INTRODUCTION TO DIVORCE

So, you want to get divorced? Or, perhaps it is your spouse who wishes to divorce you? Either way, and assuming the marital breakdown is “irretrievable”, the primary questions are:

- How does the divorce process work?
- What is to be done with the marital home, assets and finances?
- What will happen to the children? [for a detailed consider of this topic, see Child Law]

The Divorce Process

If one party to a marriage wishes to obtain a divorce, then there will be a divorce, regardless of whether or not the other party to the marriage agrees or not. That is the reality of divorce litigation. The policy behind this is that the courts do not wish to see parties held in a relationship which they do not choose to be involved in. The courts do not pursue a “fault-based” divorce law when it comes to splitting the matrimonial assets. Therefore, it is generally a relevant that one party, or another, is more “culpable” for the breakdown of the marriage e.g that one spouse has had an affair. Whilst this may seem unfair, it is usually justified on the basis that the divorce process should not encourage recrimination, but should facilitate both parties going their separate ways with a fair resolution to a division of the matrimonial estate, or finances. It is therefore one of the great urban myths regarding divorce that the innocent party will retain all or most of the assets on divorce where the other party has committed adultery or not behaved particularly well. This is simply not correct. Whilst such behaviour may be grounds for divorce, the Court will not take into account such conduct in dividing the assets.

It is for this reason that a “defended” divorce in England and Wales is now almost unheard of.

The Ground(s) for Divorce

“Irretrievable breakdown” if the sole basis for divorce. If a person decides that his or her marriage is at an end, or should be at an end, then a divorce is available by proving one of five facts:

(a) that the respondent has committed adultery and the petitioner find it intolerable to live with the respondent;
(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the decree being granted;
(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

Para (b) is the most popular, partly because it involves no interval of time being established, and can be used immediately. It is also popular because all manner of behaviour can be shoehorned the rubric of “unreasonable behaviour”. The classic examples of unreasonable behaviour are one party “belittling the other in front of other people”; “becoming increasingly cold and neglectful”; “unjustifiably critical”; “spending long periods away from the marital home without explaining his/her whereabouts”. These instances would are all commonly found in a divorce petition based on “unreasonable behaviour”.

The adultery ground (a) is also popular, if the facts can be shown, as it is also speedy.

The Procedure for obtaining a divorce: the Petition

In the vast majority of cases, as indicated above, the divorce will be undefended and granted without a hearing. A divorce can be defended on the basis that the facts alleged in the divorce petition are not and do not justify the grant of a decree of divorce. However, to defend a divorce petition is often merely to increase costs and to delay the inevitable.

A divorce must be originated by a divorce petition. Completing the form is relatively straightforward, the only part which requires consideration is to specify the ground of divorce (i.e. which of the 5 grounds above). Usually filed together with the fourth petition is: (a) a statement of arrangements for children; (b) marriage certificate; (c) a solicitor’s certificate that reconciliation has been attempted. A petition can be found at http://hmctsformfinder.justice.gov.uk. A specimen divorce petition can be found here.

The divorce itself is a two stage process, firstly consisting of an interim decree (otherwise known as a “decree nisi”); secondly, a “decree absolute”, which is the final order granting the divorce. A
petitioner will usually apply for a decree absolute 6 weeks after obtaining the decree nisi. The parties are only free to re-marry upon the grant of a decree absolute. A party re-marrying without obtaining a decree absolute will be guilty of the offence of bigamy.

There can be no final order on division of the matrimonial assets until a decree absolute has been pronounced.

**Division of Assets on divorce**

The law of dividing assets on divorce is very complex. This is because there are an infinite number of factual financial scenarios circumstantial to a marriage. No two divorces are the same. There is no set formula. Previous cases usually provide no more than useful for general guidance. Most of the cases turn on a detailed factual analysis of the parties’ finances, usually divided into detailed schedules of the parties “capital” i.e. their capital assets including properties, pensions, investments, cars etc, and their “income” i.e. what each party earns from their jobs, or investment income. The court will require the parties to fully disclose all their assets, and income during the financial resolution of the parties’ affairs.

The court therefore has a very wide “discretion” to seek to achieve the right, or fair, result allowing the parties to put the relationship behind them, but at the same time making sure adequate provision is made for the parties themselves, as well as any children. One consequence of this approach is, however, that it is somewhat difficult to lawyers, and their clients, to precisely predict the outcome of the division of assets. Given parties generally self-interest in twisting arguments, facts, and disclosed documents in their own favour under the pressure of a divorce, a criticism of the process is that it often leads to heated, and bitterly acrimonious, hearings at not inconsiderable cost. This has driven the rise of divorce by “mediation” and “conciliation” rather than by adversarial court process.

For a long time, the process of seeking a financial division of assets was called “ancillary relief”, namely that the financial relief is “ancillary” to the main divorce action. The term “ancillary relief” has now been replaced by the term “financial remedies”.

**Final Order**

Ordinarily, if attempts to settle the splitting of the matrimonial assets fail, a final hearing will be listed. Very often cases will settle in the lead up to the final hearing, or even at the door of the court.
Typical Orders made at final divorce hearings are:

(1) Consent order providing for a clean break on a transfer of property order, and ordering child maintenance by consent;

(2) Consent order providing for a clean break based on the sale of the matrimonial home, a lump sum payment by instalments, and additional child maintenance to cover school fees;

(3) Consent order providing for a continuing financial relationship between the parties, with periodical payments and a settlement of the house [the Petitioner being publicly funded]

THE DIVORCE PROCESS

Getting Married

The rules governing capacity to marry can be found in the Matrimonial Causes Act 1973 (MCA 1973), s.11. They allow persons who are not closely related, who are of the opposite sex to one another, not already married and who are aged over 18, or over 16 with parental consent, to marry. Special rules allow those who are not domiciled in England and Wales to marry polygamosly outside England or Wales.

Even where the parties have the capacity to marry, the validity of the marriage may be questioned if the formalities have not been complied with (MCA 1973, s.11), or if the marriage has not been consummated or one of the parties either did not consent to it or had not the capacity to consent to it, or married a person who was pregnant by another or suffering from venereal disease at the time of the marriage (MCA 1973, s.12). Note that MCA 1973, s.13 provides defences to some of these grounds.

When s.12 applies, a decree annulling the marriage must be obtained; whereas when s.11 applies, a declaration from the court should be obtained.

Formalities for the marriage service are governed primarily by the Marriage Act 1949. The Act allows a marriage to take place in any approved building, and many hotels and locations such as football stadia and London Zoo have been approved. There are some requirements as to the content of the ceremony; see, for example, the Marriage Ceremony (Prescribed Words) Act 1996. While rules on the formalities of marriage are well established, they can cause some difficulties. For
example, a marriage that follows the rites of a religion will not necessarily be formally valid if there is not also a civil ceremony in a Registry Office.

Since 5 December 2005 it has been possible for two people of the same sex to enter a civil partnership under the Civil Partnership Act 2004 (CPA 2004). The ceremony must be performed in an approved building and registered. Civil partners have many of the same rights as a married couple in terms of maintenance, benefits, inheritance, etc. Similarly, the divorce process is the same, although the vocabulary differs slightly (civil partnerships are ‘dissolved’).

The Ground for Divorce/Dissolution

If a person decides that his or her marriage is over, a divorce is available under the MCA 1973, s.1, only on the ground that the marriage has broken down irretrievably. This irretrievable breakdown may be shown in one of five ways:

(a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.

(b) That the respondent has behaved in such a way that the petitioner cannot be reasonably expected to live with the respondent.

(c) That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.

(d) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the decree being granted.

(e) That the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

Only the first two involve no interval of time and can be used immediately, and therefore tend to be the most popular. However, both are based on the fault of the other spouse and are therefore to
some extent antagonistic. The fourth ground is the only one which is consensual and makes no allegations of fault, but this requires two years of separation before a divorce can be granted.

There may be important considerations in deciding which basis for divorce to allege if there is any choice on the information provided by the client. Of course, the basis must be legally sound and supported by available evidence, but if there is a choice it should be carefully made. Adultery and ‘behaviour’ are most commonly used for speed, whereas the alternatives require a wait of at least two years. Two years’ separation and consent has the advantage of a parting by agreement. If more than one basis for divorce may be alleged, the choice may be based on the strength of available evidence, or on tactics.

To give an example, an allegation of behaviour may be useful if it lays a foundation for claims to be made in financial or children hearings, but may be unwise if it upsets a spouse with whom it is hoped a good financial settlement can be negotiated.

The Procedure for Obtaining a Divorce

The court must have jurisdiction to hear the divorce. This depends on the residence and domicile of the parties, and if there is an international element to the case it can be a complex issue. A spouse may wish to apply for a divorce in a particular country where he or she feels that financial provision rules may be more advantageous. In recent years there has been a perception that English rules may favour wives where a husband has substantial assets.

The great majority of divorce petitions are not defended and, in the case of an undefended divorce, r. 7.20 of the FPR 2010 allows the divorce to be granted without a hearing; this will be the procedure that applies in the vast majority of cases. A divorce can be defended on the basis that the facts alleged are not true or do not justify the grant of a decree. In the case of five years’ separation there is a statutory defence if it can be shown that a divorce would result in grave financial or other hardship for the respondent (MCA 1973, s.5). This is rarely used, and may be avoided if it is possible to find some way of making financial provision.

Divorce is a two-stage process, consisting of an interim decree (or ‘decree nisi’) and a final decree (or ‘decree absolute’), and he parties are only free to remarry once the latter has been obtained. Applications for a decree nisi are made using FPR Form D84; for a decree nisi to be made absolute,
application is made using FPR Form D36. Generally, it is the petitioner who will apply for the decree absolute six weeks after the decree nisi has been granted by the court, but the respondent can apply once a further three months have elapsed if the petitioner has not done so. When the court grants a decree absolute, it now uses the suitably unromantic sounding FPR Form D37D.

The hearing of applications relating to financial matters, and ancillary matters relating to children is normally adjourned to be heard in private. Since 6 April 2011 it has been a requirement that a person initiating an application should follow a Pre Action Protocol, which requires that (except in limited circumstances) the potential applicant should consider with a mediator whether the dispute may be capable of being solved by mediation: FPR 2010, PD3A, Pre Application Protocol for Mediation Information and Assessment. There are a range of concerns about how effective this requirement will be, and this remains to be seen.

There may be a delay in the issue of the decree absolute if the judge feels it is necessary to use the court’s powers with relation to the children (MCA 1973, s.41). Arrangements need not be detailed and final, but the judge must feel confident that there are no serious potential problems. A decision is taken on the basis of a written ‘statement of arrangements’, FPR 2010, Form D8A. If the judge is satisfied with these, the divorce will proceed under the special procedure. If the judge is not, he or she can ask for further evidence and if necessary there can be a hearing relating to the arrangements. The divorce can be delayed under s.41 if there are exceptional circumstances and it is felt that this would be in the interests of the children.

Under the current law, there are a variety of tactical and practical considerations that may be relevant in bringing or defending a divorce. Although it is possible to allege more than one basis in a petition, it is common, for costs reasons if no other, to plead only one basis, and a decision should be taken not only on the strength of the evidence but also on the likely reaction of the other side. The precise legal interpretation of each possible basis for divorce should be checked. For example, the test for behaviour is partly objective, but is also subjective; in Birch v Birch [1992] Family Law 290, the court allowed a wife to divorce a dogmatic and chauvinistic husband.

A divorce must be originated by petition. From 6 April 2011, the previous approach of a petition drafted by a lawyer has been replaced by FPR Forms D8, Divorce/dissolution/(judicial) separation petition.
The Application Form

Guidance on completion of FPR Form D8 is provided in FPR Form D8 Notes.

The petition form to commence the divorce or dissolution proceedings is filed in the local divorce county court or in the Divorce Registry in London, as appropriate. The form needs to be completed with a signed statement of truth: FPR, Part 17. With it are filed:

(a) A statement of arrangements for children P(if there are ‘any children under 16 or over 16 but under 18, who are at school or college or are training for a trade, profession or vocation (FPR Form D8A)).

(b) The marriage certificate.

(c) A solicitor’s certificate that reconciliation has been attempted (FPR Form D6).

Other provisions relating to the procedure for applications in matrimonial and civil partnership proceedings are included in FPR 2010, Part 7.

DEFENDING AN APPLICATION

The Decision to Defend

Form D8 is served on the respondent with a form for acknowledgement of service (FPR Form D 10A), and a notice informing the respondent what courses he or she can take. Respondents who wish to defend the case should give notice of intention to defend within seven days.

It is not now common to defend a divorce petition. Even if there are disputes about money or children, many couples agree in advance what the basis for the divorce should be, and which spouse should be the petitioner. According to FPR 2010, r. 7.12, an answer is only required, within 21 days of the date for filing the notice of intention to defend, if a respondent (or co-respondent):

- wishes to defend the petition, or dispute any facts alleged in it;
wishes to cross-petition, that is, to seek a divorce on an alternative basis; or

wishes to oppose the grant of divorce under the MCA 1973, s.5 (petition alleging five years’ separation and there is a defence of grave financial hardship).

It is not necessary to file an answer simply to be heard on ancillary matters relating to finance or the children. The decision whether to file an answer may involve practical considerations, bearing in mind that the mind that the majority of divorces are undefended and that defending will normally have the effect of making the divorce procedure longer and more expensive. This may require some discussion with the client, whose emotions may not immediately suggest the wisest course. In practical terms, an answer will be required:

- if the respondent does not want a divorce at all, and has some basis for defending the allegation in the petition;

- if the respondent really cannot accept the basis on which a divorce is sought in the petition, and has good reason for alleging an alternative basis; or

- if the petition makes allegations that may prejudice the respondent in the financial hearings or those concerned with children.

**Void and Voidable Marriages**

It should be kept in mind that divorce is not the only option if a client wishes to end a marriage. It is possible that the marriage may be void (MCA 1973, s.11) or voidable (MCA 1973, s.12). If either spouse in not domiciled in England and Wales, or was not so domiciled at the time of the marriage, then conflict of law points should be considered.

The grounds on which marriage may be void are:

(a) That the parties are within a prohibited degree of relationship.

(b) That either party is under the age of 16.
(c) That vital formalities relating to the marriage were disregarded.

(d) That at the time of the marriage either party was already lawfully married.

(e) That the parties are not respectively male and female.

(f) That in the case of a polygamous marriage entered into outside England and Wales, either party was at the time of the marriage domiciled in England and Wales.

The grounds on which a marriage may be voidable are:

(a) That the marriage has not been consummated owing to the incapacity of either party.

(b) That the marriage has not been consummated owing to the wilful refusal of the respondent.

(c) That either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise.

(d) That at the time of the marriage either party was suffering from mental disorder of such a kind or to such an extent as to be unfitted for marriage.

(e) That at the time of the marriage the respondent was suffering from venereal disease in a communicable form, and the petitioner did not now this.

(f) That at the time of the marriage the respondent was pregnant by some person other than the petitioner, and the petitioner did not know this.

The last four of these may only be used within three years of the marriage. In the case of either a void or voidable marriage, it is possible for the court to order financial provision and to make orders for the care of children. FPR Form D8N is used for a nullity petition.

MATRIMONIAL FINANCE ON DIVORCE
The Legal Framework

Broad powers to order financial provision are provided by statute, primarily in the Matrimonial Causes Act 1973 (MCA 1973), as amended. Procedure is set out in Part 9 of the FPR 2010. The powers of the court with regard to maintenance for children are limited by the Child Support Act 1991 (CSA 1991) (as amended).

Because every case will involve different assets and different problems, the powers provided by statute are very wide to allow orders to be tailored to fit each individual case. For this reason, the statutory provisions themselves include only general guidance as to how the powers should be exercised. The MCA 1973, s. 25 contains a list of matters to which the court must have regard when deciding how to exercise its powers. The list is widely referred to in practice as the ‘s.25 factors’ and these factors govern all applications for financial remedies. The words of the statute are plain and are designed to give judges latitude and discretion; practitioners will always seek to base their arguments, and judges their conclusions, on the words of the statute itself. Each case turns on its own facts and decided cases will rarely be persuasive or relevant, even when they have similar features. However, on occasion, decided cases can assist with interpretation and general guidance on how the s.25 factors should be understood and applied in practice.

Section 25 of the Matrimonial Causes Act 1973: General Principles


Under Section 25, the Court has a general duty to take into account "... all the circumstances of the case". The phrase "all the circumstances" enables the court to take into account whatever factors it deems to be relevant even if they are not specifically referred to in section 25.

It is important to appreciate that the s.25 factors set out below only applies to married couples on divorce, not to separating couples following co-habitation or unmarried couples.

The matters that the court has to take into account when dividing the assets on divorce are set out in section 25 of The Matrimonial Causes Act 1973. The general principles are as follows:

(a) On divorce, the aim is to divide the assets fairly. Fairness does not necessarily mean an equal division. What it does mean is that the parties must be left in the position of equal standing
and that there must be no discrimination between the respective roles of breadwinner and homemaker, which are regarded as equal;

(b) The first consideration must always be given to the needs of the dependent children. In practical terms, this usually means that accommodation must be provided for the children and the custodial parent. In some cases, this will require the custodial parent to retain the matrimonial home. Ideally, if the available assets permit, the court will always look to accommodate both parties. If not, it is generally the non-custodial parent who is prejudiced.

(c) The “starting point” is an equal division of the assets. It would be simplistic to simply say this is a simply a “divide by two” arrangement. For shorter marriages, for example, there is rarely an equal division of assets if there was an imbalance in terms of what the parties brought into the marriage in terms of assets. Where one party is very wealthy (and the other not), to provide a further example, a “divide by two” approach will not be followed. If one party has a far greater income the other party may receive a much greater share (than 50%) of the capital as part of the balancing exercise required by Section 25;

(d) the Court will always look to meet the needs of each party to be accommodated. If these needs can be met from the available assets and if there is then a surplus, the Court may go on to consider dividing the remaining assets taking into account their origin. This requires dividing the assets into matrimonial and non-matrimonial property. Matrimonial property comprises those assets that have been acquired “during the marriage” from the joint enterprise of both parties. Most assets in most divorces comprise entirely matrimonial property. Non-matrimonial assets are those assets that have accrued outside the marriage i.e. assets brought into the marriage by either party at the outset, assets that have accrued post separation, or those assets that have been received during the marriage from a source wholly extraneous to the marriage. Examples of the latter include gifts, inheritances received from one side of the family, and a personal injury accident settlement that one party was paid during the marriage. Once the reasonable needs of each party to be housed have been met, then any surplus may be divided unequally to take into account any unequal contributions. The financial contribution made by each party is one of the Section 25 factors. In practical terms this is only likely to be relevant in cases where the assets are substantial.

(e) wherever practical, the Court will seek to achieve a financial separation between the parties. This is called a “clean break”. This means that there will be no ongoing financial links between the parties save for child maintenance, if relevant. If a clean break cannot be achieved immediately then the Court has the power to order spousal maintenance for a fixed period so as to achieve a clean break in the future. Alternatively, the court may decide
that a clean break is not possible and order spousal maintenance for life. In practice, most financial settlements are on the basis of an immediate clean break. Orders for spousal maintenance are not common. Clean break settlements are not appropriate between parents and children. Parents always have a liability to maintain dependent children.

The s.25 factors in detail

So what are the section 25 factors and how are they applied in practice?

Section 25 mandates that the Court must focus specifically on the following, where relevant:

a. Welfare of the children (s.25(1))

b. Income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity and any increase in that capacity which it would be in the opinion of the Court the reasonable to expect a party to the marriage to take steps to acquire (s.25(2)(a));

c. Financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future (s.25(2)(b));

d. The standard of living enjoyed by the family before the breakdown of the marriage(s.25(2)(c));

e. The age of each party to the marriage and the duration of the marriage (s.25(2)(d));

f. Any physical or mental disability of either of the parties to the marriage (s.25(2)(e));

g. The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family including any contribution by looking after the home or caring for the family (s.25(2)(f));

h. The conduct of each of the parties if that conduct is such that in the opinion of the Court it would be inequitable to disregard it (s.25(2)(g));

i. The value to each of the parties to the marriage of any benefit which by reason of the dissolution of the marriage that party will lose any chance of acquiring s.25(2)(h)).

Welfare of the Children (s.25(1))

At the beginning of Section 25, the Court is directed to take into account the needs of any dependent children. This must be the 'first consideration' of the Court i.e. the needs of the children always come first. This consideration is limited to the children of the family, which is defined as any child who has been treated by both parties to the marriage as a child of their family. This includes
stepchildren. What it does not include his children conceived by one of the parties outside of the marriage, who were not part of the matrimonial home. The main issue in financial remedies proceedings is usually housing the children. This will be the first priority of any court. Further, the court will want to ensure that the children are adequately housed in a location that takes into account their needs in terms of schooling, family relationships and social networks and activities. It is quite common for the resident carer to be required to sell the home and move to a smaller property once the children have left no longer need it. The court will, if possible, try to stretch the resources so that the non-resident spouse has housing suitable for regular contact, ensuring that children cannot only visit, but also spend the night (known as “staying contact”). The younger a child, or the younger the children of the family, the more importance will be attached to their welfare; the closer a child is to 18, are less important its knees are likely to be in the overall balance.

Income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future including in the case of earning capacity and any increase in that capacity which it would be in the opinion of the Court the reasonable to expect a party to the marriage to take steps to acquire (s.25(2)(a))

The income of each party is often a critical aspect of each case. For example, if there is not sufficient income available to the person wanting to remain in the matrimonial home to pay the mortgage and outgoings, there may be no realistic alternative to selling it.

This In considering income, the Court may take into account bonus and commission payments. The Court will often look at the history of such payments and assess what is likely to be received in the foreseeable future on the basis of what has been received in the past. Courts will also take into account fringe benefits and perks such as company cars, petrol, payment of phone bills, pension payments etc.

The Court will take into account not only the current income of each party but also potential income. Generally, each party is expected to maximise their income. This can cause some difficulty where there are young children to be cared for. In some cases the court has decided that the custodial parent should return to work when the youngest child attends secondary school. There are, however, no hard and fast rules. The parties who choose not to work, or not to maximise their resources when they could do so are likely to have adverse inferences drawn against them. The subsection specifically requires the court to consider any increase in earning capacity that it would be “reasonable” to expect a party to take steps to acquire. A court is likely to be realistic about what is reasonable to expect people to do in the circumstances. For example, it is unlikely to expect carers
of very young children to go out to work full-time. If the court takes the view that a party of may need some time to retrain and/or otherwise adjust to future financial independence, the court may allow for this by making a fixed term periodical payments order.

The income and potential income of the parties is also important in that it also determines mortgage capacity which is often a critical factor directly linked to providing accommodation.

Another common issue is the income of any new partner. If a party has re-married or is cohabiting, then the new partner’s income can be taken into account insofar as it releases more of the payee’s income to enable maintenance to be paid to the former spouse or children. The court would need to be satisfied on the evidence that it was reasonable to expect this support to continue in the foreseeable future. Recoverable debt owed by a third party would normally be seen as a resource, though it may depend upon whether this was a “soft loan” (e.g by a family member where there was no real expectation of recovery).

The Court adopts a very wide definition of ‘property’. It covers just about every kind of asset including real property and interests in property such as tenancies or contingent interests, savings, life policies, investments of any kind, trust interest, pensions, retirement annuity trusts, shares, business interests and chattels including contents of the matrimonial home, livestock, cars and any other assets of value.

The Court can also take into account not only the assets that each party has now but also the assets that are likely to be received in the foreseeable future.

The issue of future inheritance may be raised by one or both parties. Generally, future inheritances are not taken into account unless it can be shown that there is an imminent expectation of one party inheriting a material amount. This is because such a possible future inheritance will be regarded as to “remote”. Further, a testator (the maker of a Will) cannot be compelled to disclose his or her intentions which may change over time. A Will can be revoked at any time. Against this, where there is an expectation of a significant inheritance, and where the court considers it is necessary to take this course in order to achieve fairness in a particular set of circumstances, the court can adjourn the lump sum element of an application for financial provision to wait the outcome of the inheritance.

