familyfirst

FAMILY LEGAL ADVICE MAGAZINE

EDITION 6 | 2023

Local Family Law Team Achieves Top Tier

"A powerful team of hardworking dedicated lawyers who will do the mileage to provide excellence to their clients"

The Legal 500 - the world's leading legal directory

Sills & Betteridge named *'FINALISTS'* in the Lexis Nexis Family Law Awards [Midlands & Wales].

Should I get a Solicitor to handle my divorce?
Page 4

Businesses on divorce
Page 7

Sills & Betteridge

SOLICITORS

What our clients say about us...

The service I received was supportive, considerate and I was treated with the up most respect and dignity. Family court hearings are a very hard process to have to deal with but you supported me every step of the way, explaining everything in such an understanding manner. I was kept up to date, you responded in a very timely manner listened through out to all my queries and supported me with any worries I had. I am thankful for everything and the outcome was the best I could have asked for.

I highly recommend Sills & Betteridge - the whole team have been very helpful, friendly and professional in dealing with my very lengthy court case. The representation I received was 10/10 she explained everything to me step by step and answered any question I had. It was great working with Sills & Betteridge and if you are in need of help as I was I would highly recommend you contact them. Thank you Sills & Betteridge for the fantastic support you gave me and my family during this time.

Amazing service, friendly and helpful. Keep you up to date with everything and make sure you are heard. Explain everything to you in the best possible way so you are not left confused about anything.

Highly recommended, they handled the case professionally with prompt communication and turned a very stressful case with ease and better outcome. Thank you and your team for your service.

Having recently used Sills & Betteridge family law department, I can confidently say that the service was excellent. Queries were resolved quickly and to satisfaction. I felt reassured throughout the proceedings and the outcome was as anticipated. If you do have family legal concerns, they are extremely thorough and work hard for you towards resolution.

You helped make a difficult and emotional time much more bearable. I had confidence that you had my best interests at heart and that I could rely on you - which is SO important in a divorce. No matter what happens, having that calm and rational person to turn to kept me both sane and focused on getting the best result for me and my children.

Thank you for all your help, advice and outstanding work. Very friendly and efficient, would definitely recommend.

Excellent service, very professional and quick to respond, highly recommended.

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TRUSTist

Our clients rate us 4.8 out of 5

(correct at time going to print)

Introduction

Welcome to our latest edition of Family First. As always I hope you will find this informative and interesting.

We remain one of the largest family law practices in Lincolnshire, Yorkshire and the East Midlands with 130 team members. At the senior end we have a highly experienced group of partners, all of whom are experts in their particular field of family law. We consistently invest at the junior end, bringing on trainees, paralegals and solicitors into the family department, to train and develop the stars of the future.

From our original base in Lincoln the firm has grown steadily over the past 15 years and now has 16 offices. We have offices in Lincoln, Boston, Sleaford, Skegness,Spilsby, Scunthorpe, Gainsborough, Grimsby, Doncaster, Bawtry, Wath-upon-Dearne, Nottingham, Northampton and Sheffield. Our network has enlarged over the last year with new offices in Howden and Thorne. We have also been through a period of expanding into larger offices in Nottingham and Grimsby.

I am delighted to share that this year, we have achieved Top Tier status in the highly regarded **Legal 500**, following an independent assessment of law firms based on feedback from clients and peers. We have also been shortlisted for **Children Law Team of the Year, Financial Remedies Team of the Year** and **Family Law Firm of the Year** [Midlands & Wales] in the Lexis Nexis Family Law Awards.

As a large family law practice our resources enable us to maintain multiple sub-groups dedicated to different branches of family law – matrimonial, finance, private children, domestic abuse and care with specialist partners at the head of each group. In practice this powerful combination of breadth and depth enables us to serve all corners of the community from wealthy individuals going through marital separation to cases involving children in care. Added to this we have several niche areas of expertise at the practice such as a strong understanding of agricultural and farming industries and a long association with the armed forces.

We also offer Mediation. The government remain committed to mediation and The Ministry of Justice are offering mediation vouchers whereby they will contribute up to £500 per family to the mediation costs of a child arrangements case to encourage people to resolve their disputes outside of the court process.

I hope that you find the articles interesting and as always I am grateful to receive your feedback.

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Contents

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Should I get a solicitor to deal with my divorce?

"Getting a good solicitor will therefore usually save you money by ensuring that claims are properly dealt with and by maximising what you get as your divorce settlement"

With the added ease of now being able to obtain a No-Fault Divorce online, you may be wondering whether it is necessary to instruct a solicitor. You are bound to be concerned about how much your divorce will cost. Doing a divorce 'on the cheap' however, could cost you more in the long run. Mistakes can be made which are then costly to rectify. When dealing with the divorce it is also necessary to obtain a Court Order dealing with financial matters. Time and time again we have seen couples who deal with the divorce proceedings themselves either because they wish to save costs or because they are amicable and do not then properly deal with the financial aspects of the divorce believing that the Final Order in the divorce finalises all financial claims. This is not the case. We are aware of cases where former spouses have come back many years later to successfully bring a claim.

Spouses and former spouses have rights to make financial claims against each other by applying to the Court for orders for all, or any of the following: -

- Maintenance payments.
- Adjustment of property ownership.
- Lump sum payments.
- Pension Splitting or Attachment Orders

These rights remain open unless a separate financial court order is obtained and unless the 'remarriage trap' applies. The re-marriage trap is when someone obtains a divorce and then remarries. In this situation unless that person has already applied for orders from their spouse in their first marriage before they remarry, then they are caught in the 'remarriage trap'. The effect of this is that they may lose the right to make financial claims against their former spouse.

If you do not obtain an order dealing with financial provision, in the event that the remarriage trap does not apply, then the claims which either of you may have against each other are simply left open. This situation is usually considered to be unsatisfactory in that it creates a degree of uncertainty because it leaves open the possibility of one spouse making a claim against the other at any time. On the other hand, where one spouse's financial position is likely to improve substantially it may be in the other spouse's interest to delay reaching a final financial settlement.

Getting a good solicitor will therefore usually save you money by ensuring that claims are properly dealt with and by maximising what you get as your divorce settlement. By instructing a solicitor you will usually save a lot of time and money in the long run by avoiding the need to revisit issues that have been missed through lack of expertise. If you want to make a financial claim, this can be done at the same time as your divorce. It is advisable to at least consider finalising any financial claims that spouses have against each other at the time of the divorce rather than wait until later. The longer parties wait to pursue claims the more risk there is that complications will arise. This can happen, for example, when either spouse buys assets or receives an inheritance that they did not have during the marriage or when property values rise/fall. Even if a spouse wins the lottery after the divorce this can impact on the financial distribution.

