefing-papers/sn05051.pdf
- Information from Citizens Advice on the ending of relationships.
  https://www.citizensadvice.org.uk/family/relationship-problems/
- Guidance from the Family Justice Council on financial needs on divorce.
- Guide on safeguarding published by the government.
I consider mediation to be beneficial in family law as it enables a couple to reach an agreement that a judge may not otherwise be able to make. It is a flexible process, quicker than going through the court, cheaper, and the parties are more inclined to be happier and abide by the outcome than they would if they had an order forced on them.

I am an advanced accredited specialist in international and private child law. Many of my cases have an international element. I have acted in several high-profile cases, and, as I am often contacted for comment, I have developed skills to deal with the media, sometimes at short notice. One particularly memorable case I dealt with involved the abduction of a two-year-old child who, as a result of orders against the father, was eventually delivered by a friend of the abductor to platform 12 at Waterloo station. The mother was standing with me to collect her child. As soon as the little boy saw his mother, he ran like the wind into her arms. The joy on their faces was immeasurable.

I am recognised as a leading international children’s lawyer, particularly in relocation disputes. I have written a number of articles on the recent developments in family law for the legal profession. I am also a regular lecturer on international aspects of family law both in this country and internationally. I have trained family lawyers and the judiciary in Serbia in the mechanics of the Hague Convention and international aspects of family law.

As a litigator it is essential to have skills to analyse problems, and decide on a course of action, sometimes in an emergency. Quite often there is little time to engage in detailed research before attending court to issue an application and secure court orders, especially where there are issues of child abduction, domestic violence or removing assets overseas.

All lawyers need to maintain a professional distance from their clients to enable them to give advice without risk of bias or being influenced by their situation. I empathise with my clients but never allow myself to become close to them. All solicitors must be organised, confident, have a good memory for facts and keep up to date with the law. As Officers of the Court, integrity is paramount.

In addition to qualification, all solicitors in this country are now required to sign an annual declaration confirming they are committed to their own professional legal development. They are required to analyse their cases and establish what they have learned and whether a better outcome could have been achieved.

Finally, it is good to have a sense of humour as the job can, at times, be dry, so it is good to be able to smile.