The court can take into account the value of a business. This includes sole traders, partnerships and shares in limited companies. The value of a business can be extremely important particularly so after a long marriage and where the business is of significant value. If the business is to be retained then it
will need to be valued by a forensic accountant. This is usually done by way of a joint valuation. The valuation of a business is a complex exercise and the method used to value the business very much depends upon the nature of the business itself. In practice, it is extremely unlikely that the Court would order the business to be sold or for the other party to be given a direct interest in the business. The more common approach is for the business to be retained by one party and for the other spouse to receive other assets in lieu. The family business is usually the main source of financial support for the family and for this reason it will be preserved wherever possible. For this reason, where a family business has a net worth but it is also likely to provide essential income it may not be desirable to realise it as a capital asset. The situation may be different, however, if the business depended on the partnership of the divorcing couple for its efficacy, in which case it may be appropriate to order a sale of the business and its assets. A pragmatic approach needs to be adopted.

Other assets that may or may not form part of the “matrimonial pot” or assets acquired prior to the marriage and/or assets acquired under a family trust. The discretion of fact and judgement whether such assets become part of the matrimonial assets during the marriage, depending on how they were acquired, held and used. These issues are generally only important in what are called “big money” cases where there is more than enough money to meet the needs of all the parties.

Pensions are another asset that will be taken into account. The court has jurisdiction to make a pension splitting order. Pensions are valued on the basis of their Cash Equivalent Transfer Value (CETV).

Financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future (s.25(2)(b))

Whilst the various section 25 factors are not ranked in order of priority, if they were, after housing the children, “needs” would the paramount consideration. By far the vast majority of cases are decided solely on the basis of need. Need will encompass the need for the custodial parent, and children, to have a roof over their heads. The term “needs” can be interpreted widely to include any reasonable expense of living. In low to average income cases, the subsistence level indicated by current state benefit levels plus housing costs is often used in practice as a yardstick for minimum needs.

The term “obligations” can include any legal or moral obligation to meet an expense, including obligations to third parties, such as relatives, cohabitees or children who are being supported.
The court will always look to provide viable accommodation for the dependent children and the custodial parent. In some cases, this consideration will consume all of the assets leaving nothing immediately available for the non-custodial parent. In this scenario, it is likely that an order will be made for a deferred sale of the matrimonial home which is usually referred to as a “Mesher Order”. Whilst this result may seem “unfair” on the non-custodial parent, his/her needs give way to those of the children and custodial parent when hard choices present themselves to the court.

If there are other assets available then the Court will next look at providing accommodation for the non-custodial parent. Clearly, this is of great importance when the children will enjoy regular staying contact with the other parent.

In cases where the assets are substantial and far exceed the reasonable needs of each party to be accommodated, it may be that the other section 25 factors will be of greater importance.

In considering needs, the Court will always look at the respective incomes and outgoings of each household. This may require a detailed analysis of the budget for each household.

If one or both parties have re-married or cohabit or intend to do so imminently, the Court can taken into account the new partner’s income and resources. If the new cohabitee or spouse is to provide accommodation then this can have a major impact on the ultimate outcome. If the needs of the divorcing party to be accommodated are met by their new partner’s resources then that party may find it difficult to claim that he needs to be accommodated using the assets of the marriage. This can cause difficulties in cases where the new relationship is short lived or where there is a factual dispute as to whether a party is in fact cohabiting.

The standard of living enjoyed by the family before the end of the marriage (s.25(2)(c))

This factor is usually only relevant in cases where the assets are substantial and far exceed the reasonable needs of the parties. In a needs case where all of the available assets are taken up accommodating one or both of the parties, the standard of living consideration is of lesser importance. The reality of divorce is that the standard of living for both parties is likely to fall on divorce. However, in cases where the assets are substantial and where the parties were able to maintain a good or high standard of living during the marriage then this can be a relevant factor.

The usual concern of the court will be to see that the standard of living does not slip more than is necessary to ensure that one party does not suffer a significantly greater drop in living standards from the other. The standard of living of the children must also be considered in this context.
e. The age of each party to the marriage and the duration of the marriage (s.25(2)(d))

The age of each party can have an important bearing on the decision of the Court. If the parties are young and are financially independent then almost certainly a “clean break” will be imposed so that there are no ongoing links between the parties. A young wife will normally be seen as having an earning potential, whereas an older person, who was not worked for years, will have less ability to enter the labour market and less time to accrue savings or investments and future. Younger parties will also retain a larger mortgage capacity than those parties divorcing in their 50's or older. Mortgage capacity can be crucial to the issue of retention or sale of the matrimonial home.

The length of the marriage is also an important factor. The longer the marriage the greater the obligations between the parties and the more difficult it may be to achieve immediate independence upon marital breakdown.

Duration is usually most relevant if the marriage is short. In the case of an extremely short marriage (one lasting a few weeks or a couple of months), the court may order no financial provision at all. It is particularly likely that no provision will be ordered were neither spouse has suffered financially as a result of the marriage.

In the case of a short childless marriage, the Courts will generally seek as far as possible to return the parties to their financial position as it was at the time of the marriage and impose a clean break settlement. Even for a short marriage, the existence of children of the marriage will be very significant, as the court still needs to consider the needs and welfare of any children of the marriage.

A clean break settlement may not be possible in the case of a long marriage where one party has taken a career break to raise children and is now disadvantaged in the labour market with far less income and earning capacity. These factors should be taken into account in dividing the capital assets. If one party has a far greater income the other party may receive a greater share of the capital as part of the balancing exercise required by section 25.

In short marriage cases where there are young children, the shortness of the marriage may be of lesser significance. This is because the children will almost certainly restrict the ability of the custodial parent in returning to immediate full time work and thereby achieving financial independence.

What must also be borne in mind in considering the length of the marriage is that in some circumstances the Courts can now take into account pre-marital cohabitation. There is case law
which suggests that where the cohabitation moves 'seamlessly' into marriage then this can be taken into account as one of the 'circumstances of the case'.

f. Any physical or mental disability of either of the parties to the marriage (s.25(2)(e))

If either of the parties is physically or mentally disabled then this may impact on income and earning capacity and also their accommodation needs and expenses and life expectancy. If relevant, all of these factors can be taken into account. The fact of the disability must also be put in context. If the spouse who has a disability can claim social security benefits, while the spouse against him a claim is made has limited income, it is possible that no order will be made.

g. The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family including any contribution by looking after the home or caring for the family (s.25(2)(f))

The Courts have on many occasions made it clear (particularly since the leading case of White v White (2000) 2 FLR 981) that the contribution of the custodial parent in raising the children is entirely equal to that of the “breadwinner”. The contribution of each party is seen to be entirely equal. There is direct equality between financial and non-financial contributions, at least as a starting point. A marriage involves a division of labour and however this labour is divided, there should be no bias in favour of the bread winner at the expense of the homemaker and child-carer. Thus, the Courts have made clear that domestic contributions should not be undervalued simply because they cannot be quantified in the same way as economic activity.

Contributions also cover assets brought into the marriage either at the beginning or monies or other assets received during the marriage by way of gift or inheritance by one of the parties. In practice, this can be a very contentious issue particularly in cases where substantial assets have been received from only one side of the family.

The reality is that need trumps contribution. First and foremost the Courts will always look to accommodate the parties before taking into account the source of the assets. On this basis, contributions are only likely to be relevant in cases where the matrimonial assets are substantial. In most instances, therefore, when it comes to matrimonial property it matters little that, for example, the title to a property is in the name of one spouse or another or both. It is part of the “matrimonial estate”.

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i. The conduct of each of the parties if that conduct is such that in the opinion of the Court it would be inequitable to disregard it (s.25(2)(g))

Often the parties wish to import issues of conduct into consideration of financial division, particularly where one party has been guilty of adultery. It is rarely successful. “Conduct” in this context means exceptionally bad behaviour. The courts will only take into account misconduct if “in the opinion of the court it would be inequitable to disregard it” e.g. a nasty physical or sexual assault would fall into this category, as would child abuse. One case, a husband convicted of attempted murder of his wife received only a small proportion of the matrimonial assets. Adultery will not be sufficiently serious in itself to be taken into account unless there is some aggravating feature such as if the adultery is with a father-in-law. Where a person’s right to apply for financial remedies has been based on deceitful or criminal behaviour, such as bigamy, then it has been held that such person should not be entitled to benefit from their deceitful act.

Conduct may also be relevant to the serious financial misconduct. In cases where a party dissipates, or fritters away family assets, or brings about financial ruin through obviously selfish and unreasonable behaviour, and the court may take the view that he or she is not entitled to a claim on an equal footing with the other spouse in relation to that part which remains of the matrimonial estate. This conduct in the course of proceedings, such as misrepresentation, making false statements or wilful nondisclosure, may well be relevant to the courts considerations. Depending on the severity of the conduct, in particular in respect of nondisclosure, the court may penalise non-disclosure with costs penalties in the less serious cases, or in the more serious cases adjusting the result. This may be particularly so where it is impossible, given serious non-disclosure, to determine the full extent of the matrimonial estate to be divided between the parties.

h. The value to each of the parties to the marriage of any benefit which by reason of the dissolution of the marriage that party will lose any chance of acquiring (s.25(B(1))

This is one of the less important factors but can be material in relation to pensions. Upon death after divorce the surviving party will not be regarded as a widow. Unless specific provisions are made to the contrary, the survivor is unlikely to receive any entitlement under the deceased's pension. Any loss of pension rights on divorce must be factored into the overall settlement so that the party losing out should be compensated by receipt of other assets. It is generally the wife who is in a more vulnerable position in relation to her pension provision as she may, for example, have had time away from the employment market to care for children. Pension sharing orders are available and provide that one party’s shareable pension rights (or state scheme rights) are subject to pension sharing for
the benefit of another party. The order will specify the percentage value of the shareable pension rights to be transferred to the benefiting party. This must be expressed as a simple percentage. In effect, the relevant pension fund is split and a portion hived off to be used by the person in whose benefit the order is made. After the order is made, the “person responsible” for the pension arrangement (i.e. the trustees or managers) must within four months transfer the pension credit to a suitable pension scheme or an arrangement of the transferree’s choice. The other alternative to compensate a wife for the loss of pension benefits is what is called “offsetting”. This provides her with additional capital, usually in the form of a lump sum or an enlargement of an existing lump sum being considered, in return for lost pension rights.

How do the s.25 factors apply in practice?

Practice has shown that the courts tend to follow one of a number of approaches:

Consider the Needs of the Children First

The most common consequence of considering the needs of young children is that the matrimonial home will often be used to provide a home for them either by settling it (that is, by apportioning beneficial interests in the home between the parties) or by transferring it to the custodial parent. Although stability in the life of children is important, the existence of children will not always mean that the matrimonial home is preserved. In some cases, especially when the husband has need of rehousing, or if the house is larger than is strictly required by the children of the family and the custodial parent, it will have to be sold to provide capital and smaller properties purchased.

Often the court will resolve these tensions by transferring the property into the name of the wife from the joint names of husband/wife but all drink that it be sold on specific events such as:-

a. the remarriage of the wife;

b. the wife cohabiting with another man for a continuous period of six months or more;

c. the death of the wife;

d. the youngest surviving child of the family attaining the age of 18, or finishing full-time education if later, save that in any event the charge shall become realisable upon that child attaining the age of 21 years.

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The Clean Break

The idea of the clean break is that resources should be divided once and for all between the spouses, with no further financial obligations between them, leaving each free to start a new life. This can usually only be achieved if there are sufficient available assets to satisfy the reasonable claims of the applicant, if both spouses have such income or earning potential that maintenance payments will not be necessary. The court must consider the possibility of achieving a clean break in every case. However, it should only do so after having regard to all the section 25 factors are not in isolation from them. Although the court is required to try to achieve a clean break, it is under no obligation to pursue one as a priority or at the expense of other considerations. In most cases, the court will two decisions to make: should be an immediate clean break; or should that be clean break at some future time (otherwise referred to as a deferred clean break). In “big money” cases, a clean break cannot be achieved because, whatever the wife’s short or long-term entitlement, there is enough money to meet him for her lifetime by providing her with some form of capital fund. All continuing claims can be dismissed because the capital fund provides the real self-sufficiency.

The Civil Partnership Act 2004

The Civil Partnership Act 2004 (CPA 2004) came into force on 5 December 2005 and allowed same-sex couples to gain the rights and responsibilities of marriage, including the same sort of access to financial remedies upon the dissolution of their partnership as married couples do upon divorce. The statutory provisions for civil partnerships are virtually identical to those for marriage – the CPA 2004, Sch 5 mirrors the MCA 1973, Part II; and the FPR 2010 apply.

Although the legal provisions are the same it remains to be seen whether civil partnerships bring additional considerations to the field of financial remedies and, in particular, in respect to the application of the s.25 factors to same-sex relationships. Differences potentially include the absence of gender discrimination and the view of roles within the relationship and the significance of cohabitation prior to the partnership. At the time of writing there have been no significant reported cases.

Procedure
Modern procedure places greater emphasis on the completion and use of standard forms and involves tight timetables, a greater emphasis on defining issues and reaching agreements, and more court control.

The main elements of the procedure in Part 9 are:

(a) Once there has been an application for financial remedies, there will be a first appointment (FA) within 12 to 16 weeks.

(b) Not less than 35 days before that appointment, there will be a simultaneous exchange of statements of the financial position of both spouses, containing specified information in a common format (Form E). Full supporting documentation will be attached.

(c) No other disclosure is allowed prior to the first appointment.

(d) Not less than 14 days before that appointment, both parties will file a concise statement of the issues between the parties, a chronology and a questionnaire, seeking further information and specifying relevant documents to be produced.

(e) The parties also decide at this stage whether they wish to use all/part of the FA as a Financial Dispute Resolution hearing (FDR) (they notify the court by way of Form G, a ‘Notice of Response re First Appointment’).

(f) At the FA, the district judge (DJ) will review the case with a view to defining and limiting the issues and saving costs. The DJ will see if the FA can become an FDR; if not, he will set a date for an FDR. Exceptionally, he may, if he considers an FDR inappropriate, set a date for a final hearing. He will give directions as to disclosure, documentation, valuations, evidence and any other case management directions necessary to prepare for the FDR.

(g) The FDR is to be treated as an opportunity for open discussion and negotiation. The DJ will facilitate and assist in this process. They are without prejudice meetings and the rules of confidentiality which flow from that apply. If appropriate, the DJ may adjourn and fix a date for a further FDR and give further directions or the DJ may fix a date for the final hearing,
which must be before a different DJ. Before a final hearing, both parties must file a concise statement of the nature and amounts of the orders they will be inviting the court to make.

(h) Both sides must have an updated estimate of current costs available at each hearing (Form H).

Court Powers to Make Orders

It is important to note from the very outset that the court does not exercise any of its powers in isolation from each other. After considering everything it is required to consider under the MCA 1973, s.25, the court will decide what result it wants to achieve and, choosing from among the powers available to it, will design a package of interrelating orders that best achieve its objectives. The most commonly used of these powers are found in the MCA Part II, especially ss 21-25C.

Overview and Terminology

The court has the jurisdiction to make orders for financial remedies on the grant of a decree of divorce, nullity or judicial separation. The FPR 2010 define ‘financial order’ as any of the following:

- an avoidance of disposition order;
- an order for maintenance pending suit;
- an order for maintenance pending outcome of proceedings;
- an order for periodical payments or lump sum provision both in respect of divorce and civil partnership;
- a property adjustment order;
- a variation order;
- a pension-sharing order;
a pension-sharing compensation order.

A variation order is defined as an order under the MCA 1973, s.31 or under Part 11 of Schedule 5 of the CPA 2004. Maintenance pending suit, which is an interim application for maintenance, is dealt with at 4.5. Financial remedies include all financial orders and a variety of other orders, including an application in respect of children under Sch 1 of the Children Act 1989 ICA 1989) (see the interpretation section at r 2.3). Sch 1 applications are dealt with at 7.5. The most significant of the other orders are as follows.

Financial Provision Orders: MCA 1973, s.23

Order for periodical payments to a party to the marriage or to/for a child of the family (s.23)

Periodical payments are an ongoing obligation to pay a sum at regular intervals, usually weekly or monthly. This type of order used to be called, and is still commonly referred to as, maintenance. Orders for periodical payments may be varied on further application, and may run for a set term or until the death of either of the parties or the remarriage of the person in whose favour the order is made. In considering an order for periodical payments, the court must weigh its obligation under the MCA 1973, s.25A to consider a clean break.

Order for secured periodical payments to a party to the marriage or to/for a child of the family (s.23)

This is an order for periodical payments with an additional order that some kind of secure capital fund or asset be provided out of which the payments can be made or guaranteed.

The main advantage of such an order is that the payments are protected against the death, insolvency or disappearance of the payer. Orders for secured periodical payments may be varied on further application, and may run for a set term or until the death or the remarriage of the person in whose favour the order is made. Again, the court must consider a clean break. Orders for secured periodical payments are comparatively rare.

Order that a lump sum be paid to a party to the marriage or to/for a child of the family (s.23)
A lump sum order is intended to be a final order and, with limited exception, may only be made once. A lump sum order is essentially a means of adjusting the balance of capital resources between the parties. However, within the final package of orders that a court makes it may serve a more specific purpose. Examples of such a purpose include enabling a party to purchase property, or compensating a party for exiting a jointly run business, or providing a fund to cover all purposes in big money cases, or as a way of capitalising maintenance (known as a *Duxbury* fund). The statute refers to ‘lump sum or sums’. This still means that only one order may be made, but it may provide for the payment of more than one lump sum, or for instalments, or for payment to be deferred along with the payment of interest: see, for example, *V v V (Financial Relief)* [2010] 2 FLR 516, where the jurisdiction to make a series of lump sum orders was doubted, but an order was made for the payment of a lump sum of £2.4 million by instalments over four and a half years.

**Property Adjust Orders MCA 1973, ss 24-24A**

Transfer of property order, i.e., an order that one party to the marriage transfer property to the other party or to/for the benefit of a child of the family (s.24)

This can be any kind of property but is usually concerned with house and land. Usually, the housing needs of the parties and children are a high priority and in many cases the former matrimonial home will be the sole or principal asset. The court may not make more than one order but it may provide for the transfer of more than one item of property in the same order. The property may be transferred outright or it may be transferred subject to a change in favour of the transferor. This change could be realisable on a fixed date or on the occurring of a certain trigger event (e.g., the youngest child reaching 18).

**Settlement of property order (s.24)**

When used, these orders perform much the same function as transfer of property orders, described above. Generally, the courts use transfer of property orders and other orders available under the statute to achieve the desired outcome and, as a result, settlement orders are less frequently used nowadays.

**An order varying the effect of any ante- or postnuptial settlement (s.24)**
Traditional marriage settlements are less common than they were; however, the use of postnuptial settlements seems perhaps to be increasing. The powers to vary a settlement are wide and include the power to give the capital or income in a settlement to either party or the children, to extinguish the interest of a party under the settlement and to terminate the settlement itself.

Order for sale (s.24A)

This is not strictly speaking a property adjustment order but it is conveniently dealt with here. The court may only make an order for sale when it has made a secured periodical payments order or a lump sum order or a property adjustment order. The purpose of the order for sale is to facilitate the capital order to which it relates.

Orders relating to pensions

It is generally the wife who is in a more vulnerable position in relation to her pension provision as she may, for example, have had time away from the employment market to care for children. Clearly, it could equally be the husband and references in this section to the wife should be read as applying equally to the husband in an appropriate case.

Pension-sharing orders: MCA 1973, ss 21A, 24B

Pension-sharing orders are available in respect of petitions for divorce or nullity (not judicial separation) filed after 1 December 2000. The order provides that one party’s shareable pension rights (or state scheme rights) are subject to pension sharing for the benefit of another party. The order specifies the percentage value of the shareable pension rights to be transferred to the benefiting party. This must be expressed as a simple percentage, not as a sum converted into a percentage: H v H [2010] 2 FLR 173. The pension arrangement as a whole is valued and the actual amount to be transferred is the percentage of that value. The actual amount received by the person in whose favour the order is made is known as the ‘pension credit’. In effect, the relevant pension fund is split and a portion hived off to be used by the person for whose benefit the order is made. After the order is made, the ‘person responsible’ for the pension arrangement (i.e., the trustees or managers) must within four months transfer the pension credit to a suitable pension scheme or an arrangement of the transferee’s choice.)
Other orders relating to pensions

The court has a range of orders available to it to deal with the complicated issues of pensions. Pension-sharing orders are the preferred way of dealing with most situations, but other orders are used in some circumstances. The orders made in a given case will depend on what the court is trying to achieve in relation to the issue of pension provision and on the other factors and considerations in the case.

Offsetting

Offsetting is a way of compensating a wife for the loss of pension benefits by providing her with some additional capital, usually in the form of a lump sum or an enlargement of a lump sum already being considered. It is a useful tool, but requires there to be sufficient funds available from which the lump sum, or increased lump sum, can be paid.

Attachment orders

Attachment orders (formerly known as ‘earmarking’) are orders that oblige the persons responsible for a pension arrangement to pay to someone who is not a member of the pension fund sums that would normally have gone to the member. All attachment orders are liable to applications for variation (which means that they may be varied before they are even realised). They are also at risk from a change in circumstances of the pension holder, such as bankruptcy. See Re Nunn (Bankruptcy: Divorce: Pension Rights) [2004] 1FLR 1123, where an order that a husband pay his wife one-half of his pension lump sum was not enforceable after the bankruptcy of the husband, the whole pension fund going into the husband’s estate in bankruptcy.

Attachment for income purposes (s. 25B) This order will provide periodical payments to the person in whose favour the order is made, paid out of the pension fund. It is, in effect, an attachment of earnings order against the pension fund. It would cease to have effect on the death of either party.

Attachment for a capital sum (s. 25B)

This would be appropriate where the wife was to receive a deferred lump sum from the husband’s pension entitlement, usually because there was insufficient capital to provide her with the
appropriate amount at the time of the making of the order. A weakness of this order is throughout the court has no power to order the pension holder to take his pension at any particular time.

**Attachment of death-in-service benefits (s.25C)**

This order would be appropriate where the wife continues to be dependent on the husband. If he died before retirement, any lump sum, or part of it, would be payable to the wife. The court has the power to force the husband to nominate his ex-wife to be the person to receive some or all of the benefits (most pension schemes require the pension holder to nominate the person who will receive death-in-service benefits and the persons responsible for the scheme must follow this nomination).

**Pension Protection Fund Compensation (s.21B, s.21F)**

Since 6 April 2011 the court has jurisdiction to make a pension-sharing or attachment order in relation to Pension Protection Fund (PPF) compensation. These new sections of the MCA were inserted by the Pensions Act 2008: see ‘PPF Compensation and Financial Provision Following a Matrimonial or Civil Partnership Order’ April [2011] Family Law.

**Avoidance of disposition orders and other injunctions MCA 1973, s.37**

Section 37 gives the court power, in financial remedies proceedings, to prevent or set aside a disposition of property by one of the parties to the proceedings. This type or order is applied for and made when there is suspicion that one of the parties is about to dispose, transfer or otherwise deal with property with a view to defeating or avoiding all or part of a claim for financial remedies, or one of the parties has already done so.

So there are essentially two powers under this section. The first is pre-emptive and is an order to one of the parties not to deal with certain assets in certain ways. Copies of this order can be served on banks and any relevant institutions and the order usually has the effect of freezing or barring transactions concerning the asset. The second is the power to set aside any disposition that has already been made. Such an order will require the person to whom the assets were transferred to transfer them back so that they will form part of the funds being considered in the proceedings for financial remedies.
The burden is on the person applying for a s.37 order to prove that the disposition will be or has been made ‘with the intention of defeating the claim for financial relief’. It is for the judge, however, to decide whether or not he is ‘satisfied’ that the condition is met and it has been held that further qualification of the standard of proof is not helpful (K v K (Avoidance of Reviewable Disposition) [1983] FLR 31). Although the intention can be inferred from conduct, the court must be careful in situations where there could be more than one reason for the disposition, most typically in situations where a party’s livelihood or business activity depends on the movement of such assets as are under consideration. The court must be satisfied that the intention to defeat the claim exists.

