

THE ESSENTIAL GUIDE TO SEPARATION AND DIVORCE

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BREAKING UP - WITHOUT FALLING APART

INTRODUCTION

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

GOING THROUGH A SEPARATION IS NEVER EASY

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

BE PATIENT WITH YOURSELF. DON'T PANIC!

A separation is both a psychological and a legal journey. It is not a single event but a process. In the navigation, both elements will have some impact. The purpose of this guide is to shine a light on the terrain. It's a small scale map. There are suggestions about how to fill in the detail for any parts you want to explore more fully.

TRAVELLING COMPANIONS

Separation can feel quite a lonely transition. Both aspects of the journey, legal and psychological, are complex. I hope this article helps you get your bearings and to make sense of the new terrain you are in. Family law is complicated. It is important to seek face to face advice from a family lawyer you have confidence in. The legal information here is to help you start to make sense of things. It is not the same as having legal advice about your own particular circumstances. The way you sort things out will make a big difference. Guidance is given about the different ways available.

The right support is crucial. Friends and family can be fantastic. Sometimes more neutral assistance to deal with the emotional rollercoaster is also a powerful catalyst.

SO GOOD LUCK!

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

CHAPTER 1

YOU ARE THINKING ABOUT SEPARATING.

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

Remember that if you have children they will usually very much want you to stay together. This is not necessarily the best thing for them, but you must be sure enough of what you are doing to be able to cope with the children’s reaction. Be very practical – think of the day to day things that would have to be sorted out.

You will realize that money coming into the house when you are together in one household will not go so far as between two households. Separation triggers major financial consequences. Think them through very realistically. If your partner has a drink problem or is violent to you and will not go for help, or perhaps will not even acknowledge the fact, then it might be more urgent for you to get out of the relationship. It might also be helpful for you to have specialized support.

One thing you have to accept is that if you don’t like your partner’s behavior and your partner doesn’t think there is anything wrong with it, then you can’t make your partner change. You

must either find some way of living with the situation, or leave the relationship. Living with a partner who for some reason is behaving badly to you can have a terrible effect on your self-confidence. Try to make your decision while you still have enough energy to use for the future! If you do decide to separate, you must not expect your partner or your children to accept your decision without some hurt or anger. However, once you have thought things through carefully and made your decision, don't spend too much time in trying to justify your decision to other people, even your partner. Doing this usually involves underlining or exaggerating the faults of your partner, and only causes more bitterness. It is often better to be able to accept that you both embarked on the relationship with optimism and believed it would work. If you have now come to the conclusion the dynamic has changed, you can agree to disagree about the reason for that. If you have children they will cope much better if they don't overhear arguments about where it went wrong.

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

DON'T RUSH IT.

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

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

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

BE REALISTIC

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

CAUTION

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

IT IS IMPORTANT TO DISENTANGLE THE EMOTIONAL ASPECT OF A SEPARATION FROM THE MONEY ASPECT.

TO THINK ABOUT

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

The children: Think about a referral to a Family Mediation Councilor.

Practicalities: A consultation with a sympathetic family lawyer can help stop things going into a downward spiral.

CHAPTER 2

YOUR PARTNER HAS MADE THE DECISION TO SEPARATE.

This is a 100% “rug being pulled out from under your feet” situation. It is frighteningly cold and lonely for most people. If your partner had died, you would at least have happy memories to look back on. As it is, you probably feel that the pain of what is happening now spoils the past as well. Even taking one day at a time at this stage may seem like a tall order. It is important to keep in mind that if you can just put one foot in front of the other and plod through the practical things that come up, then at some point the weight will start lifting. You will probably feel very drained. Try to use the energy you have to deal with the present, rather than constantly thinking over what went wrong. Begin to paint a picture of what could be salvaged to build the best that can be achieved for the future. If you approach things this way, you may find that at some point you are also able to rescue some of the good memories you had in the past. You may feel almost overwhelmed by quite violent emotions from time to time. This does happen. You are likely to go through a range of emotions from denial and anger to sadness. The most important thing to remember is that it is natural to go through this sequence of emotions. You are coping with a threatening situation and significant loss. It is also important to let yourself move through the stages and not get stuck.

DON'T FIGHT IT BUT DON'T FEED IT!

Talking to friends and relatives can help but remember that although they will want you to feel better; they will be feeling upset too. It can be a good idea to talk things over with someone who is not involved, such as a counselor.

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

children to keep in contact with both parents, except in unusual circumstances.

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

You may find that is just too upsetting to be present at the hand-over in the aftermath of a separation you did not anticipate happening. If so, try to arrange for a friend or relative to be there instead until you can cope with seeing your partner. If your partner is involved with someone else then you might feel strongly that the children shouldn't see that other person. For a little while after the separation it might indeed be better for the children not to have to deal with a new person – they will have a massive change to cope with anyway. However, there will come a point quite soon when it will almost certainly be important for them to meet.