Hopefully you will be able to come to an agreement about your financial matters; if that is the case, then you will not need to make an application for the Court to resolve matters. The solicitor will, however, need to turn the agreement into a draft financial Consent Order which is sent to the Court to confirm the terms of the settlement. A Judge will decide if the terms are fair and the Judge has discretion to accept or reject the terms of the settlement.

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Steps to consider upon separation

1. Take legal advice before you agree anything. You may be tempted to agree a settlement to keep costs down and to avoid arguments. Often clients are worried about seeing a solicitor because the other party has said that they do not need one or are scared that a lawyer is going to make things worse. Going to see a solicitor, however, does not necessarily mean going to Court. Most cases do settle outside of Court. It is absolutely possible to continue to negotiate with your partner, with your lawyer in the background giving you advice; or for both of you to attend with a mediator to try and resolve matters.

2. Protect your position at the start. It is vital to take the right steps to protect yourself at the start. If you believe that your spouse is hiding assets or disposing of them to stop you getting a fair share, then you may need to take urgent action. This is important not just in relation to property but also for other assets such as businesses, savings, pensions, investments, trusts, contents, etc.

3. Protect yourself online. Couples often share passwords and documents electronically with each other. I recommend the following: -

- That you change all your passwords immediately.
- That you set up a new, secure email address.
- That you sever any iCloud accounts or cloud-based software if it is connected to any devices held by your spouse. It is sometimes easy to forget that any documents you save on your laptop might be uploading to your spouse's devices.
- Carry out a thorough check of your online activity and any Alexa device (or similar) to ensure that your spouse has no access.
- Delete your privacy settings on any Apps that are shared which confirm your location.

4. If you are a property owner, notify the Land Registry of any change of address on Form COG1, (publishing.service.gov.uk) to ensure that you receive details of any important notices that may impact on the property. Only disclose your address and other details on the form if you are content for your former partner to have this information.

5. You may be eligible for additional financial support from the government. To find out what benefits you qualify for, access the website www.gov.uk.

6. Notify your Local Authority as you may be entitled to a reduction in Council Tax. If applicable, you should also immediately inform the Tax Credit Office and Job Centre Plus to ensure no over or underpayments are made in relation to any benefit claims.

7. Contact your utility supplier company if you are leaving the property and request that the meters are read. Upon settlement, it may be appropriate for your name to be removed from the accounts.

8. Protect your liability in relation to joint accounts and credit cards. Your liability in respect of joint accounts is joint and several. You may need to consider freezing the account or make the account joint signatory. Similarly, you will be jointly and severally liable for any expenditure incurred by the joint holder on any joint credit cards. If you fail to protect your position on a joint account or credit card you may suffer financial loss and in the future, this may also impact on your credit rating.

9. If you have a joint offset mortgage contact the mortgage company to see if they are willing to prohibit withdrawals from the account over a certain limit without your agreement.

10. Consider whether you are entitled to child maintenance. This is generally payable by the parent who does not claim Child Benefit, i.e. it can be claimed by the parent with whom the child lives. This is separate to spousal maintenance. If you can agree this, you can enter a family-based agreement. If no agreement can be reached, then a referral will need to be made to the Child Maintenance Service (CMS). As a starting point, consider the Child Maintenance Options website - www.cmoptions.org

11. Make a New Will. If you die prior to the granting of Decree Absolute without a Will, or without updating your existing Will, your spouse, notwithstanding the breakdown of your relationship, may be the main beneficiary of your estate.

12. There may be Capital Gains Tax or Stamp Duty implications on transfer of assets. We recommend you seek independent financial advice from a tax expert prior to transferring any assets, or indeed, separating.

13. Do not put yourself on the back foot. Steps you take in these early stages may impact on your future. It is sensible to take advice.

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Nuptial Agreements

"Post-nuptial agreements are actually regarded as having more legal standing and it is recommended that any pre-nuptial agreement is converted into a post-nuptial agreement"

Pre-Nuptial Agreement

A pre-nuptial agreement is a general contract between a prospective bride and groom which sets out the way they will hold assets, etc. Nuptial agreements provide couples with an opportunity to set out how they think it would be fair to divide their marital assets and non-marital assets in the context of a future divorce or dissolution.

Since the decision in Radmacher v Granatino [2010] the Courts have been more open to holding couples to the terms of any agreement made. Whilst a pre-nuptial agreement is not binding on the Court it is likely to be a highly persuasive document, particularly if both have taken independent legal advice, exchanged full and frank financial disclosure and there are no major changes in circumstances that were not accounted for within the document, i.e. a child/severe illness.

The overriding objective for the Court when considering the weight to attach to a nuptial agreement is fairness. The challenge for the Court is how to balance the implicit fairness of upholding an agreement that a party entered into freely with a full understanding of the consequences, with achieving fairness in all the circumstances of the case.

Increasingly the Courts will wish to ensure that any agreement meets the needs of the children and the financially weaker spouse or civil partner. If contemplating a pre-nuptial agreement think about the following: -

- Plan ahead. The agreement should be signed at least 3 weeks before the ceremony. We recommend taking advice at least 6 months before, if possible.
- Ensure that the other party obtains independent legal advice. The purpose of the agreement will be to alter the rights that you would otherwise expect on marriage.
- Provide each other with full and frank financial disclosure. At the very least, a summary of your financial position, including any prospected inheritances, should be recorded.
- Ensure there is no evidence of undue pressure before entering into the agreement. It is important that any agreement is entered into freely.
- Consider needs in the future. The Court may consider any agreement unfair if it purports to leave one spouse in a predicament of real need while the other enjoys sufficiency or more. The 'needs of the parties' are of paramount importance in determining whether the Court will uphold a pre-nuptial agreement.

Post-Nuptial Agreements

Post-nuptial agreements are actually regarded as having more legal standing and it is recommended that any pre-nuptial agreement is converted into a post-nuptial agreement in order to strengthen its validity.

The Court will always retain its ability to exercise its discretion and choose to ignore any agreement or only implement it in part. They are, however, likely to be highly persuasive, if not binding. The circumstances that the Court are unlikely to follow an agreement are where there is a significant change of circumstances which has not been contemplated within the agreement and where needs have not been met.