There is no general power under s.37 to freeze assets as a holding or precautionary measure pending the outcome of a claim, although the court has jurisdiction to do this under the Civil Procedure Rules (CPR) and under its powers to grant a freezing injunction (see below). There are two further significant considerations relating to the power to set aside a disposition that has already been made. First, it must be a ‘reviewable disposition’ as defined in s.37(4). This essentially protects the bona fide purchaser for value without notice (in this case, without notice of the respondent’s intention to defeat the applicant’s claim). Unless the respondent can satisfy the court that the conditions in s.37(4) are met, it is presumed that the disposition is reviewable. Secondly, s.37(5) provides that in some situations there is a presumption of intention to defeat the claim. Essentially, the presumption applies where the disposition was made within three years before the date of the application and where the court is satisfied that the disposition has, or would have, the consequence of defeating the applicant’s claim for financial remedies.

Applications for s.37 injunctions should, if practicable, be heard at the same time as any related application for financial remedies (FPR 2010, rr 9.6 and 9.7). Where there is urgency, the application can be made without notice and, if it grants the application, the court will fix on notice return hearing at the earliest date.

In situations where the conditions of s.37 have not been made out but doing justice in case requires the use of injunctive powers, the court can invoke its inherent jurisdiction. This means it can make such order as it sees fit in order to preserve the status quo, or achieve whatever end is required: see Shipman v Shipman [1991]1 FLR 250 and Poon v Poon [1994] 2 FLR 857. It is doubted that the county court has such an inherent jurisdiction; the practice in the Principal Registry is to transfer to the high Court an application to invoke the inherent jurisdiction. The Court of Appeal in Wicks v Wicks [1998] 1 FLR 470 considered the limits of the inherent jurisdiction.
Freezing injunctions (formerly *Mareva* injunctions) are available to the civil courts generally. Essentially, a freezing order forbids, until trial, the respondent from removing funds or assets from the jurisdiction of the court, or otherwise dissipating or dealing with assets so as to thwart the court’s judgment. Such an injunction can be worldwide. The county court can grant an injunction in a family matter but under normal circumstances should transfer such applications to the High Court. The statutory basis is the Senior Courts Act 1981, s.37 and the procedural basis is dealt with in the CPR, Part 25.

Search orders (formerly *Anton Piller* orders) may be made where it appears that the respondent has in his possession documents or materials which should have been disclosed and that he may destroy or tamper with them, if not imminently then when he is given notice of the intention to seek a court order for their disclosure. Thus, it is a without notice order. It empowers the applicant to enter the respondent’s premises and seize and remove materials of the class(es) specified. In the past, such orders have rarely been made and if their execution does not turn up materials of the class sought, the applicant may be severely penalised in costs. Its statutory basis is the Civil Procedure Act 1997, s.7 and the procedure is also dealt with in CPR, Part 25.

The Court of Appeal in *Immerman v Immerman* [2010] 2 FLR 814 suggested that both search orders and freezing injunctions are suitable tools to be used in family cases where there is a concern about the concealing of evidence and/or the threatened dissipation of assets. It recommended greater use of these interim remedies rather than the methods of self-help known as the *Hildebrand* rules which had previously been used and which are roundly criticised. Under the *Hildebrand* rules, a party to a marriage could rely in financial remedies proceedings on documents illegally obtained, if they had been so obtained due to a fear that the other party was seeking to hide assets and therefore not complying with the duty of full and frank disclosure required by the FPR 2010.

Limitations on and duration of orders

Most of the significant features of the orders available to the court have been set out above. There are three further points to note:

(a) An application for financial remedies may be made at the same time as the application for a matrimonial order or at any time after that application has been made: FPR 2010, r 9.4. The
court has no power to make orders until decree nisi has been granted (usually a formality done at the outset of proceedings). The orders of the court will not take effect until decree absolute has been granted; that is, they will take effect at the same time as the marriage is officially and finally dissolved.

(b) The MCA 1973, s.28 makes provisions relating to the continuing financial provision orders. Periodical payments orders (secured or otherwise) may not be expressed to begin before the date of the application (i.e., the court can ‘backdate’ an order to that point, but no earlier).

(c) The MCA 1973, s.29 makes provisions relating to continuing financial provision orders made in relation to children. Save in appropriate circumstances (e.g. education beyond 18 or special need), no financial provision may be made in respect of a child who has reached 18 years of age. Further, orders for periodical payments to or for a child (which may begin from the date of application) shall not extend, in the first instance, beyond school-leaving age and in any event not beyond the date of the child’s eighteenth birthday. Periodical payments orders to or for a child shall cease upon the death of the payer (save for any arrears).

The s.25 factors

The factors

On an application to court for financial remedies, there is, as has been said, no standard formula for calculating appropriate provision. If it were that simple, there would be little role for the courts in considering the case. Although there may be similarities between cases, and there may be broad categories into which some cases will fall, the details of each are unique in terms of available assets and the needs of both parties. The system for determining provision has to be sufficiently flexible to allow for this, and therefore, rather than a single rule, the statute provides a list of relevant factors, to be taken into account by the court when deciding how to exercise its powers.

The factors are listed in the MCA 1973, s.25(1)(2) and are widely referred to as ‘the s.25 factors’. The court must also take into account the provisions of s.25A, which direct the court to try to achieve a ‘clean break’ between the parties, if this is practicable. It is worth emphasising from the outset the central role that the s.25 factors play in determining applications for financial remedies.
All the analysis and evaluation of the facts of the situation must be carried out by reference to the s.25 factors. All arguments and proposals made in the case must be framed in terms of the factors. All the orders that the court could make must be considered and justified in the light of s.25.

It is worth setting s.25(1) and (2) out in full.

(1) It shall be the duty of the Court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the Court under section 23(1)(a), (b) or (c), 24, 24A or 24B above in relation to a party to the marriage, the Court shall in particular have regard to the following matters:

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the Court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the Court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of dissolution or annulment of the marriage, that party will lose the chance of acquiring.

(3) As regards the exercise of the powers of the Court under section 23(1)(d), (e) or (f), (2) or (4), 24 or 24A in relation to a child of the family, the Court shall in particular have regard to the following matters:-

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

(e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c), and (e) of subsection (2) above.

(4) As regards the exercise of the powers of the Court under 23(1)(d),(e) or (f), (2) or (4), 24 or 24A against a party to a marriage in favour of a child of the family who is not the child of that party, the Court shall also have regard:-

(a) to whether that party assumed any responsibility for the child’s maintenance, and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
(b) to whether in assuming and discharging such responsibility that party did so knowing the child was not his or her own;

(c) to the liability of any other person to maintain the child.

Using the factors

The factors listed by statute are effectively the building blocks from which the barrister constructs an argument in an individual case. No one factor is intrinsically more important than any of the others. However, in dealing with any given case, some factors will almost certainly be more central, and occupy more of the court’s time, than others. Which factors are more important than others in any given case depends entirely on the circumstances of that case. Dealing with the relevant factors in a practical and professional way can only come with practice, but as a suggested starting point in a case:

(a) Identify which factors from the general list are relevant to the particular case.

(b) Weight each relevant factors, deciding by reference to the facts which are central to the case and those which are less important.

(c) Remember that the factors can interrelate to each other. For example, disability is a factor in its own right but the fact of a disability will quite possibly relate to earning capacity and perhaps also to needs. Age is a factor and the older a person is, the lower their earning capacity is likely to be if they have been out of the labour market. Some facts may fit under more than one factor, for example, payment for music lessons could be considered a financial obligation and/or an issue relating to the welfare of a child of the family.

(d) Clearly identify the relevant facts that favour your client, which will therefore be central to your case.

(e) Clearly identify the relevant factors that undermine your client’s case or favour the other side, and which you will therefore have to try to counter.
If one factor overshadows all others in the case, it may suggest an overall basis for provision. If no factor is substantially more important than others, all relevant factors will go into the balance.

What the factors mean

The meaning of the factors should be understood primarily from the words of the statute itself. Decided cases from appellate courts can provide guidance on interpretation and establishing the broad approach of the courts to certain issues. Other than this, they are usually of little relevance in deciding how a court should exercise its discretion in a particular case. In *White v White* [1998] 2 FLR 310, CA, Butler-Sloss LJ said: ‘There is a danger that practitioners in the field of family law attempt to apply too rigidly the decisions of this court and of the Family Division, without sufficiently recognising that each case involving a family has to be decided upon broad principles adapted to the facts of the individual case. It is the statutory wording and judicial reasoning in cases, not their outcome as such, which act as a guide to the meaning of the s.25 factors.’

All the circumstances (s.25(1))

The statute states: ‘It shall be the duty of the court ... to have regard to all the circumstances of the case ...’ This means that the court must not confine itself to the listed factors but must consider any circumstance that is relevant. In practice, relevant circumstances almost always fall under one of the listed factors. However, this provision can be useful when formulating arguments and proposals, especially in a case that involves an unusual feature, so it is important to keep it in mind.

Welfare of the children of the family under 18 (s.25(1))

This consideration is limited to children of the family, which is defined as any child who has been treated by both of the parties to the marriage as a child of their family (MCA 1973, s.52(1)). This includes stepchildren. What it does not include is children conceived by one of the parties outside of the marriage, who were not part of the marital home. Such children can be considered under other factors, such as obligations, but not here. The statute says that the welfare of children of the family will be the ‘first consideration’. This does not mean that it is a consideration that should take precedence over the other factors (although in the weighing of the circumstances of a case, the
court usually comes to the view that it is) – it means that it is the first matter to which the court should direct its attention.

Maintenance for any children of the family was the province of the Child Support Agency (CSA), which was due to be reincarnated as the Child Maintenance and Enforcement Commission (CMEC) by legislation passed in 2008. The legislation has not wholly come into effect. CMEC’s declared purpose is to maximise the number of effective child maintenance arrangements in place – whether private or statutory – for children who live apart from one or both parents. The emphasis on encouraging parents to reach private agreements for their children’s maintenance is a welcome development.

The main issue in financial remedies proceedings is usually housing the children. The court will want to ensure that the children are adequately housed in a location that takes into account their needs in terms of schooling, family relationships and social networks and activities (the latter varying according to age). The main carer will, of course, be housed with the children but this will primarily be a matter of the children’s welfare – it is not a right or a benefit conferred on that carer. Either parent may or may not have a financial interest in some or all of the children’s home – that will depend entirely on how the court decides to divide the assets. It is quite common for the resident carer to be required to sell the home and move to a smaller property once the children have left and no longer need it.

The welfare of the child should not, however, unduly prejudice the need of the non-resident spouse for a home (M v B (Ancillary Proceedings: Lump Sum) [1998] 1 FLR 53). The court will, if possible, try to stretch the resources so that the latter has housing suitable for regular contact, ensuring that children can not only visit, but can also spend the night (‘staying contact’).

Generally, the younger a child is, the longer its needs will last, the more multifarious those needs are likely to be, and the further the court will go to try to balance available resources in order to ensure that they are adequately catered for. The close a child is to 18, the less important its needs are likely to be in the overall balance (unless it has special needs).

Income, earning capacity, property and other financial resources (s.25(2)(a))
The importance of getting full details and figures for capital and income cannot be over emphasised. Getting a complete and open picture of all the resources of the parties is one of the central features of financial remedies procedure. Only when the court has determined what is available can it go on to determine how those assets should be allocated. The parties are under an ongoing obligation to make full and frank disclosure. There should be no partial disclosure nor should a party wait for the other side to ask for relevant information before disclosing it. The judge is required to consider penalising in costs a party who fails to disclose completely and voluntarily within the appropriate timescale. An attempt to hide assets is serious litigation misconduct, to say the least.

A party’s resources can be highly relevant not only to the amount, but also to the type of provision ordered. Lump sum payments, for example, require sufficient capital and/or income to raise the funds. Equally, if there is not sufficient income available to the person wanting to remain in the matrimonial home to pay the mortgage and outgoings, there may be no realistic alternative to selling it.

Note that all financial resources are relevant, and this is widely interpreted to include benefits, for example, free or cheap accommodation available with a job. There are, however, some limits; for example, proceeds of crime that are liable to be confiscated might not be taken into account, depending on the circumstances. Neither an application for a confiscation order under the Drug Trafficking Act 1994, s.2, not a claim for financial remedies has priority over the other. The High Court must determine the outcome according to the public interest and applicable Convention rights. For the practice in this situation, see Re MCA; HM Customs and Excise Commissioners and Long v A and A; A v A (Long Intervening) [2003] 1FLR 164 and, for the procedural effect of the Proceeds of Crime Act 2002 (POCA 2002), Webber v Webber [2007] 2 FLR 116 (and see Stodgell v Stodgell [2009] 2 FLR 218.

As regards earnings, it is important to appreciate that the court will also look to a party’s earning capacity, i.e., it will take into account not only what he or she is earning, but what he or she may be reasonably expected to earn if exploiting all opportunities fully, both in the short term and the long term. Parties who choose not to work or not to maximise their resources when they could do so are likely to have adverse inferences drawn against them. The subsection specifically requires the court to consider any increase in earning capacity that it would be reasonable to expect a party to take steps to acquire. The court will be realistic about what it is reasonable to expect people to do in the circumstances. For example, it is not likely to expect carers of very young children to go out to work
full-time. If it takes the view that an application may need some time to retrain and/or otherwise adjust to future financial independence, the court may allow for this by making a fixed-term periodical payments order (as an alternative to a normal open-ended order which puts the onus on the paying party to apply for a variation when circumstances change).

‘Property’ is widely defined. It includes all real property, all personal property, and financial stock or other business assets or interests, any beneficial interest under a trust; this list is not exhaustive.

‘Other financial resources’ can include expectations, i.e., property or income that a party is likely to have in the foreseeable future. Note that this does not include pensions, which are considered separately. Caution must be exercised in relation to an expectation – there must be evidence upon which the court can be satisfied as to the likelihood and extent of the expectation. An example of a common expectation is the prospect of being a beneficiary under a will) or an intestacy). The problems with this expectation are that it can be difficult to gauge life expectancy and to estimate the size of the potential benefit. A testator cannot be compelled to disclose his or her intentions which may change over time. The court does have the power to adjourn the lump sum element of an application for financial provision, where there is an expectation of a significant inheritance and where the court considers it necessary to take this course in order to achieve fairness in a particular set of circumstances (Re G (Financial Provision: Liberty to Restore Application for Lump Sum) [2004] 1 FLR 997). This is, however, an exceptional course of action.

Regular financial support from a third party could, again with caution, be viewed as a resource. The court would need to be satisfied on evidence that it was reasonable to expect this support to continue in the foreseeable future. A recoverable debt owed by a third party would normally be seen as a resource.

Resources available from a cohabite may also be relevant, but the position of a cohabitee cannot be fully equated with that of a spouse, and the income of a party’s cohabitee will not simply be added to that of the party. Where cohabitation is disputed the court must first make a finding as to its existence. If found as a fact, the financial circumstances should be investigated and a key question is that what the cohabitee ought to be contributing: Grey v Grey [2010] 1 FLR 1764.

A court may draw inferences as to the resources that are available provided there is sufficient reason to do so (Thomas v Thomas [1995] 2 FLR 668), especially if there is serious non-disclosure (Baker v
Baker [1995] 2 FLR 829). A resource which is considered too remote (e.g. a possible future inheritance) will be disregarded.

Although all assets and resources must be identified, not all will necessarily be available for redistribution. For example, a family business will have a net worth but it is also likely to provide essential income and so it may not be desirable to realise it as a capital asset. The situation may be different, however, if the business depended on the partnership of the divorcing couple for its efficacy, in which case it may be appropriate to order sale of the business and its assets. Specialist advice is often needed in cases involving businesses or other ventures a little out of the ordinary, such as farms or an Internet business, and case law often provides guidance on this – for example, see P v P (Financial Relief: Illiquid Assets) [2005] 1 FLR 548, D v D&B Ltd [2007] 2 FLR 548. A pragmatic approach needs to be adopted, however, in deciding whether an expert should be instructed to value a business. Such an exercise is not an exact science; a detailed investigation is not only expensive but may not assist the court and costs must be proportional – see H v H [2008] 2 FLR 2092.

Other assets that may or may not form part of the matrimonial pot are assets acquired prior to the marriage and/or assets acquired under an inheritance or under a family trust. It is a question of fact and judgement whether such assets become part of the matrimonial assets during the marriage, depending on how they were acquired, held and used. Since the House of Lords’ decision in Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186 (‘Miller; McFarlane’), the courts have much more routinely applied themselves to the question of determining what is and is not ‘matrimonial property’. Although this issue receives a lot of judicial attention, it is usually only an issue in bigger-money cases, where there is more money than is required to meet the needs of all the parties. In Miller; McFarlane, Lord Nicholls and Baroness Hale differed in their views as to the distinction between matrimonial and non-matrimonial property. According to Lord Nicholls, non-matrimonial property is viewed as all property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps the income or fruits of that property), while matrimonial property is viewed as all other property. Baroness Hale’s approach is that non-matrimonial property includes not merely: (a) property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps its income or fruits); but also (b) business or investment assets generated solely or mainly by the efforts of one party during the marriage. For recent cases, see: Rossi v Rossi [2007] 1 FLR 790, S v S (Non-Matrimonial Property; Conduct) [2007] 1 FLR 1496. In Charman v Charman [2007] EWCA Civ 503, Potter P stated that the
newly elevated ‘sharing principle’ applied to all property, but, to the extent that property is non-matrimonial, there is likely to be better reason for a departure from equality. He also preferred the more generous (to the payee) view of matrimonial property, despite its minority status in the House of Lords’ judgment; see the recent guidance given by the Court of Appeal in Robson v Robson [2010] EWCA Civ 1171.

Care needs to be taken so far as wealth acquired by one party after the breakdown of the relationship but before the determination of the financial remedies application is concerned. Such assets are a resource available to that party and may be taken into account under the factors of need and compensation (see Miller; McFarlane), but in the absence of such factors, sharing ends at the point of separation: B v B [2010] 2 FLR 1214.

So far as pensions in particular are concerned, as a resource they are relevant no matter how far in the future the benefit might be realised. See MCA 1973, s.25B, as added by the Pensions Act 1995.

Financial needs, obligations and responsibilities (s.25(2)(b))

As regards needs, it is necessary to get accurate details of all the household expenses, such as the mortgage, gas and electricity bills, etc. The term ‘needs’ can be interpreted widely to include any reasonable expense of living, and this should be fully investigated – get the client to think of everything that has to be paid for. Remember that for your client you would try to include all arguable needs, whereas in relation to the other side’s needs, you might be more apt to claim that they should be pruned and kept within more reasonable bounds (while being aware that their advisor will argue likewise). In low-to-average income cases, the subsistence level indicated by current state benefit levels plus housing costs is often used in practice as a yardstick for minimum needs.

The term ‘obligations’ can include any legal or moral obligation to meet an expense, including obligations to third parties, such as relatives, cohabitees or children who are being supported. In some cases, this may mean that the resources of one person have to be divided between their former spouse and their new spouse or cohabitee, and any children. This can be very contentious, especially when resources are overstretched. While the court will try to give precedence to the first family, it has to be realistic – for example, it is often easier for the former wife on her own to claim benefits than the new cohabitee living with a person of average income.
Where there is a purported debt that is being claimed by a third party, then the court cannot anticipate the outcome of other proceedings. The court will decide if the debt is significant and if so will either adjourn to await the outcome, or have the cases heard in tandem by the same judge (George v George [2004] 1 FLR 421).

It used to be that different considerations applied to ‘big-money’ cases and the concept of ‘reasonable requirements’ was used in place of needs. However, since the House of Lords’ decision in White v White [2000] 2 FLR 981, this approach has been disapproved and it is established that, in the context of s.25(2)(b), consideration of needs is what the statute requires in all cases.

**The standard of living of the family before the breakdown (s.25(2)(c))**

In most cases, it will not be possible to maintain the standard of living that the parties enjoyed during the marriage. Except in big-money cases, if the money that has financed a single household has to be split to finance two, there will almost certainly have to be some drop in the standard of living.

The concern of the court will be to see that the standard of living does not slip more than is necessary and to ensure that one party does not suffer a significantly greater drop in living standards than the other.

It is worth noting that the subsection refers to the standard of living of the family, not the parties. This means that the standard of living of the children must also be considered.

**The age of each party (s.25(2)(d))**

The main relevance of age is in relation to earning capacity and to the importance of providing for retirement. A young wife will normally be seen as having an earning potential, whereas an older person, who has not worked for years, will have less ability to enter the labour market and less time to accrue savings or investments for the future. For an older person, it will also be more expensive to pay a mortgage as the 25-year term will not be available.
In the case of a younger person, a clean break or deferred clean break is more likely to be possible. With an older person, there is more likely to be a dependency and it will be important to investigate the pension situation.

The duration of the marriage (s.25(2)(d))

For marriages of average or greater length, the duration is not normally relevant, as the usual guidelines will apply. Duration is usually more relevant if the marriage is short. In the case of an extremely short marriage, the court may order no financial provision at all, for example where a marriage effectively lasted only two weeks (Krystman v Krystman [1973] 1 WLR 927). It is particularly likely that no provision will be ordered where neither spouse has suffered financially as a result of the marriage. For a marriage that has lasted more than a few weeks, it is quite possible that some provision will be ordered, even if it is at a low level, such as the award of a small lump sum or a limited term of periodical payments to allow the application to readjust.

In a short marriage, other s.25 factors may be less significant – there will probably have been far less by way of contribution and earning potential is likely to be higher. On the other hand, the existence of children of the marriage will be very significant. Even after a short marriage, the needs and welfare of any children must be properly catered for (see B v B (Mesher Order) [2003] 2 FLR 285).

In Miller; McFarlane, Lord Nicholls expressed clearly the view that a short marriage was no less a partnership of equals than a long marriage and disapproved the approach that a party’s entitlement increased over time. The short duration of a marriage might affect the amount of matrimonial property at stake between the parties – but the entitlement of the parties would be still subject to the yardstick of equality before considering whether there was a good reason for departure. Baroness Hale differed slightly in recognising that duration was a factor that the courts are required to consider. In her view, non-matrimonial assets were more likely to be excludable from the common pot in a shorter marriage, whereas, in the normal course of events, such distinctions would be likely to fade and such assets become part of the common enterprise – in this sense a short marriage might justify a departure from equality.

What is clear is that post-Miller; McFarlane, the line of authorities for short-marriage cases pre-White, which focused on the needs of the wife, cannot now be relied upon, and the post-White authority of Foster v Foster [2003] 2 FLR 299 is approved. The principle of sharing and the yardstick
of equality apply – the significance of short duration is that it may justify departure or it may diminish what is at stake.

When considering the length of the marriage, the court has traditionally taken it as lasting from the time of marriage to the time of breakdown. Cohabitation before (or after) the marriage was not normally relevant to duration (Foley v Foley [1980] Fam 160), unless the circumstances were exceptional – a 25-year cohabitation as a family where the husband could not marry for legal reasons (Kokosinski v Kokosinski [1980] Fam 72).

Recently, however, the courts have shown greater willingness to treat a period of cohabitation as being part of the effective duration of the marriage. In GW v RW (Financial Provision: Departure from Equality) [2003] 2 FLR 108, Nicholas Mostyn QC (as he then was) included 18 months’ cohabitation as part of the duration of the marriage, concluding that, ‘where a marriage moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently’. He commented that, since the decision in Foley, public opinion had moved on and was more willing to recognise fully committed relationships outside of marriage. He also thought it relevant to consider how the parties themselves define their period of cohabitation. In CO v CO (Ancillary Relief: Premarriage Cohabitation) [2004] 1 FLR 1095, Coleridge J gave full weight to eight years’ cohabitation preceding a four-year marriage. He held that, contingent on the parties having eventually married, committed and settled relationships outside marriage should be treated with the same validity as relationships which had publicly recorded that same degree of commitment by marrying.

This development has been criticised in some quarters; for some strong counter-arguments see the article in [2004] Family Law 205. One of many arguments is that cohabiting couples should not be deprived of the ability consciously to distinguish their state from that of married couples by an erosion of the distinction between the two.

Recent cases set no precedent but it is clear that the latitude of the court’s discretion is now open to the argument, based on the intention and conduct of cohabiting parties, that a relationship period longer than the marriage itself may be the appropriate measure.

Any physical or mental disability of either of the parties (s.25(2)(e))
This point is fairly straightforward. If either spouse has a physical or mental disability which makes it difficult or impossible to be self-supporting, then that will be a factor in its own right as well as being relevant to earning capacity and possibly to needs.

However, the fact of the disability must be put in context. If the spouse who has a disability can claim social security benefits, whilst the spouse against whom a claim is made has a limited income, it is possible that no order will be made (see Ashley v Blackman [1988] Fam 85).