Remember the children are not being introduced to a replacement parent. They will be meeting someone who is an important friend of their mum or dad. For the children to remain close to the other parent and in order to prevent the situation becoming artificial, then they need to meet. This will not be easy for you to cope with, but if you can it will be a huge help to the children. If the children are based with your partner, then when you see them try not to rub in how unhappy you are. The children will probably be very anxious about you anyway. It is frightening and unsettling for children to see their parents being very sad. Avoid blaming or criticising the other parent. It is very distressing to children to feel they have to take sides. You are likely to be seeing the children less frequently than before. You may be seeing them somewhere they are unfamiliar with. The temptation may be to provide treats and be indulgent. The main gift you can give your children is your time and attention. While on the subject of minimising anxiety, try to keep very closely to arrangements you make about contact with the children. If you are quarter of an hour late picking the children up, then they and the other parent will be getting

more and more worried about whether you are going to turn up. When you do arrive, the atmosphere will be tense and an argument all too likely. Similarly, if you are quarter of an hour late bringing them back, your partner will probably be imagining that you are on your way to Australia and again it will be so tense when you do turn up, sparks will fly. Finally, a reminder to be realistic where money is concerned with the overall finances. If you are the main earner, avoid making financial arrangements that are really bribes. If you offer a lot more than you can reasonably afford, in order to try to make your partner see you in a better light and in the hope of a reconciliation, you are likely to remain separated and very poor!

TO THINK ABOUT

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

THE CHILDREN

Separate out your interests from those of the children.

PRACTICALITIES

Taking advice from a sympathetic family lawyer can help make some of the practical problems more manageable.

SUPPORT

Coping with a separation you had not anticipated most likely is one of the most stressful things you could have to deal with. It would be very wise to seek the help of a divorce lawyer or counselor to help you cope.

CHAPTER 3

YOU HAVE AGREED TO SEPARATE.

If the relationship is definitely over and you can separate amicably, that would be great! Just a word of caution. If you are inclined to describe the choice to separate as a mutual one, be very frank with yourself about what your partner would say if he or she was asked that question by a third party. If, on reflection, you

realise they may not be so clear it is a joint decision then do have a look at Chapter 1.

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

Children usually want their parents to stay together. That is not always possible but it is important to be able to cope with their sadness and perhaps anger.

Preliminary advice from a lawyer could be wise, it can help in avoiding unexpected pitfalls. Sometimes people want to have a friendly separation, but find that their ideas of what constitutes a fair financial split are much further apart than they would have expected.

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

TAKE LEGAL ADVICE BEFORE YOU SHAKE HANDS ON SOMETHING

Anything other than the simplest agreement usually has to be drawn up in a fairly technical way if it has to be relied on in the future. The Collaborative process is a particularly good way to maintain a problem solving constructive focus when making practical plans for the future.

Another complicating factor can be the appearance of a new partner on the scene. Even if the new relationship only starts after the separation, it can make the other person feel more hurt and

threatened than they might have expected. Things should settle down again eventually, but don't feel too dismayed if there are some hiccups.

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

TO THINK ABOUT

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

CHAPTER 4

WHAT DOES THE LAW OFFER?

When two people are no longer making plans for a joint future difficulties can arise because there may be a disagreement over what is fair and what values are important on a personal level. Each of you will tend to become increasingly preoccupied about your own separate future. Because that will have an element of uncertainty about it this preoccupation is likely to be coloured by anxiety. In turn, that can make you become rather less sensitive to others in the situation. Because of all these factors it is usually helpful and important to be able to refer to some more neutral framework as a benchmark for fairness. The legal rules can provide such a benchmark. If you can resolve matters by agreement then the legal rules remain simply guidelines. If you can't agree, then the legal rules will be applied in the decision making process which would then be likely to take place in court proceedings.

The legal rules may not reflect your personal values. They are usually an attempt to be fair. They were arrived at after wide consultation about what would be fair for the adults in terms of finance and helpful to children. Even so, they may not take into account ethical or moral aspects which might be considered important by one of you. Sometimes in an agreed settlement these

other values can be given some weight but if matters have to be resolved in court proceedings, it is important to understand that the rules are there to provide certainty and will not always do so in a way of your choosing. What is useful is to know what the legal rules are. It is then possible to assess how close they are to your own value system. If they coincide then it is reassuring to know that whether or not matters can be agreed the considerations will reflect your own priorities. It then becomes important to weigh up what factual information there is to tie in with your own reading of a situation. If legal rules have to be applied then there is usually quite an exacting standard of evidence needed to prove your account if this is in conflict with someone else's. One aspect which can seem quite harsh about legal rules is that people are expected to a large degree to look out for their own interests. That will often mean ensuring that there is a very clear record, preferably in writing, of any agreements which have been reached. In India when couples separate, in most cases the arrangements for children and the financial consequences are resolved by agreement. The terms are set down in a document called a Separation Agreement or Minute of Agreement.

Only a court can end a marriage by granting a divorce. Although that is a very significant step it is usually fairly straightforward in legal terms. What is more complex is sorting out the child related and financial issues. If they have been sorted out in a Separation Agreement or Minute of Agreement the court doesn't need to deal with those aspects. If not then the court has to be asked to make decisions about them, to think about applying the legal rules. Legal rules don't need to be a straightjacket. They should help give shape to agreed settlements. There are potential legal claims involving money property and pensions which will be lost if not sorted out before or as part of divorce proceedings.

WHAT DO LAWYERS OFFER?

Family lawyers act as interpreters, guides, negotiators and advocates as well as being a gateway to other resources. They help you make sense of the legal rules in your particular circumstances,

assess the options and work out the best way to deal with the practical plans. This broad outline of information is just a starting point. The specific combination of details relevant for you has to be taken into account to assess a workable way to take matters forward. A family lawyer provides practical support and strategies to achieve a workable transition. You and your partner may have similar ideas about how to sort things out. You may have very different ideas. You may have no idea of where to start. Whichever applies lawyers have a helpful role to play. Your lawyer can help you to check that proposals are fair and what other aspects need to be considered. Unless there is very little in the way of money and no property to sort out, it will be important to have a properly worded agreement drawn up and carried out or, in some cases, an application made to court to sort things out.