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Businesses on divorce

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Businesses can often be one of the trickier assets to deal with upon divorce, but also, in many cases, they can be one of the most significant capital assets available; as well as being an income provider to one or both parties.

If you are separating and have a business, you will no doubt have many questions that will need answering. Below, we answer 3 common questions that arise when considering businesses on divorce:

Will the business need to be valued and if so, what is the process?

As with all assets on divorce, the starting point is to obtain a valuation of the business. However, valuing a business is not as straightforward as valuing other assets.

Usually a forensic accountant will need to be instructed to value the business, although depending on the nature of the business and any assets held within the business structure, other experts may be required in addition to the accountant, such as a Chartered Surveyor. The accountant will often be asked to look at a range of other issues, in addition to the 'value' of the business, to include tax issues, liquidity and maintainable earnings.

In some cases, a business may not have any capital value but provides an income for one or both of the parties. In such cases, expert evidence may still be required to look at the likely income that the business can produce, both at the time of separation and in the future, rather than the capital value of the business.

If the parties are agreed, then experts can be instructed without the involvement of the Court, however, if an agreement cannot be reached with regard to the need for an expert or the identity of the expert, then an application to the Court may be required. It is usually better to instruct a single joint expert who is jointly instructed, but independent of both parties. In these circumstances, the cost of the valuation is generally shared equally.

Will the business be considered an asset in the divorce process?

If the business is not just an income provider and has a capital value, it will be considered an asset within the divorce process. However, as mentioned above, a business is not usually a liquid or easily realisable asset and so will generally be treated differently from assets such as properties or cash investments. The general principle, however, is that matrimonial assets will be shared equally on divorce. A business which is established and ran throughout a marriage by one or both of the parties will generally be classified on divorce as a matrimonial asset.

For many businesses, however, they do not have a capital value and are simply income providers. In those circumstances, the Court would not usually consider the business as an asset, but as an income stream to one or both of the parties.

There are some limited circumstances when arguments can be made that some or all of the business should not be included as a matrimonial asset and that one party should retain the asset without claim from the other. An example might be if the business was built up prior to marriage by one party. These arguments are complex and full, specific legal advice would need to be obtained.

Can the Court order a sale of the business?

Although the Court do have the power to order the sale of a business, they will always try to avoid this if at all possible.

There are many options available to the Court before considering a sale of a business and much will depend upon the nature of the business, any other shareholders or directors outside of the marriage, what cash is available or can be raised as well as mitigating any tax that may be payable by the parties and/or business.

An option may be for one party to 'buy out' the others interest in the business. In such circumstances, the party who will retain the company may need to raise a lump sum in return for the transfer of shares. A lump sum can be paid either in one instalment or in a number of separate instalments over a period of time. Alternatively, if a lump sum cannot be raised, the Court can look at ordering spousal maintenance, if the business is able to generate a sufficient income to sustain such payments.

Offsetting business interests against other assets may also be another option. For example, if there is a jointly owned property or sufficient savings, those can be divided unequally between the parties or transferred entirely to one party to 'offset' interests in the business.

Client Case Study

"I received fantastic support and guidance from Ellie throughout my matter from start to finish. I felt that what set Sills & Betteridge apart from other firms was the ability to bring in an expert like Euan to advise on the corporate aspects of the divorce, whilst feeling that Euan and Ellie coordinated the work smoothly and efficiently between them. I would whole-heartedly recommend Sills & Betteridge to anyone with business assets to be dealt with as part of their divorce." [Sam Proctor, Sept 2022]

Ellie Jones and Corporate & Commercial Team Partner Euan McLaughlin successfully acted for Samantha Proctor on her £2.2m sale of shares in Proctor & Associates (Holdings) Ltd. This sale represented the end of a long-running and complicated negotiation. This transaction highlighted the close working relationship between our matrimonial finances and corporate teams, ensuring that clear, concise and pragmatic commercial advice was provided at an early stage. This joined-up approach is critical where business assets form part of the matrimonial pot. Often matrimonial firms either do not have an in-house corporate expert or involve them too late in the matter – which can lead to disastrous outcomes.

Divorce and the farm

Farming families, like everyone else, must face from time to time the consequences of a relationship breakdown, either for the owners themselves or for their adult children who possibly have an interest in the farm.

Last year, it was believed that in excess of three hundred thousand people in England worked on agricultural holdings in England. 60% of this workforce was made up of farmers, business partners, directors and spouses which would indicate that farms largely continue to be made up of 'tight knit' and often family businesses.

Divorce in farming cases are therefore inevitably more complex than it may be for other couples. Most people can comfortably distinguish between work and home, whereas for many farming couples, their home is their work and their work is their home.
It can therefore be a daunting prospect when the breakdown of a marriage could result in not only having to relocate your home, but at the same time find a new source of income.

Farming cases often have other unique features to contend with. The complex nature of ownership of farms, whether that be by way of limited company, trust or partnership can make it more difficult than in other cases to identify who owns what. Often other family members may live on, have ownership of, or have rights in the farm and the Court will be reluctant to affect the income and livelihood of any third parties. Couples often wish to protect the farm for the next generation.

Recent caselaw would suggest that the more typical approach in divorce cases of identifying matrimonial property and then seeing what an equal division would look like may not be so appropriate in farming cases. It is seen as more important to identify what the parties' needs are and how they can be met when looking at the circumstances of the case, whilst preserving the viability of the farm. The Court does have discretion in these cases in the pursuit of a fair outcome. However, fair does not necessarily mean equal in farming cases.

The Court will start by looking at the assets in the case and how they were obtained. It may be that a party attempts to 'ringfence' a particular asset by claiming it is non-matrimonial as it was acquired prior to the marriage or it was inherited, which are both arguments the Court would consider.

Ideally, there would be enough liquid assets in the case to satisfy a party's needs which would therefore leave the farm intact. Unfortunately, it is often the case that farms are capital rich and income poor and the majority of assets are tied up in the land, such as in machinery, crops and animals, or in other words everything needed for t he running of the farm. Borrowing capacity then becomes a critical issue as well as whether anything can be sold without severely i mpacting the enterprise. Involving the accountant, bank and any land agent will be crucial.

Sills & Betteridge have many years of experience in dealing with farming cases whether in the context of court proceedings, negotiated settlements, pre-nuptial agreements or mediation.