**Contributions to the welfare of the family (s.25(2)(f))**

Contributions to the welfare of the family can take many forms. One form is financial, but this provision also puts value on non-monetary contributions by making particular reference to looking after the household. So far as it can gauge them, the court will take into account contributions in the future as well as in the past.

Financial contributions include the earnings of the spouses over the course of the marriage and any capital sums or property that they bring or acquire during the marriage.

Non-monetary contributions are usually those of the spouse who does not work in order to bring up the children and look after the household. From the 1970s, there has been steadily increasing recognition of the value and status of such contributions. Now, since the House of Lords’ decision in White v White [2000] 2 FLR 981, we have arrived at a position of direct equality between financial and non-financial contributions, at least as a starting point. In that case it was held to be a principle ‘of universal application’ that there should be no discrimination between the husband and wife in their respective roles. A marriage involves a division of labour and, however this labour is divided, there should be no bias in favour of the breadwinner at the expense of the homemaker and child-carer. Other types of non-monetary contributions, such as caring for an elderly or sick family member, or playing a support role to the career of the main earner, should not be overlooked where they are relevant.

Consideration of future contributions includes both financial and non-financial contributions. Where one party will be caring for children, this will be a relevant factor and the longer the dependency, the greater its significance. The likelihood of making financial contributions in the form of child support over a significant period of time will also be a relevant consideration.
Conduct (s.25(2)(g))

You will almost certainly have to explain to your client at some point that this factor is not concerned with the ‘normal’ types of misbehaviour often associated with the breakup of a marriage. This is not an easy issue on divorce. One spouse may be very upset at the way that the other has behaved – indeed that conduct may to them personally be the most important issue in the case. However the court is loath to go into a detailed examination of the causes and effects of marital breakdown, as this can be very expensive in terms of time and money, and is rarely relevant to deciding the best way forward for the future. In McCartney v Mills [2008] 1 FLR 1508, Bennett J declined to hear evidence or argument about conduct on the basis that it would make little or no difference to the final result. As a result, the court will only take the most serious misconduct into account.

The statute provides that conduct will only be taken into account if it is such that ‘in the opinion of the court it would be inequitable to disregard it’. In fact, there have been relatively few reported cases where the court has held that conduct is sufficiently bad to have a substantial effect on the level of provision ordered.

A departure from this well-established approach was suggested by the Court of Appeal in the Miller case itself, where Thorpe LJ cited the fact that the husband was responsible (in no extreme way) for the breakdown of the marriage as a factor influencing the balancing exercise. This aspect of that judgment drew much adverse comment and when Miller went to the House of Lords this point was expressly overruled. Conduct can only be taken into account if it is such that it would be inequitable to disregard it.

It is clear that adultery will not be sufficiently serious to be taken into account unless there is some aggravating factor, for example, if the adultery is with a father-in-law (Bailey v Tolliday 91982) 4 FLR 542. Where a person’s right to apply for financial remedies has been based on deceitful or criminal behaviour, such as bigamy, then it has been held that such persons should not be entitled to benefit from their deceitful act (Whiston v Whiston [1005] 2 FLR 268). However, bigamy is not an automatic bar to entitlement; it will depend on the circumstances, including the other spouse’s degree of knowledge and complicity (Rampal v Rampal (No 2) [2001] 2 FLR 1179) (though see [2003] Family Law 415 for a trenchant criticism of this decision). Serious violence has been held to be relevant
conduct. In *H v H (Financial Provisions: Conduct)* [1994] 2 FLR 801, the husband had been imprisoned for violently assaulting and raping his wife; this was held to be relevant and the court further took into account that he had put himself in a position where he could not support the family. In *Evans v Evans* [1989] 1 FLR 351, it was held that a wife’s right to maintenance should end after she was convicted of inciting the murder of her husband. In *K v K (Financial Provisions: Conduct)* [1988] 1 FLR 469, a wife’s conduct in assisting her husband’s suicide attempts was held to be relevant to her level of entitlement. In *H v H (Financial Relief: Attempted Murder as Conduct)* [2006] 1 FLR 990, a husband convicted of the attempted murder of his wife received only a small portion of the matrimonial assets. Coleridge J stated that, ‘The court should not be punitive or confiscatory for its own sake. The proper way to have regard to the conduct is as a potential magnifying factor when considering the other subsections and criteria. It places the wife’s needs as a much higher priority to those of the husband because the situation the wife finds herself in is, in a very real way, his fault.’ See also *K v L* [2010] EWCA Civ 124 for a recent example of a case where conduct was considered relevant and for the interplay between this and the fact that much of the wife’s wealth (which she retained under the order) had been inherited by her in the early years of the marriage and so was considered non-matrimonial property.

Serious financial misconduct may also be relevant. In cases where a party dissipates or fritters away family assets, or brings about financial ruin through obviously selfish and unreasonable behaviour, then the court may take the view that he or she is not entitled to claim on an equal footing with the other spouse, a part of what remains. For examples, see *Beach v Beach* [1995] 2 FLR 160 and *Le Foe v Le Foe and Woolwich plc* [2001] 2 FLR 970. The case of *Stodgell v Stodgell* [2009] 2 FLR 218 is a dramatic example of the effects of serious financial misconduct. It deals with the conflict between a criminal confiscation order (made after the husband’s conviction for tax evasion and fraud) and the wife’s financial remedies claim. Holman J held that neither the MCA 1973 nor the Criminal Justice Act 1988 took priority over the other and that the husband’s fraudulent activities amounted to conduct it would be inequitable to disregard. However, the husband’s total assessed tax liabilities were virtually identical to his whole assets (£900,000) and the confiscation order prevailed. Leave to appeal was refused ([2009] 2 LR 244), even though it was likely that the wife would then be forced to turn to the state for assistance. A wife who has been complicit in the crime giving rise to the confiscation order is vanishingly unlikely to succeed in a claim for financial remedies to tainted property. Her prospects of success depend on her level of complicity. However, the fact that she has not been complicit is no guarantee that she will succeed in her application; it depends on the particular circumstances: see *G v G* [2010] Fam Law 572.
Misconduct in the course of the proceedings, such as misrepresentation, making false statements or wilful non-disclosure, may well be relevant to the court’s considerations. In *P v P (Financial Relief: Non-disclosure)* [1994] 2 FLR 38, Thorpe LJ held that, though the conduct was such that it would be inequitable to disregard it, this should be reflected in the order for costs rather than in the apportioning of the assets. However, in *M v M (Ancillary Relief: Conduct: Disclosure)* [206] 2 FLR 1253, the husband had gambled away a significant amount of assets and had repeatedly failed to disclose matters, leading to penal notices and eventually a subpoena. The judge took account of both elements of bad conduct in the balancing exercise, rather than just confining the litigation element to a costs penalty.

**Value of any benefit the parties will lose the chance of acquiring (s.25B(1))**

The Pensions Act 1995 deleted the reference to pensions that used to be part of s.25(2)(h) and inserted s.25B, which is entirely concerned with pensions. Issues other than pensions that may fall for consideration under this factor might include early retirement or redundancy rights, or in some circumstances inheritance rights.

Section 25B(1) added considerations to the s.25(2) factors. It provides:

**(1)** The matters to which the court is to have regard under section 25(2) above include-

(a) *In the case of paragraph (a), any benefits under a pension arrangement which a party to the marriage has or is likely to have, and*

(b) *In the case of paragraph (h), any benefits under a pension arrangement which, by reason of the dissolution or annulment of the marriage, a party to the marriage will lose the chance of acquiring, and accordingly, in relation to benefits under a pension arrangement, section 25(2)(a) above shall have effect as if ‘in the foreseeable future’ were omitted.*

Thus, the court is now required in every case to consider no matter how remote these events may be, the benefits that the parties might receive from a pension scheme and the effect of the commensurate loss on a party as a result of the divorce. In most cases, there are two types of loss.
The first is the loss of the ability to share with the husband the benefits of the payments he will receive on retirement. The second is the loss of the protection, most commonly the widow's pension which the scheme will confer on the death of the husband.

Although the court is obliged to consider pension benefits, such consideration is not a separate consideration outside of the s.25 approach. The court considers whether and how pension considerations should affect the terms of the order it is considering making, just as with any other factor. Having considered pension issues, the court may give them as much or as little weight, including disregarding them altogether, as it thinks appropriate.

Considering pension rights is a process that can become very complex. It may involve, for example, detailed evaluation of intricate financial products, calculations of future worth and application of discounts for accelerated receipt and contingency. In complex cases, it may be appropriate to obtain expert actuarial advice. What is given here is an overview of the appropriate steps to take in considering pension rights.

Valuation

Regulations, made under the MCA 1973, have been made for the extent of any benefit under a pension scheme to be valued and verified for the purposes of making an order under the Act. These regulations are the Divorce etc (Pensions) Regulations 2000 (SI 2000/1123) and the Pensions on Divorce etc (Provision of Information) Regulations 2000 (SI 2000/1048), which themselves refer to the Pension Schemes Act 1993, ss 93-101. The value of the pension arrangement shall be taken as at a day to be specified by the court. The method of valuation is to calculate the cash equivalent value (CEV) (Formerly cash equivalent transfer value (CETV)). The process has been complicated by the introduction of new regulations from 1 October 2008 which apply to some pensions, but not others (the Occupational Pensions Schemes (Transfer Values) (Amendment) Regulations 2008 (SI 2008/1050)). Calculating the CEV is a specialist process – essentially it calculates a present (i.e., the date specified by the court) cash value for the value of the member’s payments on retirement and other pension benefits. The CEV does not include death-in-service benefits nor discretionary benefits. The managers of pension schemes must provide a CEV to a party on request or within three months of being ordered to do so by the court.
The CEV is the standard method of valuation but it is not the only one and the method has its critics (see the article referred to at the end of this section). Most criticisms argue that the CEV, for various reasons, tends to undervalue the actual value of the fund that will be accrued or the benefit that will be conferred. Although the court is required to use the CEV, it can also take other methods into account, provided that it is satisfied by expert evidence that it is appropriate to do so.

**Weight**

The next thing to consider is what weight to attach to the value of the benefits. A helpful insight can be gained from reading Court of Appeal judgments in *Martin-Dye v Martin-Dye* [2006] 2 FLR 901. Generally, the most significant facts are the ages of the parties, the length of the marriage and the amount of time remaining until retirement. With younger couples, the prospect of retirement will be far away and courts will tend to regard any future lost benefits as being too remote to be justly considered. The duration of the marriage is likely to be shorter, so the shareable benefits will be smaller. Additionally, younger divorcees will have plenty of time to make provision for their own futures – so there will be considerably less need under this factor and considerably less dependency, if any, on any existing pension arrangement. Conversely, the older a couple is, the closer in time will be the anticipated losses and the more important it will be for the court to make provision for them. The amount of time spent together accruing benefits is likely to be longer and therefore the value and significance of shareable benefits will be higher. Most importantly, the wife may only have a short time until retirement during which she will probably not be in a strong position in the labour market. She will therefore have little time and means by which to provide for her retirement and will be dependent, perhaps heavily or even solely, on the retirement arrangements of her husband.

Another basic consideration is to decide the time over which the pension benefit was accruing. In *H v H (Financial Provision: Capital Allowance)* [1993] 2 FLR 335, Thorpe J, was he was then, set out an approach that is commonly followed. He said that the value of what was earned during the period of cohabitation was more relevant than what may be earned during the period between separation and retirement. In that case, the pension had been earned over 13 years of service but there had only been seven years of cohabitation. The CETV was divided by the number of years of service and multiplied by the number of years of cohabitation.

District judges often follow this ‘straight line’ fractional approach. However, there is criticism of this approach – see below.
As can be imagined, the courts are reluctant to prescribe any periods of time or specific conditions for the relevance or otherwise of pension arrangements. However, decided cases tend to follow some broad principles and considerations:

(a) Where the parties, especially the wife, are young, possibly up to early thirties, the value of the pension may have little or no relevance.

(b) Similarly, if the pension is realisable more than 20 years into the future, it may well be of little or no relevance.

(c) Taking into account the case as a whole, what are the wife’s reasonable needs for income or capital after retirement? Where there is not a clean break, there is likely to be a future dependency.

(d) It is important to consider the position the wife will be in if the husband dies.

(e) In most cases, the court will have given priority to considering the wife’s and any children’s housing needs and income needs – if substantial provision has been made here, this may, taking into account the overall balance, affect the weight given to the wife’s retirement needs.

(f) The needs of the husband must not be forgotten, especially in limited assets cases where the balance has gone against him in terms of housing and/or income.

(g) It is most important to bear in mind that these are merely illustrative tendencies derived from decided cases – every case will turn on its own facts.

**The final order**

The final thing to consider is how to reflect the value and weight of pension benefits in the final order. Pension benefits constitute a consideration under the overall s.25 exercise. When
considering what, if any, orders to make in relation to pensions, the overall balance of all the relevant factors and circumstances must be borne in mind. There is no need to interfere with pension entitlement unless it is justified by reference to relevant factors or to the overall yardstick of equality.

In circumstances where there are sufficient funds to meet all the wife’s income and capital needs for life, it may be appropriate to consider offsetting, ideally in the form of a Duxbury fund. Offsetting may also be appropriate where there is a younger couple and the wife has no serious requirement justifying adjustment of her husband’s pension entitlement – but it may be considered just to reflect some loss of provision in a lump sum.

In circumstances where it is foreseen that there is likely to be an ongoing dependency crossing over into retirement, an attachment order for periodical payments could meet this purpose. In some circumstances, for example where the dependency is strong, or where there are dependent children being provided for, or where the husband is significantly older than his wife, it may be appropriate to strengthen the wife’s protection by providing for the possible death of the husband, which can be achieved by an order for attachment of death-in-service benefits.

If there were insufficient funds at the time of the proceedings to make such lump sum order as the court considered appropriate, an attachment order for a lump sum could be used. This is in effect a deferred lump sum order.

In cases where there is a clean break and it is desired to provide for the wife with a share of the husband’s pension, a pension-sharing order will usually be appropriate. There does not have to be a clean break – a pension sharing order can be combined with an order for periodical payments. It is not possible to combine pension sharing with an attachment order – so the less independent a wife is, the less appropriate a pension-sharing order is likely to be. An advantage of a pension-sharing order is that it gives the wife a sum that is not subject to variation, nor at risk from changes in the husband’s circumstances, such as bankruptcy – once she has her pension credit it is hers for life.

**Criticism of current practice**

In the post-White era of fairness there is a greater trend towards pension-sharing orders. However, the straightforward approach adopted by many judges may not be doing justice to the complexity of
pension. Comparing cash equivalent values between different pension schemes can be very misleading in that those values can be quite unrelated to the actual income streams that the given pensions will produce. For further discussion of this and related problems, see ‘Pensions and Equality’ [2007] Family Law 310.


BASES FOR PROVISION

Consider the needs of children first

The welfare of any children is stated by statute to be a first consideration (MCA 1973, s.25(1)). However, this does not mean that the children are entitled to be given outright assets belonging to their parents, but rather that provision for the children should be taken into account in dividing the assets of the parents. The most common effect of this principle is that where there are young children, the matrimonial home will often be used to provide a home for them either by settling it (that is, by apportioning beneficial interest in the home between the parties) or by transferring it to the custodial parent.

Although stability in the life of the children is important, the existence of children will not always mean that the matrimonial home is preserved. In some cases, especially where the husband too has need of rehousing, or if the house is larger than is strictly required by the children of the family and the parent with care, it will have to be sold to provide capital and smaller properties purchased.

The welfare of children is also important in terms of income, and child support liability means that in practice payments of maintenance for children will need to take priority. This will inevitably have an effect on overall settlements and may make it less likely that generous capital provision will be made.

The clean break
The idea of the clean break is that resources should be divided once and for all between the spouses, with no further financial obligations between them, and leaving each free to start a new life. This can usually only be achieved if there are sufficient available assets to satisfy the reasonable claims of the applicant, and if both spouses have such income or earning potential that maintenance payments will not be necessary.

**Legislative framework**

The objective of trying to achieve a clean break between spouses on divorce was made statutory in 1984, when s.25A was inserted into the MCA 1973. There are three subsections to s.25A.

Subsection (1) provides that whenever the court exercises its powers under ss 22A-24A, it is under a duty to consider whether it should do so in a way that terminates the financial obligations of the parties to each other as soon after decree absolute as the court considers just and reasonable. If the court does not conclude that termination is appropriate, then subsection (2) requires the court, when it makes an order for periodical payments (secured or otherwise), to consider whether it is appropriate to set a term for the payments that lasts only as long as necessary to allow the benefiting party to adjust without undue hardship to the termination of their financial dependency on the other party. Subsection (3) provides that if the court dismisses the application for periodical payments (secured or otherwise), then it may do so with an order barring further applications in relation to that marriage. The desirability of self-sufficiency may also be read in the 1984 amendment to s.25(2)(a) directing the court to consider any increase in earning capacity that it would be reasonable to expect a party to take steps to acquire.

**The approach of the court**

The court must consider the possibility of achieving a clean break in every case. However, it should only do so after having regard to all the s.25 factors and not in isolation from them. Although the court is required to try to achieve a clean break, it is under no obligation to pursue one as a priority or at the expense of other considerations.

In most cases, the court will have two decisions to make: should there be an immediate clean break (*per* s.25A(1)); or should there be a clean break at some future time (a deferred clean break) *per* s.25A(2))? When considering a deferred clean break, the court must further think about whether to
make an order under s.28(1A), which prohibits the party in whose favour the order is made from making further applications for extension or variation under s.31.

In considering what is appropriate, there are three broad categories that cases might fall into: ‘big money’, ‘no money’ and ‘normal money’. In ‘big-money’ cases, a clean break can often be achieved because, whatever the wife’s short- or long-term entitlements, there is enough money to meet them for her lifetime by providing her with some form of capital fund, such as a Duxbury fund. All continuing claims can be dismissed because the capital fund provides real self-sufficiency. In such cases, however, the liquidity of any business assets can be a highly relevant factor – see F v F (Clean Break: Balance of Fairness) [2003] 1 FLR 847 for an example of a case where it was held to be inappropriate to order a clean break in order to preserve a significant and illiquid business that generated income for the parties. In Miller; McFarlane, the House of Lords confirmed the principle that periodical payments can be ordered to provide a spouse with a fair share of the matrimonial assets where there was insufficient capital to do so. This is a departure from the previous view that periodical payments could only be used to meet ongoing needs. It is probably limited to big-money cases where the payer is unusually ‘capital-poor’ but ‘income-rich’ – even here critics wonder whether a lump sum order in instalments would not fit the purpose better.

In ‘no-money’ cases, a clean break may be ordered on the basis that there is no possibility nor prospect of the husband paying periodical payments. In such circumstances, the clean break at least avoids ongoing uncertainty, litigation and costs. It should be said that even with no clean break, where there is no money, there is less possibility of continued uncertainty.

It is the ‘normal-money’ cases that present the most difficulty in considering the clean break possibilities. Often the husband does not have enough money to make payments without hardship but the wife does not have an earning capacity that would enable her to be self-supporting. The most significant fact is whether or not there are children of the family – wherever there are children, a clean break becomes very hard to achieve and is unlikely to be attempted. This is for very practical reasons including the obvious fact that, with children, the caring parent will have greater needs and diminished earning capacity. In addition, with children present, the parties are going to have a serious and long-term ongoing joint responsibility, so achieving a clean break may be less important. Remember that the clean break relates to the parents – one can never achieve a clean break for one’s obligations to children.
In balancing available money against needs, it is important to consider the latter side of the balance carefully, especially with childless couples. If the needs are not great, then a clean break may still be achieved even where there is not a great deal of money. Needs may be fewer where there has been a short marriage, or the parties are young, or where they both have carers.

Authoritative guidance on how to approach the question of a clean break was given by Ward LJ in *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26. Although that case involved a short marriage and the facts were very unusual, the guidance is of general application. To summarise:

(a) The first task is to consider whether an immediate clean break is appropriate. Section 25A(2) provides the test in considering a deferred clean break of the payee being able ‘to adjust [to the termination of dependency] without undue hardship’. It is commonly inferred from decided cases that this same test applies to considering an immediate clean break (even though it is not written in the statute).

(b) If the court decides to order periodical payments of some sort, then it must also consider whether to set such payments for a finite term. It should only do this if satisfied that the payee will at the end of the term have adjusted to the termination of support without undue hardship. There must be evidence before the court to support such a conclusion.

(c) What is appropriate must depend on all the circumstances of the case, including the welfare of any minor child and the s.25 factors. The duration of the marriage may be of particular relevance but a short marriage does not always lead to a clean break.

(d) In considering whether and when the payee can cope with the termination of financial dependence, the question is *can* she adjust, not *should* she adjust. In answering that question, the court will pay attention not only to the duration of the marriage but to the effect of the marriage and its breakdown; the need to care for minor children and the effect of this on the earning capacity of the payee; and any difficulties she will have in entering the labour market, resuming a fractured career and making up any lost ground.
(e) If there is doubt about whether the payee will be able to adjust, then it is wrong to set a term with the onus on the payee to apply for an extension. The proper course is to set no term and leave the payer to apply for variation.

The same principles apply when considering whether to terminate an order for periodical payments on an application to vary under s.31; the test is still can the payee adjust? Any cohabitation by the payee is also likely to be relevant. A helpful case on how the discretion is exercised at this stage can be found in Moylan J’s decision W v W (Periodical Payments: Variation) [2010] 2 FLR 985.

The Inheritance (Provision for Family and Dependants) Act 1975

The Inheritance (Provision for Family and Dependants) Act 1975, s.1(1)(b) (I(PFD)A 1975) allows former spouses to make a claim for financial relief against the estate of a deceased person. This would not be appropriate in a case where the court has effected a clean break. Section 15(1) of the I(PFD)A 1975 provides that, on a decree of divorce, separation or nullity the court can, if it considers it just to do so, make an order that the other party shall not be entitled to apply under the I(PFD)A 1975 against the estate of the deceased party. This is commonly done in clean break cases but it is a separate consideration and will not always be appropriate, for example, in the ‘no-money’ cases discussed above. The court will not make this order unless asked so you should take care not to overlook it.

Extension of terms

Where there is a direction under the MCA 1973, s.28(1A) barring applications for an extension/variation of the term, that is final and the court cannot reconsider it.

According to the guidance in C v C, there should not be a situation where a fixed-term order for periodical payments is made without a s.28(1A) order. However, it does happen and when it does the payee may apply for an extension/variation under s.31. He or she must do so before the term expires, as once the term has expired the right to apply for an extension is lost.

Summary of common orders

Open-ended order for maintenance
This is appropriate where the dependency of the payee will continue for a long time or for life or where there is uncertainty. This is often the case where there are young children or where the payee is older and the court is uncertain that she will be able to become self-sufficient.

**Maintenance order with a term and s.28(1A) direction**

This will most often be used where the court is satisfied that after a period of readjustment the payee will be able to achieve a state of self-sufficiency, for example, a younger wife with a large part of her working life ahead of her.

**Maintenance order with a term without s.28(1A) direction**

This is contrary to judicial guidance, which says that if there is uncertainty then an order without term should be made. However, this may be appropriate, for example, where there are older dependent children and the wife does have the means to achieve self-sufficiency, but the future dependency of the children cannot be ascertained with certainty.

**Immediate clean break on income**

This will be appropriate in circumstances where the court considers that there should not be an ongoing dependency, for example, where there are no children, the marriage is short, the wife is able to become self-supporting immediately or is already self-sufficient. It may be throughout the wife could have been entitled to some kind of maintenance but she gave that up in return for a greater share elsewhere in the package, such as an increased share in property, which preserved the overall balance and may also have decreased her income needs.

**Capitalised maintenance, no periodical payments**

This is a lump sum out of which the payee can provide maintenance for herself. This kind of solution can be used where there is dependency but there is sufficient money to provide for that dependency with a capital fund and thus make a clean break possible.

**Nominal maintenance order**
This is an order for periodical payments of a token sum such as five pence per year. This kind of order can be used where it is thought that a clean break is possible and/or desirable but the circumstances are such that the payee should not be left without the ability to reapply. For example, if the payee is cohabiting but not remarried, she may be supported by the cohabitant for the time being but she does not have the certainty or the legal rights that come with remarriage. Another situation where nominal payments may be appropriate is where the husband simply cannot afford maintenance but there is a chance that his situation will improve, so it should be left open to the wife to reapply if he becomes able to afford to support her.