This may be the first time you have had to see a lawyer. If you have already seen a lawyer it may have been about buying a house or making a will. The kind of lawyer you talk to at this stage will almost certainly be a divorce lawyer, rather than the other type of lawyer. Divorce lawyers are more specialised and have a focus on the legal rules as they are or may be applied in court.

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

There are a number of ways of choosing a divorce lawyer. Personal recommendation is a good one – if someone you know has had a lawyer for the same sort of thing and you like the sound of their approach, then you should phone the lawyer and make an appointment. Some lawyers, especially in rural areas, still deal

with more than one area of law. Many specialise so you should always check.

It is very important for you to choose a lawyer who is used to dealing with family law. Lawyers who deal in matrimonial disputes will tend to be very experienced in family law. They are also likely to be able to help you assess the best way of tackling things since they have experience in matrimonial issues.

PAYING FOR A LAWYER

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

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

The final cost is likely to be worked out by adding up the cost of each meeting, telephone call, letter, document or Court attendance. Your lawyer will give you an indication of the basis for his or her fee charging. At the outset you should ask your chosen firm for details of their hourly rate.

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

Dealing with a separation should not be very expensive, unless it becomes a very bitter battle when it could cost even more, but the costs are likely to be significant and they should always be discussed at the outset, so that you know where you stand about the practicalities of making payment. Most lawyer's will expect payment of their fees as the work progresses. Some might agree to accept payment from a final settlement.

If matters are resolved by agreement, then the starting point would be that you each pay your own lawyer's costs. Occasionally, people agree something else but unless there is an agreement to the

contrary, you will be responsible for your own costs. Even if Court proceedings are raised, in family court cases, it is usual for each person to end up paying their own costs. Traditionally, the person who wins a Court case is able to recover the costs from the other person. Because the family law rules are about fairness to both parties and the best interests of children there is less emphasis on “losers” and “winners” and again, each person usually pays their own costs. If one person is obstructive or dishonest during the Court process then in those circumstances it is possible they might be made to pay at least part of the costs to the other person but it is not something that you should expect.

USING A LAWYER

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

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

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

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

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

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

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

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

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

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

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

Is it the legal rules that you don't like? Sometimes the rules don't fit in with the way you feel, but the lawyer still has to tell you them. It is then a case of "don't shoot the messenger"!

Is it the way you are being told the information you don't like? If so, try again. Ask questions if there is anything you don't understand and tell your lawyer if you are puzzled or if the reply is unclear.

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

IF THINGS GO WRONG

If you or your lawyer is not communicating well, it is usually better to try to get on a better footing than to change lawyer, since such a change will only add to the complexity of the situation. The first lawyer will probably want his bill paid before he hands over your papers – a lawyer generally has the right to keep your papers until you have paid the bill.

Transfer of your case to a new lawyer may take some time and delays might not be to your advantage.

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

It may happen that the relationship between you and your lawyer does break down completely and can't be mended. If this happens, then of course you should change lawyer. If things have gone really wrong you might consider making a complaint to Bar Council of India.

CHAPTER 5

WAYS OF SORTING THINGS OUT EXPLAINS THE DIFFERENT APPROACHES AVAILABLE TO SORTING THINGS OUT.

The ways in which decisions can be arrived at following family breakdown are varied. If it was a joint decision you might have

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

THE SPECTRUM

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

MEDIATION

Mediation can help you identify a mutually acceptable formula for settlement by direct discussion with your partner with the assistance of an impartial third party.

The mediator facilitates the process by providing a clear structure for discussions and skills to keep the conversation constructive. You and your partner must be willing to sit down together to have this assisted conversation. Three or four sessions may be sufficient although more may be necessary. Once plans are made in mediation they can be put into binding form by your lawyer and your partner's lawyer. Some family lawyers are trained as mediators.

COLLABORATIVE PROCESS

The collaborative process is a fairly recent innovation to India. It enables you to have the support of your own advising lawyer through a structured series of meetings. It recognizes the importance of the emotional transition and the impact it can have on decision making. You, your partner and the lawyers all agree to use a solution seeking approach. You have to agree to make full disclosure of information. Other professionals such as financial

advisors can be involved in the Collaborative Process. Support can be given by the counselors with knowledge of the Collaborative Process. The Participation Agreement you sign at the beginning of the process underlines the importance of dealing with a separation in as constructive way as possible to limit the impact on the children. It allows options to be explored with full information and legal advice in a joint problem solving exercise.

If matters cannot be resolved by negotiation then the collaborative lawyers can take matters forward by litigation. It is more usual to reach an agreement. In that case the Collaborative lawyers draw up a Separation Agreement.

NEGOTIATION

Negotiation again allows you to retain your own advising lawyer through a process of exchanging information and looking for terms which will be acceptable to both of you. There is no set structure for negotiation. Sometimes it can be very problem solving and co-operative. Sometimes it may feel more adversarial and seem to take a long time.

ARBITRATION

Occasionally the legal rules and emotional climate generate a big gap in expectation. This can create a need for a third party to make a decision. If that happens you can still avoid going to Court if you and your partner use a family law specialist as an arbitrator. If you were using the collaborative process and there was a particular matter you and your partner were not able to agree about you could also use a joint referral to arbitration to deal with that, without the need for a change in advising lawyers.