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Parental Responsibility - how to acquire it, how to lose it

"If you deem your child at risk of harm, there are alternative ways in which parental responsibility can be restricted"

'Parental Responsibility' is defined by s.3(1) of the Children Act 1989 as "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".

Currently, the law is that birth Mothers acquire parental responsibility automatically. Fathers who are married to the Mother also acquire parental responsibility automatically. If the Father is not married to the Mother, they have to acquire parental responsibility through other provisions which are provided for within s.4(1) of the Children Act 1989. These may be, for example, being registered on the birth certificate, entering into a parental responsibility agreement with the Mother, or obtaining an order from the Court granting parental responsibility.

However, the law governing the removal of parental responsibility is not so easily defined and, as such, each case will be considered on its own facts. Unless a child is adopted, parental responsibility cannot be removed from the birth Mother and it is very rare for it to be removed from the Father. The recent cases of X and Y (Private Law – Change of Name – Termination of Parental Responsibility) [2021] EWFC B24 and D v E (Termination of Parental Responsibility) [2021] EWFC 37 both provide clarity as to the type of situations whereby parental responsibility can be removed.

In X and Y, the Father was serving a life prison sentence for the attempted murder of the Mother, having also previously been imprisoned for physically assaulting her. The Judge considered many factors, for example, that the length of the Father's prison sentence meant he was unlikely to be able to exercise his parental responsibility for some time and there was a risk of harm to the children should he exercise his parental responsibility in any event. Furthermore, the children had no relationship with the paternal family. The Judge therefore granted the applications of the Mother both to remove the Father's parental responsibility and to change the children's surnames.

In D v E, the Father was convicted of sexual offences relating to a child and was imprisoned for 2 years, also being made subject to a 10-year Sexual Harm Prevention Order. A Probation Report deemed the Father a risk to children and intimate partners. The Father had also not had any contact with the child for some time and did not engage in the proceedings. The Judge therefore granted the applications of the Mother, which were to terminate the Father's parental responsibility and to change the child's surname. The Judge also made an Order under s.91(14) of the Children Act 1989 preventing the Father from making any applications regarding the child, until she was 16 years old.

We are often asked when parental responsibility can be terminated, and these cases highlight the serious circumstances in which a termination of parental responsibility will be considered by the Family Courts.

If you deem your child at risk of harm, there are alternative ways in which parental responsibility can be restricted, a Prohibited Steps Order for example, to prevent a child being removed from your care.

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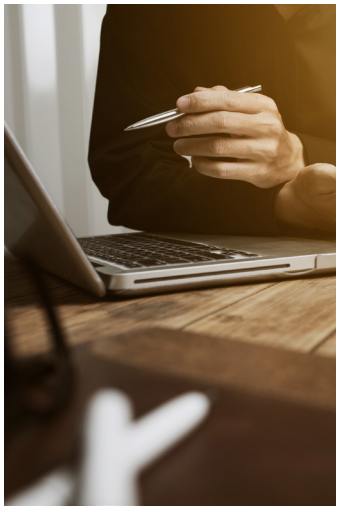
Changes to Divorce Proceedings



No fault divorce

The government Divorce, Dissolution and Separation Act 2020 was passed in June 2020. This came into force in April 2022.

The Act reforms the divorce process to remove the concept of fault. Prior to this a person seeking a divorce had to show that the marriage has broken down irretrievably by relying on one of five facts. Divorce proceedings could be commenced immediately if either party relied on the other's adultery or behaviour. Alternatively, divorce proceedings could be commenced after a period of separation, i.e., following a period of 2 years' separation if both consent or following a period of 5 years' separation if there is no consent to the divorce or upon desertion. The new legislation replaces the 5 facts with a new requirement to provide a statement of irretrievable breakdown. The legislation also removes the possibility of contesting the divorce and introduces an option for a joint application.

The hope is that this new legislation will eliminate the impact allegations and blame have on families, particularly children and has been hailed as the biggest shake up in divorce law for 50 years. Generally Family Law Practitioners are delighted by the change which avoids the unnecessary acrimony brought by the blame system.

Online divorce and financial remedy proceedings

HMCTS have expanded the online divorce and financial remedy portal following its launch in May 2018. As of 13th September 2021 it is mandatory for all divorce applications to be made online for petitioners who are represented. From January 2021 it also became necessary to make contested financial remedy applications online by way of Form A.

The pandemic has played a part in accelerating the process of HMCTS becoming more 'online'.

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Ten ways to make everything easier for your child following separation

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1. Let your child know that you love them and make sure your actions prove it.

2. Encourage your child to respect their other parent. Speak in positive terms about each other if at all possible. Be civil when talking to each other. We know how difficult this can be.

3. Be careful not to burden them with your problems and avoid sharing all your worries. They are still children and should be treated as such. Try and find an adult shoulder to lean on.

4. Try to agree with your ex on the ground rules for parenting including bedtime, discipline, homework etc. If the children can live by the same set of rules in both homes then it makes it easier on them. If the ex however does not parent as you do then do not undermine them or step in unless the situation is unsafe.

5. Do not use your children as go-betweens or prevent your ex from seeing the children as a way of punishing them in an attempt to force some kind of action i.e. payment of child maintenance. Denying time with your ex as leverage is damaging to the child.

6. Keep your promises. If you tell them you are going to do something together do it. If you have to change your plans to give your children and the other parent as much notice as possible and try and rearrange. Feeling that they can depend on spending time with you on a regular basis is very important.

7. Avoid introducing a new partner too soon. Children may resent you spending time with new people too soon or feel threatened be their presence. It is best to wait until your children are more comfortable with this. Do not introduce them to partners you have just met. Make sure you are in a stable relationship first.

8. Create a stable and predictable routine for your children if possible. Maintain as many routines, rules and traditions from your past family life as you can. They need as much consistency as they can get when everything else around them is changing.

9. Avoid conflict. Although we appreciate that this will be hard in the beginning try not to argue with your ex in front of your children.

10. Sort out child maintenance issues. Studies show one of the main factors for poor outcomes for children is when they are living in a home with substantially reduced income after separation.

Has the Pension Advisory Group provided more clarity in how pensions should be dealt with upon divorce?

"It is estimated that within 80% of marriages, at least one party has a pension"

The Pension Advisory Group (PAG) is a multi-disciplinary group of professionals specialising in financial remedies and pensions on divorce. The group was formed in 2017 with the aim of improving the understanding of this complex area of law, to enable those involved to achieve more consistent and fairer outcomes. A Good Practice Guide was produced and is now used widely by Judges and other legal professionals to assist them in reaching a decision as to how pensions should be divided.

