

# The future of family law – a Y-Res member's view

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Even to a young solicitor such as myself the pace of change in the field of family law is staggering. In the past few years there has been a wealth of legislative, procedural, and judicial developments that have had a major impact upon the practice of family law. Legal practice is also being affected by the global recession. It has gripped and distorted the interaction between our practice, and agencies such as the Legal Services Commission and charitable organisations. These are perhaps the most challenging times there have ever been in family law and as a Young Resolution member it is clear to me that while the future is going to be exciting it will also require resolution of a different kind.

## Cohabitation

From the inception of the Matrimonial Causes Act 1973 there has undoubtedly been a change in the matrix of our society. In March 2011 the Office of National Statistics presented provisional figures that demonstrated that in England and Wales marriage was at its lowest rate in 2009 since 1895. With a decline in marriage rates there has been a substantial increase in couples cohabiting before marriage, and indeed not marrying at all. Indeed even Prince William and Kate Middleton chose to cohabit prior to marrying which would have been unheard of a generation before.

The increase in cohabitation has of course had an impact on the way in which relationship breakdown is dealt with by family law solicitors. For many cohabiting couples who separate their case will, in fact, be dealt with very differently to that of their married counterparts. With the

incidence of cohabitation continuing to grow and with the concern that the law is not able to regulate it effectively the Law Commission has consulted upon this issue and presented recommendations which would see the rights of cohabitants protected, in certain circumstances.

The recommendations set out by the Law Commission would provide for cohabiting couples to be able to seek financial relief on separation if certain criteria are satisfied. Couples who meet a "minimum duration requirement" in terms of the length of their cohabitation and couples with children would be covered. The Law Commission suggested that the criteria should be set out in statute and should be complied with unless the couple reach an "opt-out agreement". The arrangements would create a rather complete and all encompassing protection for cohabitants. The financial relief would be similar to that upon divorce, including pension sharing orders. However, the Law Commission say that periodical payments would not normally be available.

However, there is certainly an argument that if couples want the rights and financial protections that may come should their relationship get into irretrievable difficulty then why don't they choose marriage? At the same time, for cohabiting couples who have consciously chosen not to marry and are happy to adopt a *laissez faire* approach the fact that they have to actively opt out of the statutory provisions may seem a little unfair.

Disputes relating to cohabitants can be extraordinarily expensive and unfruitful for clients. Cohabitation agreements may help to mitigate any such grievances but of course they may not be upheld in all circumstances. However, if reforms can help to reduce the likelihood of property disputes and the unfairness that can be construed from solely relying on property law this should be seen as a positive development.

## Mediation

Before they were published it was clear that the Family Procedure Rules 2010 (FPR 2010) would transport the realm of family law towards the ethos of the Civil Procedure Rules 1998 by introducing a greater emphasis on mediation and other form of ADR. In conjunction with the increasing popularity of cohabitation agreements and nuptial agreements post-*Radmacher* this approach can be seen not only as a cost cutting exercise, but also as a way in which relationships can be kept amicable for the sake of the children.

Throughout financial remedy proceedings clients are encouraged by their legal representatives and the judiciary to make decisions as soon as possible. However, many clients get swept along with the process and therefore do

not reach an agreement anywhere nearly as soon as they could do. Consequently they exit proceedings with their wallet much lighter and probably feeling rather dejected.

Mediation has a strong role in the future for aiding and encouraging clients to reach agreements outside the court process at an early stage. Mediation is of course not appropriate for everyone and it is often most effective alongside firm legal advice. Whilst the FPR 2010 do not introduce compulsory mediation there is a clear expectation that it should be considered. Some clients will, in my view, feel empowered by this approach as it will give them an opportunity to have an active role within their divorce or separation. Mediation remains voluntary and therefore we wait to see what impact the reforms will have, ie will courts be willing to introduce sanctions for non-participation in mediation?

### Family Justice Review

Anyone who has read the interim Family Justice Review report by David Norgrove will discern the clear commitment towards a non-confrontational approach away from the courts and also the need for separating couples to have increased autonomy and responsibility.