LITIGATION

Litigation means having things sorted out in Court. It is the most formal decision making process. You and your partner each ask for the remedies you want and provide information and legal argument in support of that request. You challenge what the other person wants. The outcome is binding and enforceable.

WEIGH THE OPTIONS

Would you be able to sit in the same room as your partner and a neutral third party to discuss plans which would be workable for you, your partner and any children involved? If the answer is yes, mediation may be right, particularly if you and your partner have in the past been able to make joint decisions when things were more positive between you. If the answer is no, would you be able to sit in the same room as your partner and both advising lawyers to consider plans which would be workable for you, your partner and the children involved? A positive response could mean that Collaborative Family Law may be right for you, particularly if despite any current difficulties, you and your partner have had a reasonably respectful relationship. If not can you discuss matters with your own lawyer and consider the plans that are best for you and let your lawyer see how much of that can be achieved with a lawyer doing the same for your partner? If so, negotiation may be right for you. If not, would you both provide the financial details and other necessary information to a third party who is a specialist in family law, who would explore the possible ways forward then make a decision binding on both of you? If so, arbitration might be right. If not, litigation is the remaining route. It would be the right process to use if there are complex legal issues or if your partner is abusive or dishonest about financial matters.

TO THINK ABOUT

Unless a separation is a joint decision, at some point it is likely you will have a mainly negative view of your partner. It is very important to be wary if your partner has a history of abuse or dishonesty. In other cases, there is a risk that because the relationship has broken down, you will each begin to see one another in an unrealistically bad light. If someone is dishonest or abusive the law does give protection and it is important to take advantage of that protection. In other cases, the legal rules emphasize fairness to both parties on the financial issues and putting the best interests of children first. The reason why a relationship has broken down is usually not considered significant

in dealing with the financial aspects. There is a risk that if you use a process which emphasises the adversarial elements, it will be financially and emotionally draining. The main thing is to give careful thought to what form of Dispute Resolution you chose. It will affect the kind of family you have in the future.

CHAPTER 6

WRITTEN AGREEMENTS

In India, the most usual way of sorting things out at the end of a relationship is to enter into a written Agreement. If you have used mediation to identify a mutually acceptable formula then each of you would have your own advising solicitors to check over those terms and in most cases put them into a binding Agreement.

If you are using the collaborative process or conventional negotiation then the lawyers involved will draw up a document setting things out. This document may be called a Separation Agreement or a Minute of Agreement. It can be worded in such a way as to have the same force as a Court Order so far as the financial side is concerned. In terms of a married relationship, the Separation Agreement or Minute of Agreement operates a bit like a financial divorce. Only a Court can end a marriage by granting a divorce. All the other aspects can be dealt with before that step and set out in the Agreement.

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

WHAT IS COVERED BY AN AGREEMENT

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

A Separation Agreement usually sets out where the children are going to live and the time they will spend with each parent. Arrangements about children set out in a Separation Agreement do not have the same force as a Court Order. In most cases they provide a reliable enough framework but if there was any real danger of children being whisked out of India by the other parent, a Court Order would be safer. If matters were as adversarial as that, it is unlikely you would be considering a Separation Agreement! Depending on how the division of the joint matrimonial assets is decided, the Agreement may be to allow the family home to be sold and if so, to say what share each of you should receive. Alternatively, the house and secured loan mortgage might be transferred from joint names to one person. If the house is rented, the tenancy could change hands with the agreement of the landlord. The question of occupancy rights might also have to be dealt with. Division of the contents can be sorted out, preferably with a common sense approach, to reflect the practical needs and wishes of all concerned.

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

You might well both agree to give up any claim you could have had against the estate of the other person on death. It is nearly always a good idea to draw up a Will after a separation. It is also important to consider the terms of any nomination in the life insurance interests you have since that would have to be dealt with separately from these other steps.

The question of ongoing financial support should also be dealt with. Money payable between spouses will usually have a cutoff date. Support for children is likely to be affected by mutual consent between the partners or as per court orders.

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

There will also be provisions that make it absolutely clear you have each had full information and advice and are quite clear you wish the Agreement to be formally binding. The Agreement will be rounded off with your consent to have it registered for preservation and execution. Although this sounds alarmingly like sanctioning capital punishment, it allows for the possibility of chopping off money rather than heads! It allows the Registered Agreement to be enforced in ways that a Court Order can so far as the financial aspects are concerned. There may be other documents to be prepared in order for some of the agreed steps to be carried out. For instance if a house transfer is involved then a document known as a Deed of Gift or Deed of Assignment has to be prepared to change the ownership. If there is a secured loan, then either a variation of the existing loan or a discharge and a new Standard Security will be needed to sort out that responsibility.

CHAPTER 7

CHILDREN IN SEPARATION AND DIVORCE

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

Children usually want their parents to stay together, they will be unhappy about the separation. Children should be able to love both parents without feeling guilty or disloyal. They won't want to feel that one of their parents is a bad person. More and more research is available on how children feel during a separation and how they turn out afterwards. It seems that children are often so frightened to rock the boat anymore and so anxious not to hurt their parents, that they hide their own feelings. In most cases, the parents are quite unaware of how

badly the children feel. A separation will usually sadden children but it need not cause serious lasting damage. The damage is usually caused by the adults fighting, especially where that conflict has the children as a focus, which often happens after separation. Although the separation itself is likely to upset the children, it is up to both parents to protect the children from the fallout. As mentioned, if either parent fails to do this, it is likely to lead to damage. It is particularly difficult if you didn't want to separate in the first place. You have to think about the long term, and hold on to the fact that your own relationship with the children later on is likely to be much better if you keep them out of the adult problems. The children are also likely to turn out happier and better adjusted. So will you probably! Children are usually much more aware of what is going on than you would realize. Uncertainty about the future can make them feel worse than the truth.