It is estimated that within 80% of marriages, at least one party has a pension. This is anticipated to increase following the introduction of the workplace pension scheme that was phased in from 2012. The difficulty with dealing with pensions on divorce is that many couples have been met with irregularity and uncertainty as to how they should be divided. It is hoped that the guidance issued by the PAG will assist in providing clarification to alleviate uncertainty relating to these matters.

As part of financial proceedings, both parties are required to provide their full disclosure by way of a document called a 'Form E'. This requires evidence of all of their financial assets and liabilities, including property valuations, bank statements and the Cash Equivalent Transfer Value (CETV) of any pensions.

Prior to the report being published the principle of 'offsetting' was commonplace. Offsetting is where one asset is used to offset another, such as the equity in a property against the CETV of a pension. Whilst this might seem fair as the assets have ostensibly the same value, assets such as property are not direct comparison to the value of a pension, given that the former is a readily available capital asset whereas a pension does not tend to be. Another issue is that the CETV can be misleading, with certain schemes providing a much more valuable income upon retirement than the valuation.

The report recommends that moving forward, pensions should be dealt with separately to other assets, and that the future income of the pension should be considered rather than the value of the asset as a whole. This therefore provides for parties to consider equality of income upon retirement, rather than calculating equality based on the CETV. It is important however, to consider seeking advice from a Pension Actuary to determine what would be an appropriate percentage of pension share to provide this equality of income, should this be the intended outcome.

Whilst the report does advise that a Pension Actuary should be instructed in cases where the value of the pension exceeds £100,000.00, parties and legal advisors should approach this with caution and consider carefully the income alongside the CETV when contemplating whether to seek expert advice as, in some cases, it is appropriate even when the CETV is less than £100,000.00.

PAG are intending to revisit their initial report and offer further clarification. We wait with interest to see what further guidance is given.

Should you have any queries relating to pensions on divorce or any other matters relating to separation, please do contact a member of the family team who will be happy to assist.

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Changes to public sector pensions

Back in 2015, a decision made by the Government to close a defined Benefit Pension Scheme to younger members, whilst still protecting existing members, set off a chain of events that has changed all Public Sector pensions going forward.

As a result of the decision, a court case was brought by a group of Judges and Firefighters who argued that younger members of Public Sector pensions were being discriminated against based on their age.

The outcome was that in December 2018 the Court agreed that discrimination had taken place. The Government sought to appeal the decision but was unsuccessful.

So, what does this mean for you?

Members of Public Sector pension schemes both still in employment and retired will now be given a choice as to whether to continue their current schemes or to revert back to the older schemes. However, there may be significant risks in terms of tax which need to be considered when making any decision. It is therefore very important that advice is sought from a reputable Independent Financial Advisor on the issue.

The Government subsequently launched a Consultation which, amongst other things, was intended to highlight the potential impact of member's decisions in terms of their pensions. They used the example of a Teacher on a £40,000 salary retiring at different ages on either the old (legacy) or new (reformed) schemes. They found that if the Teacher chose the new scheme and retired at 67, they would receive £6570 per annum and a lump sum of £17,130 upon retirement. However, if they retired at 60 and chose the new scheme, they would receive £3490 per annum and a lump sum of £13,020. The Consultation summarised that the same Teacher would receive a greater pension from the old scheme if they retired at 60 but not if they retired at age 67.

Members of Public Sector pensions (whether in payment or not) had to make their decision as to which scheme they wished to be on before 31st March 2022. On 1st April 2022 all active members were moved to the new (reformed) scheme if they have not yet opted to remain on their existing scheme. In any event, it is planned that all Scheme members will be moved to the new (reformed) scheme on the 1st October 2023. Public Sector pension schemes have said that they will not be able to provide members with the cash equivalent transfer values of the new (reformed) scheme until October 2023 at the earliest.

At members retirement age it is anticipated they will be able to make a choice as to whether or not they wish to take their eligible benefits pursuant to the legacy (old) or reformed (new) scheme. It is essential that advice is taken on this from an Independent Financial Advisor.

It is now more important than ever for professional advice (from Lawyers, Actuaries and Financial Advisors) to be obtained when there is a Public Sector pension involved in the assets of separating couples.

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Cohabitation – A 'Common Law Marriage' myth?

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In today's society it is becoming increasingly common for couples to live together as cohabitants rather than get married or enter into a civil partnership. With rates of marriage fluctuating considerably and with recent evidence showing a decline in couples opting for marriage or civil partnership, cohabitation is becoming more and more significant for family lawyers.

Couples who live together and are in a relationship will automatically pool resources. They may buy a house together, they may open a joint bank account-but what are the consequences when the relationship ends and you are not married?

When a relationship ends the feelings of stress, and upset will invariably be the same as when a marriage ends, unfortunately when it comes to sorting out finances the similarity ends.

Marital breakdown is covered under the Matrimonial Causes Act 1973, or in the case of civil partnerships the Civil Partnership Act 2004. These two pieces of legislation are designed to help the court to come to a fair outcome when dividing up a couple's assets and on divorce, Orders can be made in relation to property transfer, lump sum payments, pension provision and spousal maintenance.

In cohabitation cases, however, there is no such legislation. We have to rely on the older and less certain principles of Trust Law.

What does this mean in practice?

The starting point for solicitors in this situation is always to ask how any property is owned, and more specifically who is named as an owner on the deeds of the property. Not everyone who owns a property will have this information to hand, however it can easily be obtained by making enquires with the Land Registry, and this is something that we can help with.

If you and your partner's names are on the deeds then you own the property jointly. There are two ways of owning property jointly, either as Joint Tenants or Tenants in Common.

If you own the property as Joint Tenants and if the property is sold you will normally need to split the proceeds between you equally. It may be possible in certain cases to argue that one party has paid for example a deposit towards the house and that this should be reflected in a settlement but legally the presumption is 50:50.

If you own the property as Tenants in Common the situation is a little different. It is more likely when you bought the property, you specified exactly how much of a share each of you were to have in the event that the property was sold. This may have been mentioned in the Transfer Deed when the property was purchased and we will be able to tell you how you hold the property by looking at your title deeds.

Alternatively this could have been evidenced through a trust deed.

What if your name is not on the title deeds but your partner's is?