Finding a starting point – fairness, non-discrimination and equality

The s.25 factors govern the exercise of the court’s discretion – but it is necessary to consider what the court, in the exercise of its discretion, is trying to achieve. Is there a fundamental basis, or starting point, for the court in deciding how to approach issues of financial relief? In decided cases, there is regular reference to the objective of ‘achieving fairness’ and ‘doing justice’. In the Court of Appeal in White v White [1998] 2 FLR 310, Butler-Sloss LJ stated: ‘Sections 25 and 25A provide the guidelines and require the court to have regard to all the circumstances of the individual case and to exercise the discretion of the court to do justice between the parties.’ In Cowan v Cowan [2001] 2 FLR 192 at 213, Thorpe LJ stated that ‘the unexpected objective of the [s.25] exercise is to arrive at a fair solution’. It is helpful to consider now what ‘doing justice’ and ‘arriving at a fair solution’ have been held to mean in more practical terms.

After the passing of the MCA 1973, the first major case to deal generally with how discretion should be exercised was Wachtel v Wachtel [1973] Fam 72. This case proposed the use of the ‘one-third rule’ as a starting point for evaluating how to apportion the assets of the marriage. Essentially, it meant that a fair division of assets in a standard situation could mean one-third going to the wife and two-thirds going to the husband. Within a few years this ‘rule’ became subject to regular criticism and numerous court decisions emphasised that the only proper approach was to consider the statutory factors. The ‘one-third rule’ is now totally extinct and is of historic interest only.

A principle that partly replaced the ‘one-third rule’, at least for cases where there was a significant level of income and capital, was that of seeking to meet the applicant’s ‘reasonable needs’. This term was developed by the courts as a way of interpreting the statutory factors and achieved
widespread use, even outside of bigger-money cases. However, there are many situations where there is insufficient money to meet all ‘reasonable needs’, or where such a principle is inappropriate, as both spouses have built up and have good claims to income and capital.

The principle of ‘reasonable needs’ has now been replaced by the guidance of the House of Lords in *White v White* [2000] 2 FLR 981 and the subsequent line of authority, although not without some comment and difference of opinion. Although *White* was a case involving significant assets, which were more than sufficient to meet needs, Lord Nicholls set out some principles to be followed in future cases:

(a) It is a principle ‘of universal application’ that there should be no discrimination between husband and wife in their respective roles. Fairness dictates that, whatever the division of labour, this should not prejudice either party when considering the statutory factors.

(b) When considering how to give effect to the factors, the judge should check his or her provisional views against ‘the yardstick of equality of division’. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so’.

(c) However, although equality is a ‘yardstick’ or a ‘cross-check’, it is not a ‘starting point’ nor a ‘presumption’.

(d) The concept of ‘reasonable needs’ is a misconception. The wording of the statute is simply ‘needs’ and no general qualification of this is desirable.

There has been some debate about how much *White* applies outside of big-money cases. Lord Nicholls’ speech makes it clear that the non-discrimination principle is ‘of universal application’. The ‘yardstick of equality’ is a little less straightforward, being a ‘yardstick’ but not a ‘stating point’.

In *Cowan v Cowan* [2002] 2 FLR 192 (which was a big-money case), the Court of Appeal declined to take the opportunity to provide authoritative guidance on how *White* should be applied across all types of cases, but Thorpe LJ said in his judgment: ‘The decision in *White* clearly does not introduce a rule of equality. The yardstick of equality is a cross check against discrimination. Fairness is the rule.’ In *Cordle v Cordle* [2002] 1 FLR 207 (which was not a big-money case), Thorpe LJ said: ‘There is no
rule in *White* that district judges must produce equality of outcome unless there are good reasons to justify departure.’

In *Miller; McFarlane*, the House of Lords again considered the question of fairness: ‘In arriving at a fair outcome, three elements must be considered: the needs of the parties and children; compensation for any economic disadvantage arising from the marriage; and sharing the fruits of the matrimonial partnership.’ Baroness Hale added this important qualification: ‘The ultimate objective is to give each party an equal start on the road to independent living.’ In addition, the remit of periodical payments was extended beyond maintenance to include compensation in appropriate cases.

In the High Court the new guidance was applied with a sense of restraint. In *RP v RP* [2006] EWHC 3409 (Fam), Coleridge J said care had to be taken in ensuring that the guidance in *Miller; McFarlane* was not elevated to some kind of quasi-statutory amendment – it was the commentary of the House of Lords on a well-trodden statute now in its fourth decade. He stated that it was questionable whether ‘compensation’, which did not appear in the statute, added anything to ‘financial ... obligations and responsibilities’ under s.25(2)(b). In *H v H* [2007] EWHC 459 (Fam), Charles J said the fact that both parties to a marital relationship are free to bring it to an end, along with its cooperation and common goals, leads to the conclusion that by reference to the rationale of compensation or sharing, the lower-income earner is not, and should not be, entitled to long-term economic parity.

The Court of Appeal, however, pulled in a slightly different direction. In *Charman v Charman* [2007] EWCA Civ 503, Potter P stated that the ‘sharing principle’ (of the three strands identified by the House of Lords in *Miller; McFarlane*) is the dominant principle in big-money cases and that it should be the starting point of ancillary relief consideration – rather than come at the end of the exercise. He said that the sharing principle should come before needs, unless needs produces a bigger award. He also limited Baroness Hale’s views on non-matrimonial property as applying only to short-marriage cases and as being less preferable to Lord Nicholls’ more ‘logical’ view.

Some commentators said that this marked the end of the ‘yardstick of equality’ and that the principle of fairness should now be understood as having a starting point of sharing. This was a little premature – it has to be remembered that this was a big-money case and that in most cases courts are mainly concerned with stretching available resources to cover adequately the needs of the
parties – as lord Nicholls put it in *Miller; McFarlane*: ‘In most cases the search for fairness beings and ends at that stage.’

The yardstick of equality, involving in any given case a calculation of what equal division would be, should still be a useful cross-check against discrimination – a tool rather than an objective. In most cases, resources are limited. Various factors such as cost of living and children and the need to house everyone, will have such weight that, after they are carefully balanced in a non-discriminatory way, they may well produce an outcome that is unequal (in terms of the allocation of resources), but fair (in terms of all the circumstances and relevant factors).

In most ‘normal’ cases there will be little or nothing remaining over which to have a protracted debate about the value of various types of contribution. This is often true even in ‘well-off’ families with well-about-average incomes, as the perceived needs and entitlements tend to be of higher value – the houses cost more, the living standard to be met is higher, there are school fees and other private outgoings – so there is still nothing remaining that is perceived as surplus to needs. It should be said that in normal money cases, even though contribution may not be a leading factor, it is still relevant and the non-discrimination principle will apply. It may be more important in cases where there is a small enterprise to be divided or where there are no children; see *Foster v Foster* [2003] 2 FLR 299, CA for the principle applied to a small business in a short, childless marriage.

Four years post-*Charman*, it is still true that the only overall objective that is always relevant and can never be departed from is fairness – and the starting point for achieving this is always the s.25 factors. It is well described by Thorpe LJ in *Cordle*, at 214:

The second difficulty that needs mention is the impact the decision of their Lordships in *White* has had upon what may be described as routine district judge case … The first point, that cannot be over emphasised, is that there is no rule that district judges must produce equality of outcome … The cross-check of equality of outcome is intended to be a safeguard against discrimination … it is the first duty of the court to apply the s.25 criteria in search of the overarching objective of fairness … in the typical … case the district judge will always look first to the housing needs of the parties … the court’s first concern will be to provide a home for the primary carer and the children … where there is sufficient to go beyond that, the court’s concern will be to provide the means for the absent parent to rehouse … Another factor that should be considered is buttressing the ability of one or other of the parties to work … if there be cash beyond that the judge has to look to what in his estimation is the fair result.
These considerations will apply in many standard cases, but they are, of course, not exclusive. The only universal rule is to apply the s.25(2) criteria to all the circumstances of the case (giving first consideration to the welfare of the children) and to arrive at a fair result that avoids discrimination. This approach was reiterated by the Court of appeal in *B v B (Ancillary Relief)* [2008] 2 FLR 1627, where the court emphasised that there is no rule that equal division is the starting point in all cases, but that the financial position of the parties and s.25 factors are the starting point. The Court of Appeal emphasised that in all cases the objective was fairness and that the yardstick of equality is to be applied to every outcome and only to be departed from to the extent that there is a good reason for doing so: paras [24] and [25]. The importance of concentrating on the s.25 factors was again revisited by the Court of Appeal in *Robson v Robson* [2011] 1 FLR 751: see Ward LJ at para. [43] and his useful reminder that:

> The fact is that no formula and no resort to percentages will provide the right answer. Weighing the various factors and striking the balance of fairness is, after all, an art not a science.

### The rich couple

The application of reasonable needs has been done away with by *White*. So, too, in theory anyway, has the discrimination between wealth-creating work and ‘homely management’ of the house and children. In big-money cases, there has been great emphasis on the need to justify departure from the yardstick of equality. In doing this, there is often (although not exclusively) a focus on contribution. This is partly because wealth tends to render most of the other factors irrelevant; but it also shows that, while the courts are anxious to avoid discriminating with regard to the nature of the contribution made by the parties, they have still been willing to find differences in the level of contribution made and to reflect that in the division of the assets. In *Cowan*, departure from equality was justified by the fact that ‘the husband’s contribution ... was truly exceptional’. In *Lambert v Lambert*, at first instance, departure was justified by ‘the really special contribution of the husband’. However, on appeal (*Lambert v Lambert* [2003] 1 FLR 139), the Court of Appeal became much more wary of the issue of special contribution, making ‘a cautious acknowledgement that special contribution remains a legitimate possibility but only in special circumstances’. Courts continued to limit the concept of special contribution and in *Miller; McFarlane* the House of Lords stated that ‘the question of contributions should be approached in much the same way as conduct. Exceptional or special contributions should only be regarded as factors pointing away from equality of division when it would be inequitable to proceed otherwise.’
It will generally be easier to achieve a clean break where there are substantial assets, but continuing maintenance may be ordered, for example, where it is not reasonable to expect the claimant spouse to go out to work or where the payer’s huge salary may come to a predictable end (e.g. *Parlour v Parlour* [2004] EWCA Civ 872, the footballer case). An alternative may sometimes be for a sufficiently large sum to be ordered to buy out the right to continuing maintenance.

**The poor couple**

There are, unfortunately, many cases where the joint assets of the spouses are not sufficient to provide properly for both. Where the money that has managed to finance one household needs to be stretched to provide for two, there may simply not be enough to go around. This is, perhaps, the most obvious and frequently used reason for departing from ‘the yardstick of equality’. There may not be an easy solution in such cases, and you will need a particularly practical understanding of the problems that such a couple may face, and a thorough understanding of the social security benefit system. This knowledge will need to be both detailed and up-to-date.

One spouse cannot normally expect the state to take over the expense of caring for the other spouse, as that is a legal liability of the spouse. However, it is appropriate when assessing the potential income of a party to include non-means-related state benefits. Generally, parties are expected to apply for benefits designed to assist people in their position; a commonly occurring example is the working family tax credit. Clearly, it would be unreasonable and illogical to order a spouse to pay maintenance if that would put the payer below subsistence level, as the effect would simply be that the payer would be in need of state benefit him or herself (*Stockford v Stockford* [1982] 3 FLR 58) and in such situation a maintenance order will not normally be made. This is not an invariable rule, particularly in cases where a paying party has taken on new liabilities irresponsibly and without proper regard for his or her obligations to his or her children and/or former spouse (*Campbell v Campbell* [1998] 1 FLR 828). Generally, though, in a case where joint resources are so low that it is inevitable that one spouse will have to rely on state benefits, it may be appropriate that a nominal order or no order be made for maintenance, and the claimant spouse be left to rely on state benefits.

Where resources are limited, the ‘net-effect’ approach can be used in considering maintenance payments. This was first enunciated in *Stockford* by Ormrod LJ and is still a useful practice. In any
case where the need for financial provision may outweigh the available resources, the best approach is to calculate as accurately as possible how much the payer can afford to pay towards the maintenance of the other spouse. Attention is centred on the sum each party will have left to live on. The object is to ensure that the payer’s net income (after deductions, including the maintenance payable to the spouse) is not reduced below subsistence level (i.e., the income needs of the payer’s new household as indicated by the appropriate income support level and the cost of his or her accommodation).

There is no set formula for what is, basically, a common-sense exercise. It involves ascertaining the net income from all sources for each of the parties, adding to the subtracting from that according to the amount of the proposed order and allowing for any tax changes that may result. This gives the income of each party if the proposed order were made, which figures can be compared and related to their respective needs, and the hypothetical order adjusted accordingly.

Where there are children, note that a child support calculation will have to be made first. If the payer is not well off, this may well leave little or nothing for any additional maintenance for the caring spouse.

The short marriage

Since Miller; McFarlane all pre-White authorities on the effect of a short marriage must be treated with caution.

Probably authorities relating to very short marriages – relationships that in effect never got off the ground – are still useful guidance. If a marriage is short, then this may be an overriding factor which dictates the whole basis for provision. After a very short marriage (lasting weeks), there may be no provision at all (although a brief marriage can be debilitating; see C v C (Financial Relief: Short Marriage) [1997] 2 FLR 26). After a marriage lasting months, provision is likely to be on the basis of what the applicant has lost by the marriage. Another feature may be to provide the wife with maintenance for a limited term sufficient to enable her to rejoin the labour market, although note the dicta of Ward LJ in C v C to the effect that, just because the marriage is short, it does not automatically mean that there should be a term.
However, while these may be the effects of a short marriage on the overall package of provision, it is essential to note that, as always, all the circumstances and factors must be considered. The existence of a child of the marriage will almost certainly alter the picture completely. Foreign cultural factors may also affect the court’s approach to a short marriage.

For marriages long enough to be measured in years the best starting point is probably *Foster v Foster* [2003] 2 FLR 299, CA, which was cited with approval in *Miller; McFarlane*. In this case, a four-year marriage without children, Hale LJ restored a DJ’s order that intended to give back to the parties what they had brought into the marriage (and spent after separation) while sharing equally between them, despite different levels of financial contribution, the assets they had accumulated during the marriage. For an example of a very short marriage of less than a year where there was a child, see *B v B (Mesher Order)* [2003] 2 FLR 285, Family Division, Munby J made large (relative to the assets) orders for indefinite periodical payments and a lump sum (for housing) that left the husband short of capital. The judge said that the existence of the child meant that effectively the wife would be making a contribution to this marriage for two decades, and that her earning capacity would be severely reduced, while the husband’s large earning capacity meant that he would be able to rebuild his capital. These factors meant that it was fair and necessary to make significant and long-term provision in her favour.

In cases where there is a surplus after meeting the parties’ needs, short duration is a factor that might justify departure from equality, particularly in respect of non-matrimonial property. Baroness Hale takes a slightly more expansive view of the possible effect of a short marriage, noting that it is a statutory requirement to consider it.

**Special circumstances and assets**

The facts of an individual case may reveal some special circumstances in the position of either spouse, or with regard to the assets available for provision, which may inevitably have some practical bearing on the basis on which financial provision can be ordered.

**A business forming part of these assets**

One type of asset that may require special consideration is a business or an interest in a business. If either or both spouses is involved in the running of a business, there may be complex problems in
deciding to what extent the business should be taken into account, how the business should be valued and how provision might be made from a business, as it may be difficult to extract money from it without prejudicing its chances of success. Expert assistance may well be required in dealing with accounts, taxation, the marketability of shares and future projections for business success. For examples, see *Mubarak v Mubarak* [2001] 1 FLR 673 and *A v A* [2000] *Family Law* 470. For thorough consideration of how to value a business for financial remedies purposes, see [2004] *Family Law* 187.

Historically, there has been a reluctance by the courts to ‘kill the goose that lays the golden egg’. The income generated by a business is often more important than the cash that could be raised by selling it. However, if one of the parties is retiring from the business or if the business was run together by the separating parties, then it may be appropriate to realise the value of the business. After *White*, there was a trend, in big-money cases, in favour of selling business assets if necessary to reflect equality of contribution; see *Parra v Parra* [2003] 1 FLR 942. However, there is now a greater tendency to try to find ways of preserving the business. See *F v F (Clean Break: Balance of Fairness)* [2003] 1 FLR 847, dealing with the fairly common situation of an illiquid business. Singer J preserved the business by ordering ongoing maintenance (rather than a lump sum that could only be raised by selling the business) to the wife in a situation where a clean break would otherwise have been quite appropriate. For a very creative solution to illiquidity, see *R v R (Lump Sum Repayments)* [2004] 1 FLR 928, where, without selling the family business, the husband would have been left with £448,000 and the wife with £30,000, which was obviously not an acceptable outcome. The High Court ordered the husband to make a lump sum payment by 240 monthly instalments; as a lump sum order these payments would continue if the wife remarried and also were subject to variation if there were unforeseen circumstances. In *R v R (Financial Relief: Company Valuation)* [2005] 2 FLR 365 the husband was given five years to pay a lump sum of £1 million but was incentivised by early payment discounts of up to 20 per cent.

**Agreements**

Parties may wish to enter into an agreement about what is to happen should their marriage come to an end (or, indeed, when it has). Such agreements can be made at one of three distinct times: before the marriage and in contemplation of it; during the marriage; or after separation. These are referred to by a variety of different names: antenuptial, prenuptial or premarital agreements for the first type; postnuptial or postmarital agreements for the second type; and separation agreements
for the third. The courts have developed a clear approach to separation agreements which has withstood the test of time for over 30 years and this is dealt with below.

It is the first two categories which have resulted in differing approaches and in respect of which there have been calls for reform in recent years. It has been suggested in the medial that prenuptial agreements should be made binding. The justification is, perhaps, that parties, particularly the very wealthy, should be free to determine for themselves the financial consequences of their marriage not enduring. Baroness Hale in her dissenting judgment in the leading authority, *Radmacher v Granatino* [2010] 2 FLR 1900, commented that this area of law is ‘ripe for systematic review and reform’ [133]. The Law Commission is conducting a review into the status and enforceability of agreements between spouses and civil partners (and those contemplating marriage or civil partnership). In January 2011, having waited for the decision of the Supreme Court in *Radmacher v Granatino* the Law Commission published its consultation paper and its final recommendations are expected in 2012. See also Law Commissioner Professor Elizabeth Cooke’s article at [2011] *Family Law* 145.

Until that review and/or the passing of any new legislation, what is clear in the meantime is that none of these types of agreement is legally binding. They do not oust the jurisdiction of the court to determine the financial consequences on divorce (or on the cessation of a civil partnership): *Hyman v Hyman* [1929] AC 601. Such an agreement falls to be considered as one of the ‘circumstances of the case’ that the court must take into account in exercising its discretion under s.25.

In recent years, the courts have come to attach increasingly more weight to prenuptial agreements. In *Crossley v Crossley* [2008] 1 FLR 1467, Thorpe LJ expressed the view that, on the facts of that case (short, childless marriage between two independent, wealthy individuals who had both been previously married and both consulted lawyers), the prenuptial agreement was a factor of ‘magnetic’ importance.

However, the Supreme Court in *Radmacher v Granatino*, has now given clear guidance on this issue of the weight to be attached to the first two types of agreement. This guidance is relevant to both pre and postnuptial agreements, the Supreme Court holding that the Privy Council in *MacLeod v MacLeod* [2009] 1 FLR 641 was wrong to draw a distinction between them. *Radmacher* is, therefore, authority for the courts’ approach to both types of agreement.
In giving the lead judgment (with which six of the Supreme Court Justices agreed), Lord Phillips held that the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement [para. 75]. In considering the circumstances leading up to the making of the agreement, Lord Phillips considered that the court should approach this in the same way as it has been approached in relation to post-separation agreements (see below). He said:

The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and any other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it [para. 71].

The court will also consider other matters: the parties’ emotional state at the time of the agreement, what pressure they were under to agree (but in the context of what would have happened without such pressures), the age, maturity and experience of the parties and whether the marriage would have gone ahead without the agreement in that form. For an example of undue influence in a postnuptial agreement, see NA v MA [2006] EWHC 2900 (Fam), where Baron J considered the subtle and particular pressures that parties can be subject to within a marriage relationship. Here the husband had effectively threatened to end the marriage if she did not sign and such legal advice that she received was poor. The judge gave no weight to the agreement.

Dealing with fairness will be dictated by the facts of each particular case, but Lord Phillips gave some general guidance. A nuptial agreement could not be allowed to prejudice the reasonable requirements of children of the family; the court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated, particularly where this addresses existing circumstances; dealing with non matrimonial property in a nuptial agreement is not inherently unfair; it will be pertinent to look at the extent to which an agreement fails to provide fairly for future circumstances. Referring to three strands of need, compensation and sharing (identified in White and Miller; McFarlane as the main principles which govern the distribution of property in a financial relief application), he suggested that the principles of need and compensation were the two crucial aspects for fairness. If these strands are satisfied, the court is more likely to uphold the nuptial agreement rather than make some other order. Lord Phillips approved the general approach of Baron J at first instance in Radmacher, that the agreement fell to be considered
as one factor in all the circumstances of the case, but in the right sort of case it could be the most compelling factor [para. 83].

Unsurprisingly, the authorities on nuptial agreements concern cases with significant assets. However, the guidance in *Radmacher* may well mean that more couples wish to enter such agreements in order to assert their own autonomy over the financial consequences flowing from the possible ending of their marriage or civil partnership. It is clear that post *Radmacher*, the courts’ view will be that parties who enter such agreements will be assumed to intend that effect should be given to them. The Law Commission made this same point. The drafting of such agreements is likely to be a growth area. Perhaps the key issue identified in the consultation is that in order for there to be an absolute degree of certainty through marital agreements, the court’s discretion would need to be excluded. Even if this were the ultimate recommendation of the Commission, one wonders whether there is sufficient interest in this rather narrow topic for it to be given room in the coalition government’s legislative programme.

As for post-separation agreements, these are governed by the line of authorities following *Edgar v Edgar* [1980] 3 All ER 887. Ormrod LJ said that regard must be had to the conduct of both parties leading up to the agreement and their subsequent conduct in consequence of it. He highlighted circumstances that would be relevant: undue pressure, exploitation of a dominant position, inadequate knowledge, (possibly) bad legal advice, an unforeseen change of circumstances. He also stated the principle that formal agreements, properly and fairly arrived at, should not be displaced unless there are good and substantial grounds for believing that an injustice will otherwise be done.

The problem of poor legal advice was considered by the Court of Appeal in *Harris v Manahan* [1997] 1 FLR 205. Although bad legal advice is a circumstances to be taken into account, where there was a consent order, there is public good in having finality in litigation and the order would not be interfered with save in the most exceptional case of the cruellest injustice.

Where the parties reach a separation agreement and subsequently apply for financial remedies, the court will consider the *Edgar* principles. If the agreement was fairly reached, then the court will hold it to be one of the most important factors which are highly persuasive, but not binding. In *A v B (Financial Relief: Agreements* [2005] 2 FLR 730, Black J held that an agreement of this kind should be taken into account under the heading of conduct, as one of the considerations to which the judge must give weight in applying the statutory criteria. See also *S v S (Ancillary Relief)* [2009] 1 FLR 254.
where Eleanor King J held that a post-separation agreement reached after round-table meetings, which was then encapsulated in a draft order, was of such magnetic importance that it must necessarily dominate the discretionary process. It was appropriate for the case to proceed on the notice to show cause why the draft order should be not perfected.

The millionaire’s defence

This ‘defence’ is essentially a defence against disclosure in cases involving substantial assets where the respondent says that he will meet any order the court might make (*Thyssen-Bornemisza v Thyssen-Bornemisza (No 2)* [1985] FLR 1069). If the court considers that any difference between the, say, £400 million that the husband admits to having and the, say, £1,000 million that the wife says he has will not make any significant difference to the award it is likely to make, then it can agree to dispense with lengthy and costly disclosure. There has been some debate as to whether the ‘defence’ survives post-White.

In *J v V (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042, Coleridge J said that there may still be a role for such concessions in some circumstances, such as a marriage involving independently obtained wealth that was of short or medium duration, or where the parties wanted to avoid acrimonious proceedings and expected there to be no order as to costs.

