Unit 1:

Introduction to Family Practice
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Unit 1: Introduction to Family Law

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# Unit 1:

## Introduction to Family Law

### Learning Outcomes

| 1. Explore Family Law and the Courts | P1: Identify the structure of the family courts  
P2: Describe the process of transferring the matter to another court in relation to children and proceedings. |
| 2. Explore Confidentiality, Legislation and Case Law | P3: Explain the importance of confidentiality in family law proceedings  
P4: Describe the effect of human rights legislation on family proceedings. |
| 3. Define Public Funding/Costs | P5: Identify the areas where public funding is available  
P6: Explain the two areas of Approved family help and the process prior to providing the help  
P7: Describe the various costs orders that a court may make.  
P8: Explain when a wasted costs order may be made and the three-stage test that is applied. |
| 4. Define Marriage/Civil Partnership | P9: Describe the legal requirements of marriage  
P10: Explain when there will be a presumption of marriage  
P11: Identify the legal requirements of Civil Partnerships  
P12: Forced Marriage (Civil Protection) Act 2007 |
Candidates are asked to note that new Family Procedure Rules came into effect on 6th April 2011.

The rules are the Family Procedure Rules 2010 and apply to the Senior Courts of England and Wales and the County Courts and Magistrates Courts of England and Wales. The rules apply to all family proceedings in the High Court, County Court and Magistrates Court:

The aim of the rules is to provide a comprehensive procedural code with the overwhelming objective of enabling the courts to deal with cases justly, having regard to any welfare issues involved.

In practical terms this means;

a. Ensuring that a case is dealt with expeditiously and fairly
b. Dealing with a case in ways which are proportionate to the nature, importance and complexity if the issues
c. Ensure the parties are on an equal footing
d. Save expense
e. Allot appropriate court resources

The new rules are accompanied by extensive practice directions which provide practical guidance as to how the rules are to operate. The practice directions also refer to the forms to be use in all proceedings – the forms can be found at: www.hmcourts-service.gov.uk

1. What is ‘Family Law’?

Traditionally, the term ‘family’ conjures up an image of a married male and female and their children. Whilst this is not a situation which is redundant, anyone with any knowledge of modern society knows that this is merely one example of family life.

Family Law is an area of law that is continually evolving to reflect the changes in modern society. Family Law covers all types of legal regulation of, and intervention in, the lives of people who are related by blood, marriage, civil partnership or some other kind of recognised relationship. The phrase ‘recognised relationship’ may seem somewhat vague, but it is used to demonstrate that the court’s view as to what constitutes a ‘family’ has changed over time.

It is obvious, therefore, that to be sure of what ‘Family Law’ is, it is important to briefly consider what the courts mean when they use the term ‘family’.

The eighteenth and nineteenth century view of what makes up a family was very much that of the traditional example set out above. This view persisted into the twentieth century, and is highlighted by the case of Gammons v Ekins [1950] 2 KB 328, where a man sought to remain in the home that he had shared with his partner for many years, following her death.
His claim was rejected by the Court of Appeal, where one of the judges, Asquith LJ, said:

“To say of two people, masquerading, as these two were, as husband and wife (there being no children to complicate the picture) that they were members of the same family, seems to me an abuse of the English language.”

The view of the courts began to change, however, as society found it more acceptable that a man and woman could live together in a stable relationship. An example of this change can be found in the case of *Watson v Lucas* [1980] 1 WLR 1493. Here, the court decided that a man who, having left his wife, lived with a woman in a long-term relationship was a member of her family and was therefore entitled to the protection of the Rent Act following her death.

As society accepted heterosexuals in a relationship and living together without marriage could be part of the same family, what of homosexuals in a similar situation? The case of *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 answered that question. The House of Lords had to decide whether a surviving homosexual partner could succeed to their partner’s tenancy. To be able to do so, the surviving partner had to prove that they were a member of their partner’s family. The decision of the House of Lords was that homosexuals were capable of being members of each other’s families.

Family Law has always given rights and imposed responsibilities on the individuals which make up each family. As the individuals that make up the modern family have changed from the traditional model set out at the start of the Module, so too have those rights and responsibilities.

A concise definition of the term Family Law is made more difficult by the fact that the subject so often crosses into other areas of the law, as you will see as this distance learning programme progresses.

Those who work in the area of Family Law may also find that they benefit from a working knowledge of other areas, such as:

- Contract Law
- Equity and Trusts
- Property Law
- Human Rights

It is the continuing evolution, combined with the fact that when working in this area you will have the opportunity to help people with some of the most emotionally challenging and important aspects of their lives that makes Family Law such a dynamic and exciting subject.
2. **When can the Courts Intervene in Family Law?**

Having considered what the courts mean by the term family and how they have interpreted it in certain relationships, it is easier to consider the common types of relationships in which the courts have only limited powers to intervene.