The report details that in 2006 there were 111,000 children involved in applications to court and by 2009 this had increased to 137,000. It goes without saying that the court should always be regarded as a last resort as it is expensive, stressful and will often deepen the rifts between parents and their children. The report therefore states that out of court resolution should be promoted wherever possible. Where the courts are used the report recommends stronger judicial case management to resolve matters as effectively as possible.

To encourage couples to reach agreement outside the court process, the report recommends the use of an online parenting hub and Parenting Agreements. This is a further example of the popularity of DIY resolution. The report also recommends that there should be legislation "to reinforce the importance of the child continuing to have a meaningful relationship with both parents". This proposal is supported by the notion that there should be a move away from contact and residence orders towards specific issue orders to reduce the idea of one parent "winning".

### Economic climate

The worldwide recession has had an impact on so many aspects on all of our lives that it is no surprise that it is also likely to have a profound effect on family law. One of the biggest consequences is to come from cuts in legal aid funding. The government hopes to save £350 million from

legal aid funding in 2014/15. A consequence of this cut can only be that there would be many couples will be left to reach decisions outside of court, by themselves, although perhaps with the help of a mediator.

A further influence that the recession has had will be a decline in donations and other support for so many excellent charitable organisations all over the country that assist families in various ways. I work in the Manchester/Cheshire area where there are a few excellent child contact centres that provide great support to families but there are simply not enough.

It has been reported recently that the Child Support Agency propose that they will not continue to offer a free service to all parents to assist them with child maintenance payments. It will nearly always be advantageous to children for their parents to reach agreement between themselves (except, for example, in cases of duress or non-disclosure). This is a further example of clients taking control of their disputes. It will of course be considered unfair to charge couples who might not be able to afford to use the service particularly where the difficulty arises due to the non-cooperation of one party. Like mediation, this might not work for everyone but allowing families to take back an element of control and autonomy can only be a positive thing for the children involved.

The reforms to legal services and the introduction of alternate business structures (ABS) will mean that citizens may be able to call into their local supermarket and get a divorce together with their groceries. In some cases this will be adequate and meet their needs but in other cases they might need a more specialised or bespoke service to resolve their affairs. The mantra will no doubt become "you get what you pay for" but this may lead to a two-tier system. There is of course also a concern that this result in the closure of many small high street family practices, as we have seen, with many small local shops that have ceased to trade due to the might of the big supermarkets. Smaller practices may simply be unable to compete with ABS low cost advice.

### Conclusion

The changing shape of our society and the wider economic issues at play are likely to alter the map of family law forever. Family law practitioners will need to be adaptable and open to the challenges ahead. Firms that offer legal aid are going to be increasingly squeezed which will inevitably leave the lower income families whose means make them ineligible for such support to consider the ABS on the high street. Other firms must focus on quality and offering clients a bespoke service in conjunction with other professionals that they will want to pay for.

Attracting new instructions will become an increasing challenge for firms due to the economic climate and ABS competition. The firms that will thrive will be aware of all of the issues I have discussed in this article and will further embrace the modernisation of practice such as the use of social media (Facebook, Twitter and LinkedIn), clever marketing and fixed fees.

There is a sense that family law is moving towards the autonomy of the individual. The recent reforms that have

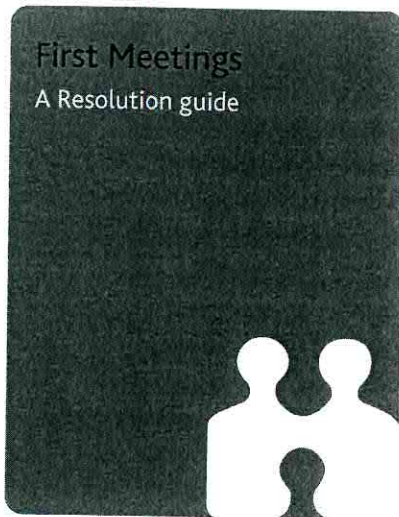
been proposed acknowledge that family law should be dealt with in a non confrontational way and that clients should become more actively involved in the process. This creates a challenge for the family law solicitor and it will be interesting to see how these issues are managed by my Young Resolution contemporaries.

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