However, in *McFarlane v McFarlane and Parlour v Parlour* [2004] EWCA Civ 872, were the wealthy husbands had not bothered with proper financial disclosure, Thorpe LJ stated *obiter*, ‘We were told by the Bar that a practice has grown up for substantial earnings to decline any statement of their needs on the grounds that they can afford any order that the court is likely to make. These appeals must put an end to that practice.’ That sounds like the final word. But in that case the court was annoyed by the husband’s cavalier attitude to disclosure. In addition, the husbands were certainly not saying to the court, ‘make any order you like and I’ll pay it’. Probably they were not able to make that offer – wealthy though they were, they did not possess the sums involved in *Thyssen*.

Foreign cultural factors

If the foreign or cultural background of the parties imports significant features relating to marriage or divorce, then the court can take these into account. The court can consider how the matter would be dealt with in the foreign jurisdiction and treat this as a relevant factor, giving it whatever
weight seems appropriate to achieve a fair outcome (Otobo v Otobo [2003] 1 FLR 192). In A v T (Ancillary relief: Cultural Factors) [2004] 1 FLR 977, an Iranian couple had married under shariah law in Iran but the matrimonial home was in England. The marriage broke down after only seven weeks and the wife returned to Iran. The Iranian court ordered the husband to pay the marriage portion—a sum of £60,000—but took no further action. The wife applied for divorce in England. It was held that the husband should pay the wife a lump sum of £35,000 if he gave her a talaq divorce within a specified time, otherwise he must pay the full marriage portion of £60,000, as this was the sum she would have received from the Iranian court in the circumstances.

Deciding on the appropriate basis

After consideration of all the factors and circumstances, an appropriate overall basis must be settled upon for each case. There are no shortcuts; every case turns on its own facts. However, it is possible to make some general observations. They are not comprehensive, and they can overlap, or even conflict in a case, but as a very simple general guide:

(a) If there are young children, their needs will be central to the overall package. Depending on the assets available and the other parents housing needs, this may require that the former matrimonial home be transferred to or settled on the parent with whom the children live.

(b) If there are no children, the primary objective will be to achieve a clean break, if this is possible with the assets available. A clean break cannot be achieved if the court is not satisfied on the evidence that an applicant spouse can become self-sufficient.

(c) If any factor clearly dominates the case, such as the shortness of the marriage or very bad conduct (rare), this may determine the overall basis for provision.

(d) Even where there are no children, one of the primary concerns of the court will be to ensure that the parties are adequately housed.

(e) As regards level of provision, the balance of needs against ability to provide will be the basic approach. Pensions should be considered as part of the balance.
(f) If any event, whatever broad starting point is appropriate, all the factors can go into the balance in deciding the overall package.

There will not always be a single appropriate basis for a case. There may be some middle ground, for example, between a clean break and continuing provision. If there are, the options should be fully discussed with the client.

The home and the overall package

Once the relevant factors have been assessed and a suitable overall basis for provision has been identified, the details of the overall package must be considered, balancing capital provision, income provision, provision for children, housing needs, pension needs, etc. *The interrelation of all the elements of a package must be considered.* For example, if a spouse gets a capital asset, such as a house, will he or she have sufficient income to pay for it and maintain it? Alternatively, if a spouse has to borrow money to pay a lump sum, the effect of the repayments on his or her own income and the income available to pay maintenance must be considered.

In many cases, where the couple own their own home, that will be central to the package, as it will be the main asset they own. In considering what should happen to the home, it is important to check whether the house is in a sole name or joint names, what its value is, what mortgage attaches to it, and who has made mortgage or other payments in respect of the house.

To outline the main possibilities for the home:

(a) The house may simply be sold, especially if there is to be a clean break. Consideration should be given to the share of the proceeds each spouse will get (noting that it is generally much better to do this in terms of proportionate shares, expressed as a percentage of whatever equity is eventually realised, rather than set figures, in case the expected value is not achieved). Sale may not be an easy option (if the market is poor) or a fair one if a spouse is old or ill, or may have trouble finding alternative accommodation. The costs of sale need to be taken into account – this usually includes solicitors’ and estate agents’ fees.

(b) The home may be left in or transferred outright into the name of one spouse only. Again this may form the basis for a clean break, and it should help to avoid continuing problems
about paying for repairs, and possible future tax liability. However, if the home is the sole capital asset of the parties, it may simply be unfair for one spouse to get the full value, depriving the other spouse of all his or her capital. In such a case, some sort of settlement or charge may be fairer.

(c) The home may be transferred to the ownership of one spouse, subject to a charge in favour of the other, especially if it is needed as a home for the children. This may be an advantage for the custodial spouse, but ties up the interest of the other spouse. Again, it is usually better to express the value of the charge as a percentage of the net equity realised on eventual sale. It is very important to be very clear and unambiguous about when, and in what circumstances, the charge will be realisable (often referred to as ‘triggers’).

(d) The home may be settled under a trust for sale, although this happens less often these days, the charge back being more commonly used. There are potential difficulties and uncertainty with a settlement, the effect of which leaves both parties in ownership of a former matrimonial home and, therefore, in a continuing financial relationship and both of them dependent on its future sale. Great care must be given to deciding the terms of the settlement, especially what interest each is to have in the house, and when it will be sold. Again, proportionate shares are better than case figures. Two widely known examples of such trusts follow:

(i) **Mesher v Mesher** [1980] 1 All ER 126. Home settled to be sold when the children were 18 or left full-time education. The wife to pay the rates and the spouses to pay half the mortgage each (note that this particular feature is very unusual these days – the resident spouse will usually be expected to pay). Each spouse to have ha half share in the proceeds of sale.

(ii) **Martin v Martin** [1978] Fam 12. No children, husband had alternative accommodation. Home settled, not to be sold while the wife was unmarried and lived in it. Each spouse to get half of the proceeds of sale.
(e) If the home is not owned but is rented, then unless both spouses are to move out, consider what names are on the lease, and whether there may be a possibility, if appropriate, of transferring the lease into another name.

**Maintenance pending suit**

Marital breakdown can cause immediate financial strains. Maintenance pending suit is simply an interim application for short-term maintenance intended to ‘tide’ a party over, where necessary, until a final determination of the application(s) for financial provision can be made and put into effect. Such orders, which take the form of requiring one spouse to make periodical payments to the other, are therefore very much a temporary measure.

**Law**

Once a petition has been filed, maintenance pending suit may be ordered to be paid by one spouse to the other. Of necessity, it will not be possible to have full information available at this stage of the case, so the court will only seek to determine what figure is reasonable for immediate needs and what the respondent’s short-term ability to pay is, rather than seeking to make complex calculations or to apply all the factors outlined above. However, it is still important to present the figures you do have and the arguments for what is reasonable as clearly as possible.

The MCA 1973, s.22 states as follows:

> On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the pension and ending with the date of the determination of the suit, as the court thinks reasonable.

**THE LONG ROAD FROM 1969: STATUTORY FOUNDATION AND EVOLVED DISCRETION**

**The Matrimonial Causes Act 1973**

Statutory provision for the financial consequences of divorce began with the Matrimonial Causes Act 1857 but the starting point for the modern law is the Matrimonial Causes Act 1973, which
consolidated the law following the major overhaul of the law of divorce (the most recent we have had) in 1969. The relevant provisions of the 1973 Act are duplicated for civil partnerships in the Civil Partnership Act 2004.

The statutes do two things. First, they set out the financial orders that can be made on divorce or dissolution (Matrimonial Causes Act 1973, s 23; and Civil Partnership Act 2004, Sch 5, parts 1 to 4A. See paras 2.5 of the 2011 CP and paras 2.3 to 2.4 of the 2012 SCP). These range from orders for periodical payments to orders for pension sharing (the addition, over the past two decades, of numerous provisions relating to pensions has made the list very much longer than it originally was). Secondly, they set out the considerations that the court must have in mind when making orders. First consideration is to be given to the welfare of the parties’ minor children. Beyond that, a set of factors – known to family lawyers as the “section 25 factors” – are to be borne in mind. They are, in a sense, obvious: the judge is to have in mind the length of the parties’ marriage, for example, and the needs and resources of the parties. But the statutes do not say what effect the consideration of these factors is to have upon the orders made.

Nor does the statute say what the orders are to achieve. Clearly the court may make an order that H must make periodical payments to W or vice versa, or it may make no such order at all. But in what circumstances might it do so, and for how long should those payments continue? Again, the court may make an order that determines who is to live in the family home, when it is to be sold and in what proportions the sale proceeds are to be divided, but no indication is given as to why such an order should be made.

As originally drafted the statute was not so silent; it imposed an overall duty on the court to exercise its powers in such a way “as to place the parties ... in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other” (Matrimonial Proceedings and Property Act 1970, s 5). This was known as the “minimal loss principle”; it was both impractical, and incompatible with a divorce law that no longer depended upon proof of fault, (in a fault-based divorce law there is a rationale for saying that the “innocent” party should suffer no financial loss as a result of the divorce, and therefore might get life-long support. Divorce law no longer depends upon proof of fault (divorce can be obtained by consent) and therefore if there is to be life-long support in any cases, a different justification has to be found), and it was repealed in 1984 on the recommendation of the Law Commission (see the recommendations in Family Law: The Financial Consequences of Divorce: The Response to the Law Commission’s Discussion Paper, and Recommendations on the
Policy of the Law (1981) Com No 112, para 46(5)(ii)(b). The Commission’s recommendations in that paper led to the enactment of the Matrimonial Proceedings and Property Act 1984. See further paras 3.13 to 3.19 of the 2012 Supplementary Consultation. Nothing took its place. The task of the family judge has been likened to that of:

…a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination (P Parkinson: “The Diminishing Significance of Initial Contributions to Property” (1999) 13 Australian Journal of Family Law 52, 53, explaining Justice Chisholm’s extra-judicial writing on the equivalent Australian statute).”

Discretion pre-White v White

In the absence of any indication in the statutes as to their objective, the courts evolved their own. In the years before the decision in White v White ([2000] UKHL 54, [2001] 1 AC 596), an applicant for financial provision would be awarded – insofar as the other party’s assets and income made it possible – her “reasonable requirements”. That meant the applicant’s financial needs generously assessed by reference to the marital standard of living, for housing, income, entertainment, holidays, and other luxuries where possible (The “financial needs, obligations and responsibilities” of the parties is one of the section 25 factors: Matrimonial Causes Act 1973 s 25 (2)(b). These factors are replicated at paragraph 21 of Schedule 5 of the Civil Partnerships Act 2004). For most applicants, of course, the extent of the couple’s resources meant that full provision for either party’s reasonable requirements was impossible. But in the very wealthy cases it represented both a generous measure of lifestyle, and a ceiling upon awards.

As to lifestyle, the “reasonable requirements” standard meant that the wife of a wealthy man, who had not been in employment and had either no wish for or no prospect of employment after divorce, could be maintained at the marital standard of living for her lifetime. In effect, the “minimal loss” principle lived on – despite the fact that it is hard to justify that standard of provision in an era where divorce no longer has to be fault-based.

But reasonable requirements was also a ceiling. So the millionaire’s wife might be awarded lifelong support, capitalised using the Duxbury calculation (a Duxbury calculation produces a lump sum which would, if suitably invested, provide sufficient income to meet the recipient spouse’s reasonable requirements for the rest of his or her life: Duxbury v Duxbury [1987] 1 FLR 7. For further discussion,
see N Lowe and G Douglas, *Bromley’s Family Law* (10th Ed, 2007) pp 1038 to 1039) but however wealthy her husband was, she would almost never receive more than £10 million to £12 million. A little extra might be awarded for special contributions, especially of the domestic or social variety; £15 million was pretty much a ceiling.

Thus the idea that the family wealth should be shared on divorce, no matter which party had earned it – a basic principle of the continental European community of property regimes (see Part 4 of the 2011 CP) – was unknown in this jurisdiction. That made no practical difference in the majority of cases where in fact there was no prospect of anyone’s reasonable requirements being met on a lifelong basis; but in the “big money” cases the inappropriateness of the position became obvious. There is perhaps an air of understatement about Lord Justice Peter Gibson’s remark in *Dart v Dart*:

I would have to say that I regard an award of £9m to a good wife in a marriage of 14 years and a good mother to the respondent’s children out of the respondent’s resources of £400m as on the low side ([1996] EWCA Civ 1343, [1996] 2 FLR 286 at [36]).

The White v White decision and its aftermath

The “reasonable requirements” approach was brought to an end by the House of Lords’ decision in *White v White* ([2000] UKHL 54, [2001] 1 AC 596). Mr and Mrs White were farmers, working together in a business partnership; their two farms were held in Mr White’s name. One farm was purchased with the help of £14,000 from Mr White’s family and the other farm was acquired by Mr White on advantageous terms as his separated share of a family owned estate. On divorce, Mrs White wanted a half share of the family assets. The court awarded her £800,000 (17% of the total assets) on the basis that her reasonable requirements would be met by a sum of money which would provide her with an income for the remainder of her life, a home and enough land for her horses.

Mrs White appealed, first to the Court of Appeal which increased her award to £1.5 million (32% of the total assets), and then to the House of Lords. And although their Lordships decided that the Court of Appeal’s award to Mrs White should stand (misgivings were expressed about the value attributed to the gift from the paternal family and Lord Cooke felt that the award was “probably about the minimum that could have been awarded to Mrs White without exposing the award to further increase on further appeal”: [2000] UKHL 54, [2001] 1 AC 596 at [63]); the case marked a revolution in financial provision, outlawing the reasonable requirements approach. Lord Nicholls
said, “The present case is a good illustration of the unsatisfactory results which can flow from the reasonable requirements approach” ([2000] UKHL 54, [2001] 1 AC 596 at [45]).

He stressed that:

... there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party ([2000] UKHL 54, [2001] 1 AC 596 at [24]).

Their Lordships saw no reason why, when the assets exceeded the financial needs of the parties, the surplus should belong solely to the husband. Lord Nicholls said:

Sometimes, having carried out the statutory exercise, the judge’s conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge’s decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion...a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from if, and only to the extent that, there is good reason for doing so ([2000] UKHL 54, [2001] 1 AC 596 at [25]).

Lord Nicholls later said that “the glass ceiling...was shattered by the decision...in the White case” (Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618 at [8]).

The new principle established in White v White marked a sea-change in the courts’ approach. The many cases that had been put on hold pending the outcome in White v White went ahead on a new basis and later, the Court of Appeal began to refer to the “sharing principle” as one of the bases for its orders (Charman v Charman [2007] EWCA Civ 503, [2007] 1 FLR 1246 at para [65]).

Six years later the House of Lords had the opportunity to revisit its new principle in the conjoined appeals in Miller v Miller, McFarlane v McFarlane ([2006] UKHL 24, [2006] 2 AC 618; see J. Miles, “Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions” (2005) 19(2) International Journal of Law, Policy and the Family 242). The two cases involved a combination of factual scenarios that enabled the basis of financial provision to be explored; the outcome was a number of different judgments from the members of the House of
Lords that enriched, but did not simplify, our understanding of the courts’ discretion. In particular, we were told that “several elements, or strands, are readily discernible” ([2006] UKHL 24, [2006] 2 AC 618 at [10]) namely financial needs, compensation, and sharing.

Of those strands, needs and sharing are familiar. The relationship between the two is unclear; the best we can say is that in some cases needs are to be met, and the balance (if any) shared, whereas in the wealthier cases financial needs are more than met by the provision of a half share of the entire wealth of the parties. In some cases, inevitably, a half share in the family wealth happens to match what is needed to provide for the financial needs of one party – but this is coincidental (see, for example, Young v Young [2013] EWHC 3637 (Fam) at [179]).

The most mysterious of the three strands enunciated in Miller v Miller, McFarlane v McFarlane is compensation. It seems intended to reflect what one party would have had, or been able to earn, if certain choices had not been made within the marriage. Thus Mrs McFarlane lost out on projected high earnings as a solicitor because she gave up her job in order to look after the children. In our 2011 CP we suggested that compensation in this sense has always been an aspect of financial needs; and indeed in subsequent cases the courts have been wary of making separate orders for compensation because of the risk of “double-counting” (the 2011 CP, para 2.55; Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618 at [15] by Lord Nicholls; see also G v G (Financial Remedies: Short Marriages Trust Assets), [2012] EWHC 167 (Fam) at [185], and CR v CR [2007] EWHC 3334 (Fam) at [83]).

The limits of sharing

The sums of money involved in White v White were not particularly high compared with some of the very high-net-worth cases seen during the previous decade (Conran v Conran [1997] 2 FLE 615; Dart v Dart [1996] 2 FLR 286; A v A (Financial Provision) [1998] 2 FCR 421). But for very wealthy individuals the implications of the decision in White v White, and of the Court of Appeal decisions that came after it were immediately obvious. The 1990s position had been that there was in all cases a cap on the amount that a wealthy divorcé would have to pay; no matter how extreme the wealth involved, awards did not exceed £15m at most. But the application of the yardstick of equality meant that that had come to an end.
The introduction of the sharing principle as a development of discretion meant that there were no formal limits to sharing. That in turn meant that the principle was open to challenge in a number of different ways, all dependent upon the court’s discretion – with a consequent lack of predictability.

The “stellar contribution” as a challenge to sharing

One early challenge was the idea of the “stellar contribution”. How can a spouse’s business profits be shared, runs the argument, when that spouse’s inspiration and business drive were so exceptional that they cannot be said to be matched by the other’s domestic contribution? It is now clear that where the party who generated the couple’s assets has shown exceptional talent and industry, he may take more than half on the basis of that exceptional contribution (Cowan v Cowan [2001] EWCA Civ 679; Lambert v Lambert [2002] EWCA Civ 1685; G v G (Financial Provision: Equal Division) [2002] EWHC 1339 (Fam); H v H (Financial Provision – Special Contribution) [2002] 2 FLR 1021. But the Court of Appeal stressed in Charman v Charman that these cases should be unusual and that departure from equality for this reason should generate sharing awards between 45%:55% and 33.3%:66.6%; further departure was disapproved (Charman v Charman [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [90].

Arguments of stellar contributions now appear to be rare and, more recently, debate has focused on the distinction between matrimonial and non-matrimonial property (G Howell and J Montgomery (eds), Butterworths Family Law Service (Issue 182) para. [866.2].

Non-matrimonial property as a limit on sharing

A consistent theme within the case law has been that, provided that financial needs are met, the courts will generally not make orders that require a party to share non-matrimonial property; that is, property that he or she has inherited or been given, or which was acquired before the marriage or the civil partnership. The precise limits of the concept of non-matrimonial property are unclear. Does it include property acquired in one party’s name before marriage but during cohabitation? Can it include the matrimonial home? The answers offered by the courts to these questions are not consistent and, are the subject of considerable disagreement within the legal profession (and no doubt among the general public too).

The sharing principle does not make England and Wales a community of property jurisdiction, if community of property is defined as a system of rules for the sharing of matrimonial assets (see

Twenty years ago, such cases were almost unheard of, and the courts were very sceptical of the few marital property agreements that they encountered. For example, in *F v F*, in 1995, Lord Justice Thorpe said that a pre-nuptial contract “must be of very limited significance” (*F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, 66). Yet just over three years ago, the Supreme Court said this:

> The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (*Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at [75]).

The decision in *Radmacher v Granatino* demonstrated the increasing willingness of the courts to reflect the terms of a marital property agreement in financial orders. But in another sense nothing has changed; it remains impossible for a marital property agreement to oust the court’s jurisdiction to make financial orders. So where one of the parties does not wish to abide by the agreement it is open to him or her to apply to court for financial provision; and the principle set out above indicates that the court will then start from the terms of the agreement (see *V v V* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315 where Charles J stated that the effect of *Radmacher v Granatino* was to add a new rationale to be applied in financial relief proceedings. “The new respect to be given to individual autonomy means that the fact of an agreement can alter what is a fair result and so found a different award to the one that would otherwise have been made” at [36]. Munby P in *S v S* [2014] EWHC 7 (Fam) extends this is reasoning to agreements between parties to arbitrate and to arbitral awards). Only if it would be unfair to hold the parties to it will the court instead make an order in different terms. It is not known how the courts will assess fairness, nor how far they will depart from the terms of an agreement in order to protect either financial needs or an entitlement to
compensation. Case law since *Radmacher v Granatino* was decided has not generated any general principles to shed light on those questions.

This is as far as the courts can go in validating marital property agreements. Only statutory reform can make such agreements contractually valid and capable of being enforced as contracts without the possibility of the court being able to override the contract by making an order under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004.

**The limits of financial needs**

In the majority of cases the disapproval of “reasonable requirements” will have made no difference. The extent of the available resources means that for either partner to be maintained by the other at the marital standard of living for life is an unattainable aspiration. It is a matter of making ends meet, and the courts do the best they can. In most cases there is no question of any periodical payments between spouses (although there may be regular payments of child support) (just under 15% of all disposals of applications for financial orders in 2011 were for periodical payment claims; if periodical payments are ordered they may be for a limited term. The courts’ priority is likely to be to make use of the family’s resources in order to provide a home for the children and one of the parents. Anything approaching the reasonable requirements standard, in most cases, is not feasible.

In the very wealthy cases the picture is different. Where there is very great wealth the courts tend to assess the financial needs of the applicant, check that they will be met by a half share of the matrimonial property, and then simply make a sharing award (as Sir Mark Potter, P said, “It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail ….” *Charman v Charman* [2007] EWCA Civ 503 at [73]. For further discussion of the relationship between needs and sharing, see the 2012 SCP at paras 4.96 to 4.104).

Needs are still assessed primarily by reference to the marital standard of living. Mr Justice Charles in *G v G* said that “the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties” ([2012] EWHC 167 (Fam), [2012] 2 FLR 48 at [136]). There is no longer a right to be kept at the marital standard of living for life (see for example: Lady Hale’s comments about the transition to self-sufficiency in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [158]; Bennett J’s comments in *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 at
 (“It must have been absolutely plain to the wife after separation that it was wholly unrealistic to expect to go on living at the rate at which she perceived she was living”); and Charles J’s comments in G v G [2012] EWHC 167 (Fam), [2012] 2 FLR 48 at [136] (“the objective of achieving a fair result ... is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage”)); but it is not known what standard is aimed for. The only indication of what is wanted in Lawrence v Gallagher, for example, is a reference to the need “for each to live comfortably in their own homes” ([2012] EWCA Civ 394, [2012] 1 FCR 557 at [42] by Thorpe LJ).

This links to the idea of need being “generously interpreted” which derives from the speech of Baroness Hale in Miller v Miller, McFarlane v MacFarlane ([2006] UKHL 24, [2006] 2 AC 618 at [140]). In recent case law concerning high net worth, or “big money” cases, this concept has gained ground, when the court is assessing the applicant’s needs (Lauder v Lauder [2007] EWHC 1227, [2007] 2 FLR 802; VB v JP [2008] EWHC 112 (Fam), [2008] 1 FLR 742; McFarlane v McFarlane [2009] EWHC 891 (Fam), [2009] 2 FLR 1322. See also the discussion in G Howell and J Montgomery (eds) Butterworths Family Law Service (Issue 184) para [846]). However, this is not a term found in statue and, accordingly, judges have criticised the use of the term, as a judicial gloss that can create confusion and which should not be accorded a separate life (Robson v Robson [2010] EWCA Civ 1171, [2011] 1 FLR 751; J v J (Financial orders: wife’s long-term needs) [2011] EWHC 1010 (Fam), [2011] 2 FLR 1280).

At the other end of the spectrum is the idea, from Radmacher v Granatino, of “real need” identified by Lord Phillips (giving the judgment of the majority) who commented that:

Of the three strands identified in White v White and Miller v Miller, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement ([2010] UKSC 42, [2011] 1 AC 534 at [81]).

It may be that the reason why the majority in the Supreme Court in Radmacher v Granatino spoke of “real need”, which sounds narrower than “need”, was because, in the same paragraph, they referred to the compensation of long-term disadvantage generated by the devotion of one partner to the family and home (([2010] UKSC 42, [2011] 1 AC 534 at [81]. The majority in Radmacher v Granatino took the view that there was no question of compensating Mr Granatino for the economic effects of his career change, on the basis that his was an individual choice, not a family decision; see [121], but
see also the comments of Lady Hale at [194]). The concept of compensation may simply make explicit what has always been regarded as an element of needs, that is, making provision, on divorce, for the long-term financial consequences of the marriage. This is not a new concept but the term “compensation” may be useful because it draws attention to financial consequences of divorce that may not be immediately obvious.