They will want to know where they are going to live and go to school and when they will be with the other parent. It is usually best to spare them the gory details of the reason for the separation. The main message for children from both parents should be that sometimes parents do separate, that it is sad when they do, but they continue being parents and loving their children and that the separation is not the children's fault. If you were the one who left the family home, it is quite likely that the children will feel hurt about themselves. This is particularly true if you have a new partner, especially if that partner has children. Don't assume that just because the children seem happy when they are with you, they are not upset. They might confide such feelings to the other parent. Try to work with rather than against the other parent over this. Don't assume the children are being coached or indoctrinated. Similarly, don't reach for the telephone to protest if you are the main care and the children return after contact upset and full of complaints. Children, like adults, take time to adjust after a separation. They have to work through various stages. This will show up in different ways, depending on their ages, from bed wetting to tantrums to lack of concentration.

The signs often peak after contact but it is better that there should be visible signs of adjustment than silent suffering! Make sure they realize that the separation isn't their fault.

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

TO THINK ABOUT

Using mediation or the collaborative process can help create a climate which makes a separation more survivable for children. Think of how the children will feel you dealt with the separation when you all look back in five or ten years. Keep a focus on being good separated parents even if you still feel very raw about the ending of the adult relationship. Imagine how the children would like things to be post separation. Bear in mind 10 golden rules:-

10 GOLDEN RULES FOR PARENTS

- Tell your children that mum and dad love them and you know they love mum and dad.
- Tell your children that you want them to feel at home with both mum and dad.
- Tell your children that the separation was not their fault.
- Show your children you are able to sort things out and they don't need to look after you.
- Give the children an example of the way you want them to behave.

- Find some way of communicating direct with your ex-partner; don't use the children as go-between.
- Don't argue with the other parent in front of the children.
- Don't criticize the other parent in front of the children.
- Pay attention to the children individually.
- Accept the other parent may have a different parenting style.

CHAPTER 8

THE LAW RELATING TO CHILDREN

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

AGREEMENT

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

MEDIATION

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

PARENTING PLAN

The plan is not legally binding on parties but aims to encourage parents to think about potential problems, and their solutions, before they cause major difficulties.

PARENTAL RIGHTS & RESPONSIBILITIES

If you cannot agree between yourselves what is best for your children, you can ask the court to decide. This Act emphasizes the responsibilities parents have rather than their rights. Parental responsibilities include the responsibility to safeguard and promote their child's health, development and welfare, and to provide guidance and direction. A parent is also responsible for maintaining contact with their child. The rights which parents have mirror these responsibilities and their function is to enable parents to fulfill their responsibilities. These rights and responsibilities continue until the child reaches 16 years, except for the right and responsibility to provide guidance, which continues until the child reaches 18 years.

COURT ORDERS

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

RESIDENCE & CONTACT

The court can be asked to step in and make various orders where necessary. The most common are orders for residence and contact. Residence orders regulate where children are to live. Contact orders regulate the maintenance of relations between, for example, the children and the non-resident parent. Contact and residence orders are not confined to disputes between married couples and grandparents is just one example of parties who frequently have questions about rights relating to children. Children themselves may need and can obtain advice on how the law affects them and their rights.

INTERDICTS & SPECIFIC ISSUE ORDERS

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

DECISIONS ABOUT CHILDREN

The law does not consider that either the mother or father has a better claim. The decision is based on what is in the best interests of the child. That will depend on who is best able to provide for the practical and emotional needs of the child. A court is usually slow to significantly change arrangements which have been working well enough.

REPORTS

In order to help make its decision, the court can call on the expertise of third parties. For example, the court can order a Reporter to produce a report. The Reporter may be an experienced family lawyer or sometimes a Child Psychologist who will meet parents, the children and other parties involved with the children: for example, teachers or grandparents. The Reporter will then write a report on what she or he considers to be in the best interests of

the child. The court can then use the report when making its decision, usually at quite an early, interim stage. If required, the Reporter can produce supplementary reports. Decisions made at an early stage often influence the final outcome or are accepted by both parents as if they were final.

GUARDIAN

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

CHILD WELFARE HEARINGS

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

CHILDREN'S VIEWS

The views of the children themselves are also important. A child of twelve is assumed to be old enough to say what their views are. With younger children, it depends on their maturity. Children can be given a form to fill out which only the councilor will see, and which gives them the opportunity to express their views. Court action is very much a last resort. It is often stressful. In the long-term, it is better if parents can agree arrangements for their children between themselves.

TO THINK ABOUT

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

It's no fun being the meat in the sandwich! Consider using mediation or the collaborative process to sort things out.

CHAPTER 9

DIVISION OF MONEY AND PROPERTY MARRIED

COUPLES

One of the big worries after separation is money. Two households are going to be more expensive than one. There may be debt already, and even if there isn't, there is a real risk that some will start mounting up unless you are both able to be realistic. There are two separate money issues to tackle. One is the question of immediate ongoing finances including weekly or monthly support, division of responsibility for existing debt and how each of you will meet commitments like housing loan payments and utility bills.