In this situation there is no automatic right to 50% of the asset as some people believe. This is a myth. The onus is on you to establish an interest, and this is where trust law comes in, more specifically The Trusts of Land and Appointment of Trustees Act l 996 (TOLATA. Section 15 of this Act says that the court need to look at the following when making a decision on your interest in the property:

- The intention of the parties; at the time the property was purchased
- The purposes for which the property is held;
- The welfare of any minor who occupies or might reasonable be expected to occupy the property;
- The interests of any secured creditor or beneficiary;

What we are looking to establish by proving these facts is whether a trust has been created.

There are three types of trust all of which may be used depending on the circumstances:

- If you think that you have a claim on a property by making a contribution towards the purchase price of the house or because you have made substantial payments to a mortgage then we are looking to establish a resulting trust -think of your claim being as a result of something you have paid towards the property.
- If you feel that at any time during the relationship there was an agreement arrangement or understanding between you that a property should be shared then you may have a claim under a constructive trust. What we are looking for here is a common intention that you were to have an interest in the property-either by express discussions or evidence that you relied on this presumption by for example paying for substantial property improvements.
- If there is an intention clearly expressed by your partner, either in writing or verbally that you are to have a share in a property, this is an express trust.
- In addition, If you have acted to your detriment because you genuinely thought for the reasons above that you had an interest in the property then it may also be possible to establish a claim under something called proprietary estoppel. Think of this as relying on a promise and suffering loss as a result of doing so.

Cohabitation Disputes can be complicated and expensive. In order to minimise and bring certainty as a Cohabitee, you can draw up a Cohabitation Agreement which is the nearest equivalent to a Pre-Nuptial Agreement. When jointly purchasing a property with a partner without being married, you should also consider how you intend to share the property in the event that the relationship comes to an end and, if it is not your intention to share any equity equally, the specific shares you hold should be recorded in a declaration of trust.

Cohabitation Agreements

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As outlined in the previous article, couples who live together do not have the same legal rights as married couples, and the law governing cohabiting couples is complex. Many choose therefore to have a Cohabitation Agreement drawn up, which if properly prepared by a solicitor and signed as a Deed is legally binding. They provide clarity and peace of mind and should reduce difficulties and disputes both during co-habitation and in the event of a relationship breakdown.

Key elements to include in a Cohabitation Agreement

Cohabitation Agreements typically record financial and other arrangements between two parties who have agreed to live together, both during the cohabitation and following cohabitation should their relationship break down.

Property - any property owned before moving in together and / or property bought while living together should be addressed in the agreement.
Household Bills & Mortgage Repayments – who is paying what and what claim does this then give the partners over the property in the event of separation?
Assets & Debts – both should be recorded with details of ownership and repayments
Children – how will any children be cared for and financially supported in the event of a break-up?
Inheritance & Wills – unmarried cohabitees do not automatically inherit each other's estates and as such need to draw up a Will and regularly review it.

Cohabitation Agreements are usually drafted before a couple start cohabiting, but they can be drawn up after many years of living together. It is important to review them periodically, to include a change in circumstances such as the birth of any children, loss of employment, receipt of a large inheritance or other significant change in financial status of one or both of the parties.

What is the difference between a Declaration of Trust and a Cohabitation Agreement?

Many unmarried couples who purchase a property together choose to draw up a Declaration of Trust. Also known as a Deed of Trust, these confirm the share each party owns and the way in which the property is owned – either as Joint Tenants or Tenants in Common, depending on the contributions made by each party, and to whom any increase in value due to, say, any home improvements will benefit. Cohabitation Agreements are more comprehensive and outline what happens to the property if the relationship breaks down, and as covered above, also deal with day to day matters including household bills, and child arrangements.

Legal Advice

Cohabitation Agreements require independent legal advice to be taken by both parties, to ensure that the parties are absolutely clear about what they are agreeing to and signing. The cost will depend on the complexity of the circumstances and associated arrangements required, all of which our team of family lawyers have extensive experience of advising clients in relation to.

Sills & Betteridge Matrimonial Team

Divorce and the 'Silver Splitters'

There has been a marked increase in the number of over 60s divorcing in recent years.

The financial consequences of a divorce at any time can be significant, however, there are some very important issues to consider for those spouses who divorce later in life.

Particular attention will need to be given to the issue of pensions. Full disclosure of both spouses financial circumstances will be needed and this includes information about all pensions which either spouse may have. We will need to see details of each and every pension which has been paid into during a spouse's life. These may include occupational pension schemes (from various employments, including public sector pensions), contribution based pension schemes and/or self-invested pension assets (such as a commercial property).

In addition, it will be important to understand what state pension both spouses may qualify for and at what age they will be due to receive that income.

Ensuring that both parties have sufficient income following a divorce and into retirement is crucial.

If one spouse has more pension provision than the other, it is possible to obtain a share of their pension(s) so that you are left in more comparable positions. After a long marriage, it is normally only fair that both spouses have more or less the same pension provision in retirement. Working out how a pension(s) should be shared is a complex task which normally requires the assistance of a pension expert known as a Pension Actuary.

In addition to careful consideration of your pension position, decisions will need to be made about the marital home. Assuming all the children are now adults, it may be that the property has to be sold in order to release capital to enable both spouses to purchase properties in their own names. Unless the parties have significant pension provision, usually such properties need to be purchased mortgage free.

A sale of the marital home is not always necessary, however, and one spouse may have other assets (such as a business) that they would like to retain and which they are willing to 'offset' against the marital home. Alternatively, it may be that one spouse has sufficient capital in savings and/or investments to 'buy out' the other spouses interest in the marital home for a fair and agreed amount. Finally, divorcing spouses will want to ensure that they have reviewed their Wills and have both updated those following the split. This is because on the divorce being made final, anything originally left to the other spouse will instead pass to the next beneficiary who is entitled to receive it under the terms of the Will. If everything had been left to the other spouse in the original Will, the estate will pass in accordance with the intestacy rules unless a new Will is made.

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Processes available that can be used to resolve children issues or financial matters

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Many people think that they should have their 'day in court' which will lead to a final resolution of a dispute. It is rarely the case that much satisfaction is achieved by having a 'day in court' and often it can lead to increased costs, acrimony and delay. Sometimes it will be necessary to make an application to the Court, particularly if you suspect that the other party are reducing the matrimonial assets, failing to provide full financial disclosure or in Children Act cases if you feel that the other parent is trying to turn the children against you. In most cases however there is an alternative to court proceedings.

Outlined below are various low conflict options that you may choose to take advantage of to try and resolve any children or financial matters between you.