The recognition that an award focused on this type of disadvantage is a form of compensation may help the courts to focus their attention upon the real value of what has been lost. It is arguable that the introduction of compensation as a separate concept therefore simply teases out the complex notion of “needs generously interpreted”, to which the Supreme Court majority in *Radmacher v Granatino* referred ([2010] UKSC 42, [2011] 1 AC 534 at [28]). We note that this was not the view of Baroness Hale in *Miller v Miller, McFarlane v McFarlane* who took the view that compensation for relationship-generated disadvantage “goes beyond need, however generously interpreted” ([2006] UKHL 24, [2006] 2 AC 618 at [140]).

But this, at least, appears to be the way that the courts have subsequently applied the concept, as the introduction of compensation as a distinct concept has made no difference in the level or the nature of the awards made. However, the effect of doing so may be to express the idea of “need” more narrowly, as “real need”, because its long-term aspect is now considered under this different head. That said, the concept of “real need”, as expressed in *Radmacher v Granatino* does not appear to have been taken up in subsequent case law.

While the statute does not prescribe any objective for the making of financial orders, in practice the outcomes tend eventually, not towards life-long support, but towards independence. In most cases it seems that the major form of spousal support ordered or negotiated at the point of divorce or dissolution – if any – will be a transfer of some or all of one party’s interest in the family home to the other. Only a small proportion of divorces and dissolutions result in any award of periodical payments; this has been clear for some years (C Barton and A Bissett-Johnson, “The Declining Number of Ancillary Financial Relief Orders” (2000) 30(Feb) Family Law 94), and is confirmed by the last judicial statistics (just under 1% of all disposals of applications for financial orders in 2011 were contested periodical payment claims; just over 3% of all disposals of applications for financial orders were for initially contested but subsequently claims settled by consent for periodical payments; and around 11% of all disposals of applications for financial orders were uncontested periodical payment claims. See Ministry of Justice, *Judicial and Court Statistics (annual) 2011* (2012) pp 27 and 28 and table 2.6, available at https://www.gov.uk/government/publications/judicial-and-court-statistics-
annual (last visited 7 February 2014)). Of those, not all will be joint lives orders; even assuming half are joint lives orders, that is a very low proportion indeed. Some of the cases where no periodical payments are ordered will, instead, have involved capitalised maintenance – but, necessarily, very few. Child support may be paid in many cases; but not, of course, indefinitely. Accordingly, people move on. Sooner or later, and in some cases only after children have grown up and left home, people become self-supporting; the available economic evidence supports that conclusion (H Fisher and H Low, “Who wins, who loses and who recovers from divorce?” in J Miles and R Probert (eds) Sharing Lives, Dividing Assets (2009) at 227. The writers note that the income loss faced by women after divorce returns to average pre-divorce rates after about nine years; some of that recovery is of course due to repartnering (at which point any liability of the former spouse to make periodical payments ceases).

The Civil Partnership Act 2004

The Civil Partnership Act 2004: on 5 December 2005 and allowed same-sex couples to gain the rights and responsibilities of marriage, including the same sort of access to financial remedies upon the dissolution of their partnership as married couples do on divorce. The statutory provisions for civil partnership of virtually identical to those for marriage – CPA 2004, Schedule 5 mirrors the Matrimonial Causes Act 1973.

What if a party to a marriage is disposing of his assets or seeking to hide them?

It is often tempting, in the face of an expensive divorce, for one party either to fail to disclose all of his or her assets, or to try to dispose of or conceal such assets from the court. The parties are under an ongoing obligation to make full and frank disclosure of their assets. There should be no partial disclosure, nor should party wait for the other side to ask the relevant information for disclosing it themselves. A judge will often contain penalise in costs a party who fails to give proper disclosure on time.

What can the other party do? The usual answer is to deploy s.37 of the Matrimonial Causes Act 1937. This gives the court the power to prevent or set aside a dispositional property by one of the parties to the proceedings. Thus, this order can be applied for when there is a suspicion that one of the parties is about to dispose, transfer or otherwise deal with property with a view to defeating or avoiding all or part of the claim for financial remedies, or one of the parties has already done so.

S.37 can also be used to set aside dispositions already made in the face of an application so as to reverse the transaction whose object was to conceal assets.
Pre-Nuptial Agreements – are they enforceable?

Prenuptial agreements have not traditionally been enforced in divorce law in England. A divorce lawyer is often asked about the possibility of making a prenuptial agreement before entering into a marriage. In divorce advice for men this question is often asked although, of course, it is not only of interest to men. The normal reason for asking is that at least one of the parties to the intended marriage wishes to preserve previously acquired assets from the jurisdiction of the divorce courts. Unfortunately, the answer in almost all cases is that the jurisdiction of the divorce courts cannot be ousted in this way and that a pre-nuptial agreement is hardly worth the paper it is written on.

There are however recent winds of change in this area. There are circumstances under which the English courts do give weight to these agreements and these circumstances may become much more common as a result of the case of *Radmacher v Granatino* [2010] decided by the Supreme Court clearly established that, contrary to the previous line of authority holding that pre-nuptial agreements were against public policy, they were now to be given effect to so long as they were entered into by both parties freely and with full appreciation of their consequences. However, various factors (set out at paragraphs of 68 to 74 of *Radmacher*) would have a bearing, detracting from or enhancing, the weight to be accorded to such agreements within the section 25 exercise.

DIVORCES WITH AN INTERNATIONAL DIMENSION

This part contains an overview of the provisions of English law relating to the area of Conflict of Laws or Private International Law as it relates to marriage. In particular it discusses recognition of marriages solemnised in other jurisdictions, and when they will be treated as valid, void, voidable or as a non-marriage by the courts of England and Wales. The article includes consideration of recognition of civil partnerships and same sex marriages conducted in other jurisdictions, following the coming into force of the Marriage (Same Sex Couples) Act 2013. Related articles can be found in the Marriage, Forced marriage and Civil partnerships specific articles. For a detailed analysis refer to Dicey, Morris & Collins, *The Conflict of Laws* 15th Ed. referred to as "Dicey & Morris" in this article.

Status of Marriage: It is important to determine the status of any marriage contracted in another jurisdiction. A marriage may be valid, void (so that it is regarded as never having taken place), voidable (so that it is valid until annulled), or non-existent which is no kind of marriage at all. The distinction between these categories affects the question of whether a decree and/or and financial relief can be granted pursuant to the Matrimonial Causes Act 1973 or the Matrimonial and Family Proceedings Act 1984. The status of a marriage also has implications for issues such as legitimacy.
and succession. See Rayden & Jackson on Divorce and Family Matters for a detailed discussion of the status of marriage.

The key distinction is that void and voidable marriages may be annulled - Roberts (Deceased), Re [1978] 1 W.L.R. 653. A marriage which is non-existent is not entitled to a decree of nullity - Hudson v Leigh [2009] EWHC 1306 (Fam); [2013] Fam. 77. The fact that a marriage entered into here which is not compliant with the provisions of the Marriage Act 1949 is recognised in another jurisdiction does not make it valid, void or voidable here, it remains a non-existent marriage - Shagroon v Sharbatly [2012] EWCA Civ 1507; [2013] Fam. 267 approving Hudson v Leigh above.

Criteria for Recognition of a Foreign Marriage between a man and a woman: See further below for a discussion on recognition of same sex marriages and civil partnerships. Dicey & Morris Ch.17 contains a detailed discussion of the requirements for a marriage to be valid. The rule can be summarised from Dicey & Morris r.73 as follows; A marriage between a man and a woman will be recognised as formally valid when:

- it was celebrated in accordance with the form required, or recognised as sufficient, in the country where the marriage was celebrated; or
- it was celebrated in accordance with the requirements of English Common law in a country where the use of local form is impossible, or the country is in the belligerent occupation of military forces;
- it was celebrated in accordance with the Foreign Marriage Act 1892 and one of the parties is serving in HM Forces in a foreign territory. Note that the Foreign Marriage Act 1892 was repealed by the Marriage (Same Sex Couples) Act 2013 and replaced by Sch.6 to that Act. The repeal and Schedule are not yet in force but Pt 3 of Sch.6 provides for marriage of forces personnel. The relevant statutory instruments anticipated by this schedule have not yet been published;
- it was celebrated in accordance with the Foreign Marriage Act 1892 and one of the parties is a UK National, and it was performed by a British Consul or Ambassador or a member of their staff holding a marriage warrant from the Secretary of State, in circumstances where insufficient facilities exist for the parties to be married by local law. Note that the Foreign Marriage Act 1892 was repealed by the Marriage (Same Sex Couples) Act 2013 and replaced by Sch.6 to that Act. The repeal and schedule are not yet in force but Pt I of Sch.6 provides for consular marriage in foreign territories. The relevant statutory instruments anticipated by this schedule have not yet been published.
Marriages Celebrated in the Form Required by Local Law: Whether the marriage is valid in the country where it was solemnised is determined by the law of that country alone, irrespective of the parties’ domicile - Berthaume v Dame Dastous [1930] A.C. 79. The general rule includes marriages conducted, for example, by proxy if that is permitted in the country of solemnisation, the relevant country being that where the proxy takes part in the ceremony - Apt (otherwise Magnus) v Apt [1948] P. 83. In the case of McCabe v McCabe [1994] 1 F.L.R. 410 the marriage was recognised as having taken place in Ghana in accordance with Akan law despite neither party being present at the ceremony or in the country where it was formed. In some instances, it may be difficult to ascertain in which country the marriage has taken place, for example where the marriage has taken place by telephone - Westminster City Council v C [2008] EWCA Civ 198; [2009] Fam. 11.

An exception to the general rule (a) above may arise in a number of circumstances:

- A foreign marriage between two persons of the same sex is not currently recognised. Such marriages will be recognised when s.10 of the Marriage (Same Sex Couples) Act 2013 comes into force.
- Where it would be contrary to public policy to recognise the marriage - Westminster City Council v C [2008] EWCA Civ 198; [2009] Fam. 11.
- Where either of the parties lacks capacity to marry the other according to their ante-nuptial domicile (r.74 Dicey & Morris) unless such incapacity is, penal, discriminatory or contrary to public policy (Exception 6 to r.74 Dicey & Morris).

If the marriage is bigamous. If the earlier marriage has been dissolved or annulled by an English court or the dissolution / annulment is recognised in England, it will not be treated as bigamous even if the parties' countries of domicile do not recognise the dissolution/annulment (s.50 of the Family Law Act 1986).

The Gender Recognition Act 2004 s.21(2) currently provides that a person is not to be regarded as being married by reason of having entered into a foreign post-recognition marriage. The Gender Recognition Act 2004 was amended by Sch.5 to the Marriage (Same Sex Couples) Act 2013, which is not yet in force, but which repeals s.21(2) in relation to England and Wales.

If either of the parties has not consented. The questions of which country's law governs consent, and the method of giving consent are difficult issues - see Apt (otherwise Magnus) v Apt [1948] P. 83 and Szechter v Szechter [1971] P. 286. In some circumstances lack of consent may justify a declaration that a marriage had never taken place capable of recognition - for example, in some Forced marriage

Since the coming into force of the Marriage Same-Sex Couples Act 2013 s.10, same sex-marriage is lawful and a foreign marriage is not prevented from being recognised under the law of England and Wales merely because it is a marriage of a same sex couple. This includes marriages conducted in Scotland. Note, however, that a same-sex marriage in England, Scotland or Wales will be recognised only as a civil partnership in Northern Ireland.

There are potentially particular difficulties for recognition in England and Wales of same-sex marriages according to the dual domicile rule where the ante-nuptial domicile of either of the parties to the marriage would prohibit same-sex marriage. Rule 74 strictly interpreted could lead to a situation where a person is regarded as not having had capacity to marry under their ante-nuptial domicile. This is irrespective of whether the marriage was conducted in the UK or abroad. However, it is likely that the marriage would fall within one of the exceptions to Rule 74, either if just one of the couple has an English domicile, or if the prohibition on same-sex marriage in the country of domicile is considered to fall within Exception 6 relating to incapacity under rules which are penal, discriminatory or contrary to public policy, or by the Marriage (Same-Sex Couples) Act being read in a manner consistent with the Human Rights Act.

Polygamous Marriages: A polygamous marriage is one in which either spouse is entitled to take another spouse, even if it is in fact monogamous, for ease of reference sometimes referred to as potentially polygamous. A potentially polygamous marriage entered into in a country which permits polygamy will be recognised as a valid marriage in England and Wales provided it complies with the required formalities of the country of solemnisation - s.5 of the Private International Law (Miscellaneous Provisions) Act 1995. An actually polygamous marriage will, however, be void if either party is domiciled in England and Wales - s.11 Matrimonial Causes Act 1973. This does not invalidate actually polygamous marriages between spouses domiciled elsewhere, but consideration will need to be given to the law of their country of domicile. See Dicey & Morris on the subject of polygamous marriages generally.

Presumption from Cohabitation and Reputation: Even where the procedural requirements have not been fully complied with, it has long been established that a ceremony of marriage followed by cohabitation and reputation can establish a valid marriage. Sir Jocelyn Simon P in the case of Mahadervan v Mahadervan [1964] P. 233 held that:
"[Where] a ceremony of marriage is proved, followed by cohabitation as man and wife, a presumption is raised which cannot be rebutted by evidence which merely goes to show on a balance of probabilities that there was no valid marriage: it must be evidence which satisfies beyond reasonable doubt that there was no valid marriage. The presumption in favour of marriage applies not only to the requirement of the address, but also to the preliminaries to celebration. Moreover, it would apply also to the place of the ceremony."

See also Pazpena de Vire v Pazpena de Vire [2001] 1 F.L.R. 460, where a valid marriage was found despite there being no record of the marriage in Uruguay and deficiencies with the certificate. In the case of M v M (Divorce: Jurisdiction: Validity of Marriage) [2001] 2 F.L.R. 6 Hughes J. found a valid marriage on the basis of the presumption in circumstances where it was not clear that a ceremony had taken place, but where it could have taken place with relatively little formality. The many authorities on this point are not always easy to reconcile and require detailed consideration beyond the scope of this overview.

Void, Voidable and Non-existent Marriages: Where a marriage in a foreign jurisdiction has not been solemnised in accordance with the formalities required by local law, in some circumstances it may be treated as a void or voidable marriage entitling the parties to a decree of nullity. See ss.12-14 of the Matrimonial Causes Act 1973 for the factors rendering a marriage void or voidable and the circumstances in which the validity of the marriage would fall to be determined in accordance with the law of a country outside England and Wales and Rayden and Jackson on Divorce and Family Matters Ch.7. Once the foreign law has determined whether a marriage was or was not valid, is for the lex fori to decide the implications, and to decide what remedies were available to a petitioner. By way of recent example see:

- Burns v Burns [2008] 1 FLR 813 - Coleridge court granted a decree of nullity following a marriage invalid in California.
- Asaad v Kurter [2013] EWHC 3852 (Fam) - Moylan J. found a marriage which was not valid as a result of a failure to comply with the required formalities and as such was to be properly described in English law terms as a void marriage.
- SH v NB [2009] EWHC 3274 (Fam); [2010] 1 F.L.R. 1927 - Moylan J. considered that the marriage was entered into without effective consent, rendering the marriage voidable. The time had passed for annulling the marriage. Moylan J. declared that the marriage was not recognised in this jurisdiction.
- Dukali v Lamrani [2012] EWHC 1748 (Fam); [2012] 2 F.L.R. 1099, Al-Saedy v Musawi (Presumption of Marriage) [2010] EWHC 3293 (Fam); [2011] 2 F.L.R. 287. If the marriage is
not valid or void, but is no marriage at all, the presumption of marriage cannot apply to convert it into a valid marriage.

- K v A [2014] EWHC 3850 (Fam); [2015] Fam. Law 137: there was no binding authority in the Pakistani courts which conclusively answered the question of whether an inter-faith marriage, such that H and W's, would be valid. Despite the expert's provisional view, his report was not sufficiently clear for the court to say with certainty that H and W's marriage would not be recognised in Pakistan. In those circumstances, the court would proceed on the basis that the Nikah marriage form and its subsequent formal registration gave rise to a presumption of a valid marriage which had not been rebutted by any clear evidence to the contrary. Accordingly, the marriage should be recognised as valid in England and Wales.

Civil Partnership and Same Sex Marriage: Until the advent of the Marriage (Same Sex Couples) Act 2013, a marriage conducted between two people of the same sex in another jurisdiction was not recognised as a marriage in England and Wales, but would be treated as a civil partnership - Wilkinson v Kitzinger [2006] EWHC 2022 (Fam); [2007] 1 F.L.R. 295 and Civil Partnership Act 2004 s.215. The Marriage (Same Sex Couples) Act 2013 provides for recognition of marriages entered into overseas as marriages in England and Wales in s.10 of that Act, which is not yet in force.

" (1) A marriage under - (a) the law of any part of the United Kingdom (other than England and Wales), or (b) the law of any country or territory outside the United Kingdom, is not prevented from being recognised under the law of England and Wales only because it is the marriage of a same sex couple. "

The Marriage (Same Sex Couples) Act 2013 does not abolish the Civil Partnership Act 2004 and civil partnerships entered into in other countries will continue to be afforded recognition where they fall within the definition of an "overseas relationship" and comply with the provisions of ss.212-216 of the Civil Partnership Act 2004. Same sex marriages conducted overseas are excluded from the definition of "overseas relationship".

Conversion of civil partnership to marriage: Section 9 of the Marriage (same-sex Couples Act) 2013 provides for the conversion of "an England and Wales civil partnership" into a marriage. This specifically includes consular civil partnerships conducted abroad provided one of the civil partners would have been eligible to register the civil partnership in England and Wales ( per ss.210 211 CPA 2004). Overseas civil relationships cannot be converted to marriages in England and Wales, and civil partners cannot marry according to the Matrimonial Causes Act 1973 - any overseas relationship would therefore have to be dissolved before a UK same-sex marriage could take place.
Declarations as to Marital Status: Provided its validity is not in dispute, a foreign marriage may be proved by production of the marriage certificate or similar document from the country where the marriage took place - Family Procedure Rules 2010 PD7A. The procedure for attaining formal recognition of a foreign marriage is to seek a declaration of marital status pursuant to s.55 of the Family Law Act 1986. The declarations which may be made in relation to a marriage under this section are:

"(a) a declaration that the marriage was at its inception a valid marriage;
(b) a declaration that the marriage subsisted on a date specified in the application;
(c) a declaration that the marriage did not subsist on a date so specified."

Conflict of laws: matrimonial causes

This is an overview of the rules of private international law as they apply to divorce, dissolution and annulment of marriage and judicial separation. There are a number of different aspects to this which each merit in depth consideration and further reading. The key areas to consider are:

- Jurisdiction to entertain proceedings for a matrimonial cause.
- Matrimonial causes pending in different jurisdictions; forum and stay;
- Recognition of foreign decrees of divorce, dissolution, annulment or separation.

As the UK is a Member State of the European Union, the first two of these key areas are largely determined by Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Different considerations apply when there is no Member State with jurisdiction under the regulation and as between the different parts of the UK.

Frequently there will be more than one country or Member State with jurisdiction. Arguments as to jurisdiction largely take place because of a real or perceived advantage to a party in one jurisdiction or another dealing with the financial provision application which follows from the matrimonial cause. Closely linked to Regulation 2201/2003 concerning judgements in matrimonial matters is Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in relation to matters relating to maintenance obligations, which determines where jurisdiction lies in relation to maintenance obligations. Article 3 of Regulation 4/2009 confirms that jurisdiction in matters relating to maintenance includes the court which "according to its own law has jurisdiction to entertain proceedings concerning status where the maintenance is ancillary to those proceedings" - namely what we used to call an application for ancillary relief. The maintenance
regulation will also apply when the court is considering whether the English court has jurisdiction to entertain an application for financial provision after an overseas divorce pursuant to the Matrimonial and Family Proceedings Act 1984 (MFPA 1984). Article 12 of Regulation 2201/2003 also enables a court to assume jurisdiction in relation to matters of parental responsibility where that court is dealing with divorce, separation or annulment in some circumstances. It will be apparent, therefore, that the question of in which jurisdiction the matrimonial cause proceeds has huge implications for the jurisdiction in which the financial and parental consequences of the breakdown of the relationship will be dealt with. This article gives an overview of the position when there are competing jurisdictions. It is outside the scope of this article to examine the nature and extent of financial provision following a decree in this or another country. In any case where there is more than one potential jurisdiction for a matrimonial cause it is imperative to take advice as to the law in relation to financial provision in all of the countries concerned, and to act swiftly to secure the jurisdiction of choice where available.

The Matrimonial Causes Act 1973 includes as matrimonial causes divorce, nullity, and judicial separation. This now includes marriages between same sex couples pursuant to the Marriage (Same Sex Couples) Act 2013. In addition, the Civil Partnership Act 2004 provides for dissolution, nullity and separation of Civil Partnerships. Whilst not strictly a "matrimonial cause" this article does include guidance as to issues of jurisdiction and recognition in respect of the breakdown of Civil Partnerships.

It will be important to know whether a marriage or civil partnership has been dissolved or annulled in another country. Sometimes a petition for divorce will be met with an assertion that the parties are already divorced in another jurisdiction. Both the Regulation 2201/2003 and the Family Law Act 1986 address recognition of foreign decrees. Different considerations apply in respect of same-sex marriages and civil partnerships because of the lack of uniform approach to same-sex unions within the EU and worldwide.

Jurisdiction - general: Jurisdiction in matrimonial causes derives from Regulation 2201/2003 in the first instance, as reflected in the Domicile and Matrimonial Proceedings Act 1973 (DMPA 1973), which provides:

"(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if)- (a) the court has jurisdiction under the Council Regulation; or (b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are
begun.

(3) The court shall have jurisdiction to entertain proceedings for nullity of marriage if (and only if)-
(a) the court has jurisdiction under the Council Regulation; or
(b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the
parties to the marriage-
(i) is domiciled in England and Wales on the date when the proceedings are begun; or
(ii) died before that date and either was at death domiciled in England and Wales or had been
habitually resident in England and Wales throughout the period of one year ending with the date of
death. "

Since the Marriage (Same Sex Couples) Act 2013 entered into force, the DMPA 1973 s.5 added a
further Sch.A1 to provide for jurisdiction in respect of same-sex marriages, and allowed for
regulations to be made to govern jurisdiction to entertain matrimonial causes in respect of same-sex
marriages. Arguably this was unnecessary: neither Regulation 2201/2003 nor the DMPA 1973
specifically state that they only apply to opposite sex marriages. Whether a marriage is recognised as
a marriage is a matter of domestic law rather than EC law. Nonetheless, the resulting regulations in
Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014/543
provide for the provisions of Regulation 2201/2003 to be largely mirrored, without referring to the
EC regulation so that:

" The court has jurisdiction in proceedings for the divorce of, or annulment of the marriage of, a
same sex couple or for the judicial separation of a married same sex couple where-
(a) both spouses are habitually resident in England and Wales;
(b) both spouses were last habitually resident in England and Wales and one of the spouses
continues to reside there;
(c) the respondent is habitually resident in England and Wales;
(d) the petitioner is habitually resident in England and Wales and has resided there for at least one
year immediately preceding the presentation of the petition;
(e) the petitioner is domiciled and habitually resident in England and Wales and has resided there for
at least six months immediately preceding the presentation of the petition; or
(f) both spouses are domiciled in England and Wales. "

Neither the Regulation 2201/2003 nor the DMPA 1973 specifically provide for jurisdiction in relation
to dissolution, separation or annulment of civil partnerships, but the provisions of the Council
Regulation are largely mirrored in the provisions of the Civil Partnership Act 2004 which provide for
jurisdiction, namely s.219 CPA 2004 and the regulations made thereunder Civil Partnership
(Jurisdiction and Recognition of Judgments) Regulations 2005/3334 in the same circumstances as those in which the court would have jurisdiction in respect divorce, annulment or separation of a same-sex marriage.