The first relevant type of relationship is that of heterosexual cohabitants and homosexual cohabitants. Whilst these relationships will often appear to the casual observer as if they constitute a family, the rights of the members of the relationship will be limited. Examples have been given above of where the courts have defined the term ‘family’ to include certain types of cohabitants. It is important to remember that this does not mean that the law will provide the same rights and impose the same responsibilities on cohabiting couples.

You may often hear people use the term ‘common law marriage’ in relationships where partners are not legally married or there is no civil partnership. People will often use this term, assuming that they will have similar rights as if they were legally married. This is a very common misconception. The term ‘common law marriage’ has not existed in English law for over 250 years.

The position concerning the rights of cohabiting couples has recently been examined by the Law Commission. There has been increasing debate that the law surrounding heterosexual cohabiting couples should be reconsidered in light of the provisions of the Civil Partnership Act 2004 which concerns same-sex couples. This Act places same-sex couples who register their partnership in virtually the same legal position as those who marry.

Following consultation the Law Commission published a report in July 2007 which focused on the financial hardship suffered by cohabitees or their children on the termination of their relationship by separation or death. The Government will decide whether to accept and implement the recommendations. It is important to note that the Commission did not consider blood – relative or “caring” relationships nor did it consider commercial relationships (e.g. tenant/lodger). The current administration have signalled their intent to review the position of cohabiting couples in light of the Law Commission report.

The report also coincided with the House of Lords’ decision in April 2007 in the case of *Stack v Dowden*. The judgement established a new framework within which future cases about cohabitants’ rights are to be decided. This should lead to greater certainty and simplicity.

*Stack v Dowden* at [www.bailii.org/uk/cases/UKHL/2007](http://www.bailii.org/uk/cases/UKHL/2007)

The second type of relationship is less common than the first. It is where a couple live together again in a fashion that the casual observer would consider them to be a family, but the relationship is entirely platonic.
In law, the participants in these relationships are not considered to be part of each other's family, and therefore have none of the rights of members of a legally married couple or members of a civil partnership.

3. The Structure of Family Courts

The basic structure of the Family Courts can be set out quite simply.

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<th>JUDGES</th>
<th>HEARS CASES RELATING TO</th>
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| Magistrates, known in Family cases as the Family Proceedings Court (FPC) | Magistrates, specially trained to deal with Family cases, sometimes District Judges | 1. Children  
2. Injunctions, usually relating to Domestic Violence  
3. (Rarely) Adult Maintenance |
| county court                 | District Judges, Recorders (part-time Judges, who are also experienced practising solicitors or barristers), Circuit Judges | 1. Children  
2. Divorce  
3. Ancillary Relief  
4. Injunctions, usually relating to Domestic Violence |
| High Court, Family Division  | High Court Judges, Circuit Judges allowed to sit as 'Deputy High Court Judges' | 1. Very serious/complicated cases  
2. Appeals from the FPC |
| Court of Appeal              | Lord Justices of Appeal, High Court Judges                            | 1. Appeals from the county court  
2. Appeals from the High Court |
| Supreme Court                | Supreme Court Judges                                                  | 1. Appeals from the Court of Appeal |

4. Transfer of Proceedings

The court in which Family Proceedings begin life may not ultimately be the most appropriate court to finalise the matter. This could be for any one of the number of reasons set out below.

The issue of transfer is one that needs to be considered at the beginning of proceedings and reviewed throughout, as one of the first things that the court will usually do is set out a timetable to the conclusion of the proceedings. If the issue of transfer is not considered until the case has progressed for a long time in an ‘inappropriate’ court, it can cause delay when transferred to a different court that will then set a new timetable.
We shall consider the two most common occasions for transfer that you are likely to encounter: Transfer of Proceedings Relating to Children and Transfer of Proceedings under Part IV of the Family Law Act 1996.

4.1 Transfer of Proceedings Relating to Children

The transfer of proceedings relating to children is governed by the Children (Allocation of Proceedings) Order 1991.