Solicitors' Negotiation

It is still the case that the majority of cases are negotiated between the parties with the help of solicitors. The majority of cases do not go to Court and even smaller numbers proceed to a final contested hearing. Often the matter is negotiated along the way.

Mediation

Mediation is a dispute resolution process that works very well for many couples. Many people confuse the process of mediation with that of reconciliation. The purpose of mediation is to support you to make decisions when you decide that your relationship has ended.

The mediator is a neutral person who can help you make decisions. Mediation is one of the most cost effective and time effective ways to resolve disputes. Mediators tend to have an average of 2 – 4 meetings with a couple to help them resolve both children and financial matters.

Legal Aid is still available to help fund the process of mediation if you are financially eligible.

I would recommend that you look at the video available at: www.gov.uk/government/publications/family-mediation as it will give you a good idea of what mediation is and what mediators do.

The government remains committed to mediation and the Ministry of Justice has recently launched a Mediation Voucher Scheme whereby a contribution of up to £500 per case/family to the mediation cost of a child arrangements case will be offered encouraging people to resolve their disputes outside of the Court where appropriate to do so. The guidance for this scheme can be accessed at https://www.gov.uk/guidance/family-mediation-voucher-scheme

Collaborative Law

Collaborative law is a process whereby both parties engage solicitors who are specialists and who are trained in the collaborative law process. The solicitor's commitments are such that if the process does not result in an agreement the solicitor will not be able to represent you in the litigation process. This can be an advantage and disadvantage. Some people are concerned at the prospect of paying solicitor's costs to try and resolve matters during a collaborative process when they may be required to fund new solicitors if that process does not result in an agreement.

If you are not able to reach an agreement during the collaborative law process, an outcome cannot be imposed on you.

Arbitration

Arbitration more closely resembles the Court process because the arbitrator can make a decision if you do not reach an agreement first. The Arbitrator can deal with most financial cases. An independent arbitrator will be chosen by yourself and the other party, and the arbitrator ensures that the evidence is collected and that each party has the opportunity to have their say. The arbitrator then uses the information to make a decision about the division of assets, income, pensions and property between the parties. The decision of an arbitrator is called The Arbitration Award.

Arbitration can be used at any time in place of the court process and can often be quicker than the court process.

Domestic Abuse

We understand people often go through crisis points in their lives and need advice and support during these periods. We are also aware that in domestic abuse and child abduction cases, advice is often required urgently and action by way of court orders are required immediately. To meet the needs of our clients, we have established a Family Emergency Team who can respond to your needs quickly and offer advice out of hours.

Please call or text "need to talk" to 07557 850212

Many women, men and children live with domestic abuse. It can affect people from every social background, religion or culture and it can occur at any stage in a person's life.

You do not have to put up with domestic abuse. We understand, however, that moving out of an abusive relationship is never easy. Often people will return several times before they are able to make the final break. There are many reasons why it is difficult to leave, for example that you are still in love, you are terrified of the consequences, you are worried about the children and the financial implications.

If you do decide to leave, we can help you.

If you are suffering from domestic abuse, there are a number of legal options available to you under the Criminal Law and Family Law which will protect you.

Criminal Law

If you are in danger call the Police and always dial 999 in an emergency. The Police have a duty to protect and help you. If you make a complaint to the Police, they will investigate the matter. The Police are under a duty to take into account the views of the complainant before releasing a suspect on bail. If sufficient evidence is found in the investigation, the Police will press charges. The Crown Prosecution Service will then take over the prosecution of your case.

Family Law

We can make an application to the court for an injunction (Non Molestation and/or Occupation Order) on your behalf and, if there is an immediate threat of danger, this application can often be without giving notice to the person who you seek protection from.

The Domestic Abuse Act 2021 has now come into force and strengthens protection for victims and survivors of domestic abuse.

Legal Aid is available for injunctions. Do not hesitate to talk to one of our lawyers if you are affected by domestic abuse and we can undertake a financial assessment with you to establish whether you have any contribution to your Legal Aid.

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What to pack if fleeing domestic abuse?

You may decide to leave the family home permanently or temporarily whilst putting into place an Injunction and Occupation Order.

Try to take everything you will need with you. There is always a possibility that you may not be able to return later, or your belongings will be destroyed by your partner. Take your children with you. Remember to keep with you, or in your emergency bag:

- Mobile telephone
- Some form of ID
- Birth Certificates of you and your children
- Passports for you and your children
- Work Permits/Visa
- Proof of National Insurance Number
- Money/bank books/cheque books/credit and debit cards
- Keys for house/car/place of work (think about getting an extra set cut and keeping them in your emergency bag/ with a neighbour/family/ friend).
- Cards for payment of Child Benefit and other benefits.
- Driving Licence/car registration documents
- Copies of any documents relating to your house, e.g. mortgage, lease, rental agreement.
- Insurance documents and any other financial documents belonging to you, including bank statements, details of policies etc.
- Address book
- Family photographs and anything of value to you
- Clothing and toiletries.

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Questions & Answers

Dear S&B
I have been in a difficult marriage for many years. I have been controlled by my husband. I have little confidence left and just want to move on. I have a limited income and do not have the money to spend on legal fees. My husband has suggested a 50:50 split and that his solicitor will prepare the agreement. This seems fair. Do I really need a solicitor in this situation?

You mention that you felt controlled by your husband during the marriage but do not mention specifics. In certain circumstances Legal Aid is still available. If you go to a firm that offers Legal Aid, it will be possible for them to assess this before you take any action. To assess you for Legal Aid we will require the following: -

- Evidence of domestic abuse, for example a letter from your support worker or GP (we can provide you with a template letter they can use so they provide the correct information).
- Confirmation that you are in receipt of a passported benefit such as: -
  i. Universal Credit
  ii. Income Support
  iii. Income-based Job-Seekers' Allowance
- Income-based Employment Support Allowance
- Guarantee Pension Credit
- If you are working, 3 months' bank statements and wage slips
- Mortgage statement (if applicable)
- Evidence of any other assets you may have such as shares, Premium Bonds, any item worth more than £500

I understand that people are often worried about seeing a solicitor because the other party has said that they do not need one or are scared that a lawyer is going to make things worse. Often if one half says that you do not need a solicitor, this is an attempt to control you so that it is easier for them to get the outcome that is best for them and not for you.