The other is how to split up fairly the property that you have built up during the marriage, decide if differences in income merit some further adjustment and sort out child support.

It is possible to ask the Court to sort out the ongoing finances at any time but it is generally only in an action for divorce or dissolution that you can force a decision regarding division of matrimonial property by asking the court for the orders you believe are justified by the legal rules.

In practice, couples often want to sort out both of these aspects as soon as possible, even if they are not wanting an action for divorce or dissolution at once. You can use mediation, the collaborative process or negotiation to work out terms for a Separation Agreement taking into account the rules that would

apply on divorce. The two areas, ongoing finances and the division of matrimonial property or partnership property, tend to be bound up with one another. You can't really take anything in isolation.

WHAT IS MATRIMONIAL?

Matrimonial is all the property belonging to you both at the time you stop living together as a couple (which occasionally can happen when you are still under the same roof but start leading separate lives) or raise proceedings for divorce (whichever is earlier and is the date referred to as the "relevant date") and which you acquired during the marriage (or any house or furniture you bought before then to use as or for a family home). It includes the proportion of pension or life policy interests which accumulated during the time of the marriage up until the separation. It excludes inherited assets or money and personal gifts from third parties (and assets you owned before the marriage, subject to the rules about family homes mentioned earlier). The question of whether or not a particular asset counts as matrimonial property is not always clear-cut, and if agreement can't be reached occasionally has to be decided in Court.

DIVISION OF MATRIMONIAL PROPERTY

Law encourages the "clean break" principle. Lump sum payments, known as capital sums, and a later addition of orders allowing pension sharing, were encouraged to take the place of ongoing payments to a former partner and the circumstances in which ongoing support would be payable were restricted.

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

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

One overriding principle is that although the way someone behaves might be the reason a divorce or dissolution of a marriage is granted, that behavior will usually not be taken into account when the money side is considered. You might be surprised by this. You might think, for example, that your partner should be penalized for having walked out on you to go and live with someone else. It is perhaps not easy to accept, but it is important to realize that even though the ending of the relationship may be achieved by proving fault, the financial division will not be. It is only in very restricted circumstances that conduct can be taken into account. The cases where this is factors are very rare and mainly focus on circumstances where quite extreme behaviour has had a significantly negative impact on the finances. The other general point to remember is that if the financial things have to be sorted out in Court rather than by Agreement, it doesn't matter which of you raises the action, the other one can normally get their entitlement sorted out in the same action.

BUSINESS INTERESTS

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

DEBT

Once all the assets including any other properties such as holiday homes, investments, the value of any policies which

has accumulated during the marriage or any other asset acquired has been worked out then all the debt which has accumulated at the relevant date has also to be identified. The debt is taken away from the assets and the amount left is the net matrimonial property.

SOURCE OF FUNDS

Another factor which might affect the decision is if assets from before the marriage had been used to acquire assets after the marriage. For example if you had savings, then married, then bought a painting with them then the painting is matrimonial property though you could ask for the source of the funds used to buy the painting to be taken into account in your favour. Although the rules specifically say that the source of funds can be taken into account, that argument is weaker if the relationship has been quite a long one and the funds have been used to buy a family home, particularly if it is put in joint names.

APPROACH TO DIVISION

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

FINANCIAL SUPPORT

Quite apart from the division of matrimonial or partnership property there is the question of the need for ongoing financial support. During a marriage if you are not working or earning much less than your partner you can ask for monthly support called alimony (separate from support for any children you might have).

If your partner wants you to live with him or her and this offer is reasonable you may not be able to get alimony for yourself. The

amount of alimony has to take into account the needs and resources of both parties. To continue receiving ongoing financial support after divorce (this time called periodical allowance) you must be:-

Hampered from being self supporting because of looking after any children of the relationship under 16.

Have been financially dependent on your partner for financial support in which case support can go on for up your lifetime or till you remarry or earlier settlement by agreement.

Be likely to suffer serious financial hardship as a result of the divorce. This is difficult to establish but there is no maximum fixed period if you are in this category. If you want to claim periodical allowance you have to show your partner can't pay a lump sum instead. Sometimes the fact that a claim could be made for periodical allowance can be used to justify an alternative higher capital settlement which could involve for example the transfer of the family home.

SUBSEQUENT VARIATION OF ALIMENT OR PERIODICAL ALLOWANCE

If either of you undergoes a major change in circumstances during the period the maintenance is payable, you can ask the Court to review the level of maintenance. The overall amount of a capital sum on the other hand cannot be changed, even if it is payable by installments.

TO THINK ABOUT

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

CHAPTER 10

FINANCIAL SUPPORT FOR CHILDREN

Both married and divorced parents can be asked to share the financial responsibilities of childcare. If you are not living with children this is usually in the form of weekly or monthly support called aliment or child maintenance. The rules for this are not the same as the rules for aliment for a spouse or civil partner. The question of child support can be dealt with by agreement. If agreement is not reached then the Child Support Agency applies a formula to work out how much maintenance should be paid by the absent parent for children. Even if an agreement is reached and set out in writing, either of you could ask the Child Support Agency to carry out an assessment at any time after the first anniversary of this Agreement.