In addition to the jurisdictional rules set out above, there are provisions in s.221 CPA 2004 and the DMPA 1973 Sch. A1 as amended by the Marriage (Same Sex Couples) Act 2013 which enable the court to dissolve a civil partnership or same sex marriage which was entered into in the UK if a party is domiciled in the UK and does not otherwise fall within the jurisdictional rules. These provisions were introduced because of the lack of recognition of same sex relationships in some other countries, potentially resulting in a situation where a person is unable to find a jurisdiction where they can dissolve their civil partnership or obtain a divorce.

Does the court have jurisdiction under Regulation 2201/2003 in respect of matrimonial causes? This is the starting point for any matrimonial cause application. Jurisdiction under the council regulation is governed by art.3 of that regulation which provides:-

" General jurisdiction 1 In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State
(a)in whose territory:
- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;
(b)of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses. "

Jurisdiction under art.3.1(a) is founded on habitual residence and applies whether or not the parties are nationals of another EU Member State Sulaiman v Juffali [2002] 1 F.L.R. 479. The Court of Appeal in the case of Tan v Choy [2014] EWCA Civ 251 considered the meaning of "residence" and 'habitual residence' contained within art.3. In respect of habitual residence, this is an autonomous European concept, and the Court of Appeal reiterated the "centre of interests" test per M v M [2007] EWHC
2047 (Fam); [2007] 2 F.L.R. 1018, namely "the place where a person has established on a fixed basis the permanent or habitual centre of his interests". In relation to "residence" for a year prior to the application being made, Lord Justice Aitkens considered that there are at least 3 different possible interpretations of this requirement, which it was not necessary to determine for the purposes of that case. This remains an area of potential dispute where a person has not been residing consistently in their country of habitual residence. Mr Justice Bodey in the recent case of Chai v Peng [2014] EWHC 3518 (Fam); [2015] Fam. Law 37 considered whether the wife had genuinely been habitually resident here for the 12 months prior to issue, or whether it was contrived for the purposes of her application in circumstances where the family were resident in a number of different countries. Jurisdiction under art 3.1(b) can be founded on the nationality of both spouses or, in respect of the UK and Ireland, the domicile of both spouses. This provision has recently been considered in two cases. In the case of Sekhri v Ray [2014] EWCA Civ 119; [2014] 2 F.L.R. 1168 the Court of Appeal upheld a decision that the court had jurisdiction to entertain a divorce petition in circumstances where both parties resided in Singapore and it had been found that the husband had a domicile of origin in England due to his Indian father's intention to settle here, and his wife had acquired a domicile of choice here. In the case of Divall v Divall [2014] EWHC 95 (Fam); [2014] 2 F.L.R. 1104 the petitioner husband was not able to establish that his wife of Chinese origin who was a British Citizen had a domicile of choice in England at the date of issue, the parties were residing in the Netherlands.

In addition to jurisdiction under art.3, the court may have jurisdiction under arts 4 or 5 Regulation 2201/2003 to entertain a cross petition, or where the court has already given judgement on a judicial separation. Article 7 allows member states to assume jurisdiction based on their own laws only where no court of a Member State has jurisdiction. Articles 6 and 7 of Regulation 2201/2003 are to be interpreted as meaning that if, in divorce proceedings, a respondent is neither habitually resident nor a national of a Member State, the courts of one Member State could not base their jurisdiction to hear the divorce petition on national law, if the courts of another Member State had jurisdiction under art.3 of Regulation 2201/2003: Sundelind Lopez v Lopez Lizazo (C-68/07) [2008] Fam. 21

Residual jurisdiction: If the court does not have jurisdiction pursuant to Regulation 2201/2003 does it have jurisdiction on any other basis?: Only where no Member State at all has jurisdiction pursuant to Regulation 2201/2003 - per DMPA 1973 s.5.
If the court does not have jurisdiction pursuant to art.3 Regulation 2201/2003 it is irrelevant that the parties have assumed and proceeded as though it does: there is no room for the court to assume jurisdiction based on the parties' wishes or intentions: Saward v Saward [2013] EWCA Civ 1060

If another Member State has jurisdiction, the court is required to declare of its own motion that it has no jurisdiction, whether or not another Member State is seised: art.17 Regulation 2201/2003. Only if no other Member State has jurisdiction, may the court go on to consider whether it has jurisdiction based on domicile. When considering whether another Member State has jurisdiction it may also be appropriate to consider whether the other Member State would recognise the marriage - for example a same-sex marriage.

Another country which is not a Member State has jurisdiction, but no other Member State, has jurisdiction: Jurisdiction of the court of England and Wales is determined in the same way - either it has jurisdiction pursuant to the Council Regulation, or no Member State has jurisdiction and the court may consider whether it has jurisdiction based on domicile. See Divall v Divall [2014] EWHC 95 (Fam); [2014] Fam. Law 781 and Sekhri v Ray [2014] EWCA Civ 119; [2014] 2 F.C.R. 167 for consideration of jurisdiction based on domicile.

Jurisdictional issues between different parts of the UK: Where the UK has jurisdiction pursuant to art.3 Regulation 2201/2003 there may still be an issue as to which part of the UK has jurisdiction - the Council Regulation does not apply to internal territory disputes: Pt II of the DMPA 1973 sets out when Family Court of England and Wales has jurisdiction and Part III of the DMPA 1973 sets out when the Court of Session of Scotland has jurisdiction. In relation to Civil Partnerships, the Civil Partnership Act 2004 defines only when England and Wales has jurisdiction.

Competing jurisdictions: Schedule 1 para.7 to the DMPA 1973 imposes a duty on parties to inform the court of proceedings in another jurisdiction:

"While matrimonial proceedings are pending in the court in respect of a marriage and the trial or first trial in those proceedings has not begun, it shall be the duty of any person who is a petitioner in the proceedings, or is a respondent and has in his answer included a prayer for relief to furnish, in such manner and to such persons and on such occasions as may be prescribed, such particulars as may be prescribed of any proceedings which- (a) he knows to be continuing in another jurisdiction; and (b) are in respect of that marriage or capable of affecting its validity or subsistence. "

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Where the court has been alerted to such a conflict, different considerations apply depending on whether that conflict is within the territories of the UK, within the Member States of the EU, or with another country outside the EU.

Within the territories of the UK: Where proceedings for divorce or nullity of marriage are pending elsewhere in the British Isles Sch.1 para.8 DMPA 1973 provides that the court must stay the English proceedings in the following circumstances:

" (1) Where [...] it appears to the court, on the application of a party to the marriage-
   (a) that in respect of the same marriage proceedings for divorce or nullity of marriage are continuing in a related jurisdiction; and
   (b) that the parties to the marriage have resided together after its celebration; and
   (c) that the place where they resided together when the proceedings in the court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun, is in that jurisdiction; and
   (d) that either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the court were begun,

This duty only arises on the application of a party to the marriage before the beginning of the trial or first trial Sch.1 para.8(1) DMPA 1973. Thereafter there is a discretionary power of stay in Sch.1 para.9. This is discussed further below in the context of discretionary stays.

In respect of Civil Partnerships, the same provisions are applied by virtue of the Family Procedure (Civil Partnership: Staying of Proceedings) Rules 2010/2986.

More than one Member State is seised of proceedings: This situation is governed by the provisions of the Regulation 2201/2003. The primary Article is art.19 which provides:

" 1 Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
   3 Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court. "

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This creates a "first past the post" test for dealing with the proceedings where there is potentially more than one Member State with jurisdiction. In circumstances where there is more than one potential jurisdiction, it is important to secure jurisdiction as a priority before engaging in dispute resolution. Neither an estoppel nor a jurisdiction agreement can displace the provisions of art.19: Jefferson v O’Connor [2014] EWCA Civ 38; [2014] 2 F.C.R. 112. A number of particular difficulties may arise:

It is not always easy to determine which court was first seised. Article 16 indicates that the relevant time is when the document instituting the proceedings is lodged with the court, or when it is lodged with the authority responsible for service if it has to be served first. Not all member states have the same rules for determining when an application is lodged. See for example Leman-Klammers v Klammers [2007] EWCA Civ 919; [2008] 1 F.L.R. 692 and C v C (Divorce: Jurisdiction) [2005] EWCA Civ 68; [2005] 1 W.L.R. 1469.

It can take a significant amount of time for the court first seised to determine jurisdiction. The person disputing jurisdiction is effectively having to engage in proceedings in that other Member State to refute that State's jurisdiction before the matrimonial cause can proceed. If proceedings have been issued in another Member State but jurisdiction is contested and it is believed that the UK has jurisdiction, proceedings can still be issued here but they must be stayed pursuant to art.19 while the jurisdiction of the court first seised is explored: see Wermuth v Wermuth [2003] EWCA Civ 50; [2003] 1 W.L.R. 942. In the case of Chai v Peng [2014] EWHC 3518 (Fam); [2015] Fam. Law 37 Holman J. held that a person who challenged the jurisdiction of a court could not be regarded as having submitted to its jurisdiction simply because he funded and instructed lawyers to attend before that court in order to register and argue his protest.

Member States don't always interpret EU law uniformly. A Member State will sometimes consider itself to have jurisdiction in circumstances which the English court disagrees with. The question of jurisdiction of the court first seised must be established by the court first seised - there is no scope for the English court to disagree.

There is no scope for the court first seised to decline jurisdiction in favour of a more appropriate jurisdiction: Wermuth v Wermuth No.1 [2002] EWHC 3049 (Fam); [2003] 1 F.L.R. 1022 and Wermuth v Wermuth [2003] EWCA Civ 50; [2003] 1 W.L.R. 942

There may be an issue about when proceedings have come to an end. See for example G (A Child) (Jurisdiction: Brussels II Revised), Re [2014] EWCA Civ 680 in relation to parental responsibility. In the case of S v S (Brussels II Revised: Articles 19(1) and (3): Reference to ECJ) [2014] EWHC 3613 (Fam);
Mostyn J. referred a question to the CJEU concerning whether the jurisdiction of the court first seised had been "established" for the purposes of Regulation 2201/2003 art.19 where a husband had simply filed judicial separation proceedings but had not progressed with those proceedings before they lapsed. The outcome of this reference is not yet reported. In the case of de Bauge v China [2014] EWHC 3975 (Fam); [2015] Fam. Law 274 Nicholas Cusworth QC held that in circumstances where the Italian separation proceedings were not final until the time for appeal had expired and no Italian petition for divorce could be issued in that period, no English petition could be issued either.

Competing jurisdiction with another country which is not a Member State: The Sch.1 para.9 to the DMPA 1973 provides the court with a discretionary jurisdiction to stay proceedings where proceedings are continuing in another jurisdiction and the balance of fairness and convenience as between the parties is such that it is appropriate for the proceedings in that other jurisdiction to be disposed of before further steps are taken in the English court. The same ability to allow discretionary stay of competing civil partnership proceedings is afforded by the Family Procedure (Civil Partnership: Staying of Proceedings) Rules 2010/2986, which also fall outside the Council Regulation. It is possible to both contest jurisdiction here and seek a stay. The Court of Appeal has recently confirmed in M v M [2013] EWCA Civ 1255; [2014] 2 W.L.R. 1033; that the provisions of Regulation 2201/2003 do not operate to prevent the courts of England and Wales from staying proceedings here where it has jurisdiction and where another country which is not a Member State of the UK also has jurisdiction. The Court confirmed that it was neither necessary nor desirable to extend the principle in Owusu v Jackson (t/a Villa Holidays Bal Inn Villas) (C-281/02) [2005] Q.B. 801 to cases where there were parallel proceedings in a non-Member State, and approved the decision in JKN v JCN (Divorce: Forum) [2010] EWHC 843 (Fam); [2011] 1 F.L.R. 826.

The question of whether the court should grant a stay in favour of another jurisdiction is a discretionary issue, and can have significant consequences because of the widely varying outcomes which might ensue in different jurisdictions. The excellent chapter in David Hodson’s book The International Family Law Practice is essential reading in this area. There are numerous authorities in which the courts have considered and applied Sch.1 para.9 to the DMPA 1973 and the guidance in the leading authority of De Dampierre v De Dampierre [1988] A.C. 92. In particular see Butler v Butler (No.1) [1997] 2 F.L.R. 311; R v R (Divorce: Stay of Proceedings) [1994] 2 F.L.R. 1036; Armstrong v Armstrong [2003] EWHC 777 (Fam); [2003] 2 F.L.R. 375; A v L and F v F [2009] EWHC 1448 (Fam); [2009] 2 F.L.R. 1496. Most recently the series of cases between Pauline Chai and Tan Sri Peng of the Laura Ashley dynasty are essential reading in this area. Mr Justice Bodey at [2015] Fam Law 37 raises
some questions about whether there is a conflict between Butler v Butler and De Dampierre as to whether a party must show the other jurisdiction is "clearly and distinctly" more appropriate, or, on balance more appropriate which would benefit from "more authoritative determination at some point". The Court of Appeal considered the issue of forum in some detail in the case of O v O (Appeal against Stay: Divorce Petition) [2002] EWCA Civ 949; [2003] 1 F.L.R. 192, concerning a dispute over jurisdiction with Nigeria. The court considered that the history of the litigation in the competing jurisdictions was a significant factor, as was the issue of recognition of any decree granted here or in the competing jurisdiction. Further guidance was given as follows:

"It is my opinion that if the ancillary relief order is to be determined by a London judge (and any order would be manifestly enforceable against London assets) he should give due weight to what I might loosely describe as Nigerian factors and not ignore the differential between what the wife might anticipate from a determination in London as opposed to a determination in Lagos. The dispute to date, like most of these disputes as to jurisdiction, has undoubtedly been driven by the husband's conviction that a Lagos award would be to his advantage and the wife's contrary conviction that a London award would be more generous. These contests are particularly arid and in my view should be discouraged by permitting a reflection of the differential within the review under section 25(1) of the Matrimonial Causes Act 1973 of "all the circumstances of the case". I accept the consequence that the ancillary relief trial in London would be more complex, and more expensive, than it would be in a conventional case between British subjects. 58. I would also accept the judge's conclusion that 'looked at overall this is, in the widest sense, a Nigerian family'. I would also accept that that is a factor rightly put into the scale in favour of a stay, both as a factor in measuring fairness to the husband and also in measuring to which court system family disputes naturally attach. However the judge's statement is perhaps over succinct. The family is primarily and predominantly Nigerian but the extent to which it has elected a secondary attachment must not be overlooked.""

The Court of Appeal also suggested that there should be less of a distinction between EU and non-EU cases:

"But, as the judgment of Hobhouse LJ in Butler v Butler [1998] 1 WLR 1208 at 1215 reminds us, in the end the judge's discretion is bounded by the statutory considerations which rest upon an evaluation of fairness to the parties rather than upon a comparison of the competing jurisdictions, save insofar as the comparison relates to convenience of witnesses, delay and expense. Of course the issues that took the case of De Dampierre to the House of Lords could not now arise since with effect from March 2001 the Brussels II Regulation applied the rule of lis alibi pendens between the
member states of the European Union. That has restricted the application of section 5(6) of the 1973 Act to competition between this jurisdiction and non-EU jurisdictions. I am of the opinion that in order to confine to some extent the effect of applying two different rules, greater weight should be given to the consideration of where proceedings were first issued in the exercise of the statutory discretion."

Whilst the courts of England and Wales may determine that the proceedings here should be allowed to continue, that of itself does not bring the proceedings in the competing jurisdiction to an end, and a situation can arise where there continue to be two sets of proceedings and conflicting orders. Not all other jurisdictions have a mechanism for proceedings to be stayed, and the other party may wish to pursue a different outcome in the other jurisdiction. It may also occur that the other party is vigorously pursuing proceedings in the other jurisdiction whilst seeking a stay in this jurisdiction. Whilst forum is still being considered in this jurisdiction, the court may make a "Hemain" injunction seeking to prevent a party from pursuing the suit elsewhere: See Hemain v Hemain [1988] 2 F.L.R. 388 and R v R (Divorce: Hemain Injunction) [2003] EWHC 2113 (Fam); [2005] 1 F.L.R. 386. See also Golubovich v Golubovich [2010] EWCA Civ 810; [2011] Fam. 88 regarding the relationship between "Hemain" injunctions and recognition of decrees.

A "Hemain injunction" is an interim remedy pending resolution of jurisdictional issues. Much rarer are anti-suit injunctions intended to prevent a party from re-litigating matters in another country, or enforcing a party’s right not to be sued in another country. The Court of Appeal recently confirmed in the case of Ahmed v Mustafa [2014] EWCA Civ 277; [2014] Fam. Law 790 that the High Court does have the power to restrain a litigant from re-litigating matters in a foreign jurisdiction where it is unconscionable to do so, and reviewed the case law in this area. It is clear, however, that such injunctions will continue to be rare.

Recognition of Matrimonial Causes: Whether a divorce, dissolution, separation or nullity from another jurisdiction will be recognised again varies as between territories of the UK, Member States of the EU, and divorces, annulments and separations from non-EU countries.

Territories of the UK: The Family Law Act 1986 provides for divorces, annulments and judicial separations to be automatically recognised throughout the UK where they are granted by a court of civil jurisdiction. This means, for example, that a talaq pronounced in England is ineffective; Sulaiman v Juffali [2002] 1 F.L.R. 479. It also means that divorces granted in foreign embassies in the UK are not recognised as effective here, see for example Solovyev v Solovyeva [2014] EWFC 1546. Similarly, s.233 of the Civil Partnerships Act 2004 provides that:
"the validity of a dissolution or annulment of a civil partnership or a legal separation of civil partners which has been obtained from a court of civil jurisdiction in one part of the United Kingdom is to be recognised throughout the United Kingdom."

Member States of the EU: Within the EU, there is automatic recognition in all Member States of divorce, annulment or legal separation orders made in other member states. The term judgment is specifically defined by art.2 Regulation 2201/2003 to mean "a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility". Note, however, that the Member State in question is not required to recognise the marriage in respect of which the divorce took place. For example, if a married same-sex couple divorce here, another Member State may not recognise the divorce because it does not recognise the same-sex marriage which is the subject of the divorce. Note also that there is no automatic inter-State recognition of civil partnerships - regard will need to be had to the domestic law of each relevant Member State. In respect of civil partnerships, the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005/3334 provides for recognition of an "order for the dissolution or annulment of a civil partnership or the legal separation of civil partners, pronounced by a court of a Member State, however termed by that State".

Recognition of judgments within the EU falls principally within arts 21 and 22 Regulation 2201/2003. Article 21 provides that "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required". Article 22 sets out the grounds for non-recognition which includes circumstances which are manifestly contrary to the public policy of the Member State in which recognition is sought. This is the ground on which recognition most commonly fails, and might include refusing to recognise a divorce of a same sex couple.

Part 31 of the Family Procedure Rules 2010/2955 and Practice Direction 31A deal with the procedure relating to obtaining recognition in the UK of divorces, annulments and judicial separations obtained in other Member States, and pursuant to the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005/3334 and under the Hague Convention 1996. All applications must be made to the Principal Registry in accordance with those procedural rules.

Recognition of divorce, annulment or separation obtained outside the EU: It should be noted that even though the courts of England and Wales may recognise a divorce obtained outside the EU, that country will not necessarily recognise a divorce obtained here, and it may be necessary for the parties to be divorced in more than one jurisdiction. The Family Law Act 1986 Pt II governs the issue of recognition in England and Wales of overseas divorces, annulments and legal separations. Section
46 creates a distinction between a divorce, annulment or legal separation obtained by means of proceedings, and otherwise than by means of proceedings. See in particular the notes to rr.88 and 89 in Dicey & Morris, The Conflict of Laws, 15th Ed..

The different rules according to whether a divorce, annulment or separation has been obtained by proceedings necessitates consideration of what constitutes proceedings, and the distinction between them remains unclear. Proceedings is defined in the Family Law Act 1986 s.54 to mean "judicial or other proceedings". The consideration given by the House of Lords to this issue in the case of Quazi v Quazi [1980] A.C. 744 is instructive, but pre-dated the 1986 Act which also requires effectiveness in the country where it was obtained. See also Chaudhary v Chaudhary [1985] Fam. 19, El-Fadl v El-Fadl [2000] 1 F.L.R. 175 and H v H (Validity of Japanese Divorce) [2006] EWHC 2989 (Fam); [2007] 1 F.L.R. 1318. What is clear is that "proceedings" has a much wider definition than simply court proceedings, can include an administrative procedure or some degree of formality which doesn't involve any independent body or authority - see Berkovits v Grinberg [1995] Fam. 142

Where the divorce, annulment or separation was obtained by way of proceedings, it is also a requirement of recognition that it is effective under the law of the country in which it was obtained, and at the relevant date either party to the marriage was:

" (i) habitually resident in the country in which the divorce, annulment or legal separation was obtained, or
(ii) was domiciled in that country, or
(iii) was a national of that country "

The relevant date is the date the proceedings commenced FLA 1986 s.46(3). If the country in which the divorce, annulment or legal separation was obtained has a number of independent territories or states, FLA 1986 s.49 applies to mean that each territory or state is treated as though it were a separated country for the purposes of determining those points (i), (ii) and (iii).

Where the divorce, annulment or separation was obtained otherwise than by way of proceedings there are additional requirements in FLA 1986 s.46;

" 2) The validity of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings shall be recognised if- (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; (b) at the relevant date- (i) each party to the marriage was domiciled in that country; or (ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the
divorce, annulment or legal separation is recognised as valid; and (c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date."

The relevant date in these circumstances is the date on which the divorce, separation or annulment was obtained: FLA 1986 s.46(3). Divorces obtained otherwise than by way of proceedings may include divorces obtained on the informal act of one party to the marriage, and sometimes the other party is not even aware that they have been divorced. Informal acts can include the Muslim Talaq or the Jewish Ghet, but these forms of divorce are not always obtained otherwise than by proceedings. See in particular Abbassi v Abbassi [2006] EWCA Civ 355; [2006] 2 F.L.R. 415. In some cases there may be an issue as to where the divorce was obtained. See for example Sulaiman v Juffali [2002] 1 F.L.R. 479. It is clear from the provisions of FLA 1986s.46(2) that such a divorce, separation or annulment will not be recognised if either party was habitually resident in the UK throughout the period of 1 year prior to it being obtained. This prevents parties who are habitually resident here simply hopping over to a jurisdiction where proceedings are not required, issuing a divorce by the informal act of one party, and then returning to the UK seeking to have it recognised.

Section 46 FLA 1986 deals with the proof of facts relevant to recognition and provides:

"(1) For the purpose of deciding whether an overseas divorce, annulment or legal separation obtained by means of proceedings is entitled to recognition by virtue of section 46 and 47 of this Act, any finding of fact made (whether expressly or by implication) in the proceedings and on the basis of which jurisdiction was assumed in the proceedings shall- (a) if both parties to the marriage took part in the proceedings, be conclusive evidence of the fact found; and (b) in any other case, be sufficient proof of that fact unless the contrary is shown. (2) In this section "finding of fact" includes a finding that either party to the marriage- (a) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or (b) was under the law of that country domiciled there; or (c) was a national of that country. (3) For the purposes of subsection (1)(a) above, a party to the marriage who has appeared in judicial proceedings shall be treated as having taken part in them."

As might be expected from the foregoing, FLA 1986 s.51 also provides a number of grounds for non-recognition of overseas divorces annulments or separations, which include circumstances where it was obtained without taking the steps to give notice to the other party to the marriage or opportunity to participate in the proceedings which ought to have been given - see Duhur-Johnson v Duhur-Johnson [2005] 2 F.L.R. 1042 and Ivleva (formerly Yates) v Yates [2014] EWHC 554 (Fam);
The court may further refuse to recognise divorces, annulments and separations obtained otherwise than by proceedings where there is no official document certifying that it is effective in the country where it is obtained. Recognition may also be refused on grounds of public policy. See El-Fadl v El-Fadl [2000] 1 F.L.R. 175 and Kellman v Kellman [2000] 1 F.L.R. 785. A divorce is not an overseas divorce merely because it is valid under foreign law if it is obtained within the precinct of England and Wales at foreign embassy or consulate; Solovyev v Solovyeva [2014] EWFC 1546.

Recognition of Civil Partnerships obtained outside the EU: Sections 235-237 CPA 2004 apply to effectively replicate the provisions of Family Law Act 1986 s.46 in respect of Civil Partnerships. The same distinctions as to dissolutions, annulments or separations obtained by proceedings and otherwise than by proceedings applies.