A 50:50 division of the assets may be appropriate, but without you each making full financial disclosure we will not be certain whether all the assets and liabilities are being taken into account. There is always a risk that a spouse does not disclose all the assets or provides an inaccurate valuation (he may do this unwittingly). Further, not all cases settle on a 50:50 basis. Sometimes 'needs' dictate that one spouse should receive more of the assets than the other. This can be properly reviewed by a Solicitor. It is generally important to exchange financial information and then proper consideration can be given when putting forward a financial proposal that takes into account all the assets and relevant circumstances.

Dear S&B
I have separated from my child's mother and we have very different views on vaccines. I am on the birth certificate.

There have been 2 recent cases in relation to vaccinations. Re. H (A Child) Parental Responsibility: Vaccination [2020] was a case that came before the Court of Appeal in relation to a child under the care of the Local Authority. The case of M v H (private law vaccination) [2020] was in relation to a Private Law dispute.

In his Judgement MacDonald J was guided by the Court of Appeal decision in Re. H and summarised the Court's approach that where two parents with parental responsibility disagree as to the proper course of action with respect to vaccination, the Court becomes the decision maker through the mechanism of a Specific Issue Order. In considering whether to grant a Specific Issue Order requiring vaccination the Court's paramount consideration is whether it is in the child's best interests. In deciding this the Court must have regard to the matters as set out in the welfare checklist. Furthermore, pursuant to Section 1 (5) the Court should not make a Specific Issue Order unless doing so would be better for the child than making no Order at all.

He also went on to say that the instruction of an expert was not necessary where vaccination has been approved and recommended by the NHS and Public Health England, save for those cases where there was a concern for the efficacy or safety of a particular vaccine or a contraindication specific to a particular child. If an expert was required, it should be from a jointly instructed expert drawn from the field of immunity and not the use of 'partial and partisan material gathered from the internet'. In the absence of special circumstances and peer reviewed evidence it would be very difficult for a parent to successfully object to vaccination in accordance with the Public Health recommendations.

The strength of any parental objection to vaccination would not be determinative.

It was decided that the objective of vaccination, namely to protect the children from the consequences of the diseases vaccinated against, and the population more widely from the spread of such diseases, is sufficiently important to justify the limitation of a fundamental human right. In this case the Court made a Specific Issue Order that the children have an MMR vaccine. It is therefore likely that in the absence of a well evidenced contraindication, specific to the child, or providing peer reviewed evidence it is likely that an order will be made authorising a vaccination.

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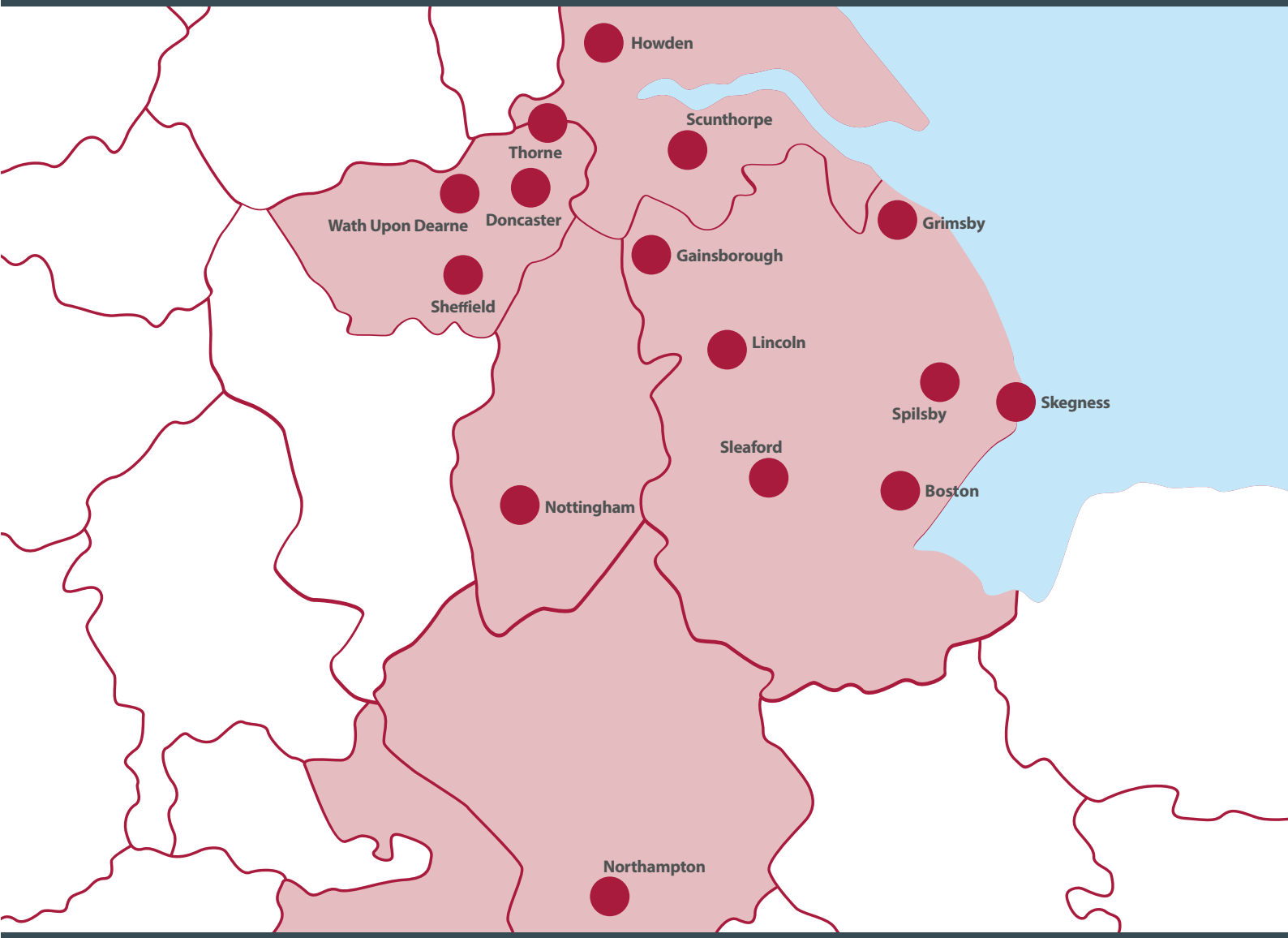

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I hope you enjoyed this edition.
As with everything we do, we welcome your feedback, so if you have any comments on this issue please send me an email to: hderry@sillslegal.co.uk