IF YOU HAVE ACCEPTED A CHILD INTO YOUR FAMILY

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

CHANGE OF SURNAME

If you want to go back to using your original surname you don't need to wait until your divorce. Equally, you can go on using your married name after the divorce; however according to a recent judgment passed by Hon'ble Bombay High Court a wife cannot use her husband's surname after divorce.

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

TO THINK ABOUT

You don't necessarily have to have been separated for a year before you start a divorce. However you do need to have sorted out any financial matters before you take this step or you will need to ask the Court to sort things out in the divorce proceedings. You don't have to be separated at all to start proceedings in Court for divorce or dissolution if you can use a fault based way of showing the marriage is over.

CHAPTER 11

PRE-NUPTIAL & POST-NUPTIAL AGREEMENTS

WHO SHOULD HAVE THEM?

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

WHAT ARE THEY FOR?

They can be tailor-made to suit your requirements. They are generally designed to exclude or limit the provisions of the law relating to matrimonial or partnership property and financial provision on divorce or separation. The law defines matrimonial or partnership property as being all assets acquired by parties either jointly or solely after the marriage or partnership until the date of separation. Inherited items or gifts from third parties are not matrimonial or civil partnership property. On this basis, there might seem little point in having a pre-nuptial agreement, since at that stage there will be no matrimonial or partnership property.

A pre-nuptial agreement can aim to exclude assets, or anything deriving from them from the definition of matrimonial property. It can establish that your partner is to

be excused from making a claim against a particular asset, no matter what. This could be used for example if you have a business built up before the marriage, which then undergoes significant re-structuring over the course of the marriage. Ordinarily, your partner could argue that the restructured business had become matrimonial property.

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

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

HOW ENFORCEABLE ARE THEY?

There is not much case law on this. A pre-nuptial agreement can be set aside or varied by the courts. The overriding concern of the courts is to examine whether the agreement was fair and reasonable at the time the parties signed it. There are various factors to bear in mind. The longer the marriage, the less relevant the pre-nuptial agreement is likely to be, and therefore the more opportunity for challenge. Circumstances are likely to have changed significantly since the agreement was signed. It is possible to word the agreement so that it will only cover specified period. If an agreement is clearly designed to benefit one partner to the exclusion of the other, again there is more scope for challenge.

The circumstances in which the agreement was signed will be relevant. Factors which may lead to the agreement being unenforceable include one partner putting pressure on the other to sign, signing within days of the ceremony or not taking independent legal advice.

TO THINK ABOUT

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

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

CHAPTER 12

MAKING A WILL

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

IF YOU ALREADY HAVE A WILL

If you already have a Will, then if you die, the terms of your existing will stand, even if your circumstances have changed since you made that Will. In India marriage does not have the effect of making an old Will invalid. In these circumstances the terms of your Will might be open to interpretation. A court might have to decide whether a legacy to “my husband” meant the husband at the time the Will was written or the husband at the time of death. The birth of a child will not change or cancel a Will either, although there are other ways that a child can make a claim.

IF YOU HAVEN'T MADE A WILL

If you have never had a Will, then on death what you owned (“your estate”) would be divided up according to legal rules of “Intestacy”.

INTESTATE SUCCESSION

RULES OF INTESTATE SUCCESSION VARIES FROM RELIGION TO RELIGION

When someone dies and leaves no Will their surviving wife/husband is entitled automatically to certain shares of the estate.

LEGAL RIGHTS

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

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

Cohabitants: cohabitants do not have any automatic rights. They may be able to make a claim on their deceased partner’s estate, but only where there is no will. The court will also look at any claims being made on the deceased’s estate by his/her surviving children.

WHAT’S INVOLVED IN MAKING A WILL?

APPOINTING AN EXECUTOR

An executor is someone who is appointed to help sort out your property after your death. This might include paying off any debts, dealing with the tax office and distributing the property. Most people appoint two executors. You can appoint a professional person, such as your lawyer or bank manager but you should be aware that they may charge for this. People usually ask someone close to them such as their husband or wife and children. The executors can employ lawyers to carry out work for them. The expense is met from the dead person’s estate. The executor is legally responsible for any mistakes so it is worthwhile seeking legal advice and asking a lawyer to do the necessary administration.

APPOINTING A GUARDIAN:

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

PREPARING THE WILL

Your Lawyer will discuss your needs in detail. Here is a checklist of what you need to think about:

1. PRIOR WILL:

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

2. EXECUTOR/GUARDIAN:

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

3. PROPERTY:

You will need to think about who you wish to leave your property to. The following are examples.

A) House

If you own a house or a share in one you can pass this on. You can also make a more complex arrangement where someone lives in your house during their lifetime but the house is owned by someone.

B) Specific Items

If you have particular items, such as jewellery or a piece of furniture, which you would like to pass on to a relative or friend you can simply include this in your Will. This is known as a “specific legacy”.

C) Money

If you want to leave anyone, or your favourite charity or good cause, a sum of money you can make what is called a “pecuniary legacy”.

D) Residue

After all the above have been dealt with the property left over is called the residue. Think who you would like to have this. It is common to leave it to a surviving husband/wife or to your children. If any of the people in these categories die before you it is possible for their share to be passed on to their own children or grandchildren (known as their representatives.).

E) Life rent

In some circumstances you might wish someone to continue to use your property or money without actually owning it. For example, if you have a new partner you may wish them to be able to stay in your house after your death but also want to make sure your children inherit the property. This arrangement is called “Liferent and Fee”. Your partner would be known as the “Liferenter” and your children the “Fiars”. This is common in second marriages where there are children from the first marriage.

4. OTHER ISSUES TO CONSIDER:

A) IF SOMEONE DIES BEFORE YOU

If you are worried that some of the provisions of your Will might not be effective it is possible to put in a kind of “what if” provision. For example you could leave your residue to your husband/wife/civil partner “whom failing” your children. This would mean that if the first person died before or at the same time of you, your property could be passed on without the Will becoming invalid.

B) CHANGES TO YOUR WILL

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

C) FUNERAL ARRANGEMENTS

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

5. LEGAL RIGHTS

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

INHERITANCE TAX

This is a tax which is paid on the estate. The tax does not apply to money left to a husband/wife and there are tax exemptions up to a certain value and for certain items such as wedding gifts.

SEPARATION AGREEMENTS

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

TO THINK ABOUT

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

CHAPTER 13

FINANCIAL PRACTICALITIES

BANK ACCOUNTS, COUNCIL TAX, PENSION NOMINATIONS, CHILD AND WORKING TAX CREDIT, CAPITAL GAINS TAX, INDEPENDENT FINANCIAL ADVICE.

BANK ACCOUNTS

If you have joint accounts, you should consider closing these, so that neither of you can withdraw money, or use the overdraft without the other's agreement. At the very least, you should contact your bank and ensure that any overdraft facility cannot be increased without the agreement of both account holders. This is especially important if your salary is paid directly into a joint account. If, as is likely, you use the joint account to pay direct debits, you should try to agree how these should be shared. You could then each set up separate accounts and take over responsibility for particular outgoings, bearing in mind it can take some time for direct debits to get moved over. If there are credit cards where the person is second card holder, again you should try to agree that these will not be used or, preferably, that they should be cancelled. Really, you want to do as much as possible to protect your position financially. It is much better if this can be done in a planned and co-operative way.

PENSION NOMINATIONS

If you have nominated your spouse to receive a death-in-service benefit, for example for your pensions, then you should decide if you want to change this.

INDEPENDENT FINANCIAL ADVICE

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

CAPITAL GAINS TAX

There are often tax implications following on from a separation. There are tax advantages for married couples which generally do not continue after separation. If assets are to be sold or transferred as part of a settlement, there will generally be capital gains tax consequences. Transfers between spouse are exempt from CGT, and this exemption is still available during the tax year in which the couple separated. However, if a couple separate towards the end of a tax year, it is very unlikely that a settlement will be finalized before the end of that tax year. Without proper advice, you could find yourself financially worse off than you anticipated during the negotiation period, particularly where an asset has increased significantly in value over the course of the marriage. There is some leeway for the family home for up to 3 years but this is an issue to explore with an accountant.

TO THINK ABOUT

Your solicitor may be able to point you in the right direction.

CHAPTER 14

COUNSELLING

With family problems, because of all the mixed emotions around, it can be difficult to see what is for the best. Counseling

is a helpful way of coping with those feelings. There are many different types of counseling, each with a slightly different emphasis. It is worthwhile 'shopping around', and booking an initial session, to see which type of counseling, and which counselor suits you and your needs best.

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

COGNITIVE BEHAVIOURAL THERAPY

Emphasizes finding links between your feelings, ways of thinking and behaviors, and working to understand and break patterns of thinking and acting which are not helping you anymore.

PERSON CENTERED

Offers an accepting, warm, non judgmental relationship in which you can explore your situation and make changes.

TRANSACTIONAL ANALYSIS

Focuses on understanding the ways we relate to ourselves and other people. It offers the opportunity to experiment with new ways of relating to ourselves and others.

PSYCHODYNAMIC

Provides a way of exploring how our past experiences and relationships may have shaped the way we experience the present. Through this understanding, it offers us the chance to act consciously and skillfully in present situations.

GESTALT

Makes use of our here and now experience to gain understanding of how we are feeling and acting. It encourages us to be aware of

and act according to what we really feel and need, and to free ourselves of blocks which may have come from the past.

TRANSPERSONAL

Offers ways of working creatively and imaginatively, with issues which arise at times of transition and upheaval in life. The transpersonal acknowledges the spiritual aspects of life and questions of meaning.

CHAPTER 15

EXPENDITURE YOU YOUR PARTNER

- Housing costs
- Rent/loan repayments
- Endowment policies
- Buildings
- Contents
- Gas/ electricity
- Telephone
- Car costs
- Food
- Council Tax
- Nursery Fees
- School Fees
- Aliment paid: CSA/MA/Informal/Court

NEW PARTNER?

Are you living with new partner? YES / NO

If YES, do they have an income? YES / NO

If YES, give details of how much they contribute to your listed expenditure

ASSETS AND LIABILITIES

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

YOU YOUR PARTNER
JOINT CURRENT VALUE

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

OTHER ASSETS

- Time share/holiday home/ other heritage
- Household contents of special value
- Other Endowment policies
- Savings
- Shares
- Premium Bonds
- Other Investments
- Pension values
- Occupational/Private
- Additional State Pension

YOU YOUR PARTNER JOINT CURRENT VALUE

- Business Interests
- Vehicles
- Any inheritance or gifts or previous assets
- Other resources

TOTALS LIABILITIES

- Bank loans
- Car loans
- Credit cards
- Other:
- Additional Information

CHAPTER 16

CONCLUSION

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

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

Unfortunately I can't comment about individual circumstances, I can only give legal advice where I have the full information to do justice to your situation and have established a working relationship.

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