4.1.1 Transfer from F.P.C. to county court

Under Article 7 of the Children (Allocation of Proceedings) Order, the F.P.C. may, upon application from a party or of its own motion, transfer proceedings to a county court, having regard first to the child’s best interests and secondly to these questions:

a. where the proceedings are exceptionally grave, important or complex, in particular –
   i. because of complicated or conflicting evidence about the risks involved to the child’s physical or moral well-being or about other matters relating to the welfare of the child;
   ii. because of the number of the parties;
   iii. because of a conflict with the law of another jurisdiction;
   iv. because of some novel and difficult point of law; or
   v. because of some question of general public interest;

b. whether it would be appropriate for those proceedings to be heard together with other family proceedings which are pending in another court; and

c. whether transfer is likely to significantly accelerate the determination of the proceedings, where –
   i. no other method of doing so, including transfer to another magistrates’ court, is appropriate, and
   ii. delay would seriously prejudice the interests of the child who is the subject of the proceedings.

Some of these terms require further definition. Examples of what is ‘grave, important or complex’ are:

a. where there is a conflict of medical evidence;

b. where there is complex evidence relating to whether a minor has the ability to instruct his own solicitor;

c. where the have been serious non-accidental injuries to a child;

d. where the case has an international element.
An application for transfer may also be based on the estimated length of the final hearing. The case of *Re H (A Minor) (Care Proceedings: Child’s Wishes) [1993] 1 FLR 440* decided that where a final hearing is likely to last for two or three days, the F.P.C. should consider transfer to the county court.

This is not a rule as such, and is certainly not always followed by the F.P.C., often for the reason that the county court already has too many cases for the court time available. Indeed, the case of *Re A [1993] Fam Law 619* decided that any decision not to transfer the case ‘up’ to the county court and to therefore hear a case of three or possibly more days, does not invalidate the court’s ultimate decision in the case.

4.1.2 Transfer from county court to F.P.C.

Having received a case from the F.P.C., the county court may transfer the matter back ‘down’ to the F.P.C. under Article 7 of the *Children (Allocation of Proceedings) Order* where it considers that the criteria used by the F.P.C. to transfer does not apply. This may be because there has been a change of circumstances since the transfer, or the county court simply disagrees with the F.P.C.’s decision.

4.1.3 Transfer from county court to High Court

The county court may transfer a case to the High Court under Article 12 of the *Children (Allocation of Proceedings) Order*, where the court considers:

a. that the proceedings are appropriate for determination in the High Court; and

b. that such determination would be in the interests of the child.

4.2 Transfer of Proceedings under Part IV of the Family Law Act 1996

We shall consider the precise nature of proceedings under Part IV of the *Family Law Act 1996* in later modules, but it is appropriate to consider the issue of transfer here. The principles are very similar to those set out above in relation to children’s proceedings, and are governed by *The Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order 1997*, which can be found at: [http://www.opsi.gov.uk/si/si1997/19971896.htm](http://www.opsi.gov.uk/si/si1997/19971896.htm). This has been amended by *The Family Law Act 1996 (Part IV) (Allocation of Proceedings) (Amendment) Order 2005*, which can be found at: [http://www.opsi.gov.uk/si/si2005/20052924.htm](http://www.opsi.gov.uk/si/si2005/20052924.htm).
Task 1:

Go to the above websites and look at the Orders, print off copies and keep them with your notes.

4.2.1 Transfer from F.P.C. to county court

Article 8 of the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order states that the F.P.C. may on application or of its own motion transfer proceedings to a county court where it considers:

a. it would be appropriate for those proceedings to be heard together with other family proceedings which are pending in that court; or

b. the proceedings involve -

i. a conflict with the law of another jurisdiction;
ii. some novel and difficult point of law;
iii. some question of general public interest; or

c. the proceedings are exceptionally complex.

Paragraph (2) of Article 8 sets out when the F.P.C. must transfer the proceedings to the county court. This is when:

a. a child under the age of eighteen is the Respondent to the application or wishes to become a party to the proceedings; or

b. a party to the proceedings is a person who, by reason of mental disorder within the meaning of the Mental Health Act 1983, is incapable of managing and administering his property and affairs.

4.2.2 Transfer from county court to F.P.C.

As in relation to children’s proceedings, Article 11 of the Family Law Act 1996 (Part IV) (Allocation of Proceedings) Order, allows for transfer ‘down’ to the F.P.C. where circumstances have changed or the county court disagrees with the decision to transfer ‘up’.

4.2.3 Transfer from F.P.C./county court to High Court

Such a transfer can be made of the court’s own motion or on application, when the court considers the case appropriate for the High Court.
5. **Confidentiality**

The issues in Family Law proceedings are, by their very nature, private to the people involved in them. As a result of this, there are restrictions on the people who can see papers and evidence filed in Family Law proceedings, and on who can be in court during a Family Law case. Knowing that what goes on in Family Law proceedings will remain private is often very important to those involved.

In the **Family Proceedings Court**, only the following are allowed in court:

- Officers of the court, this will include the court clerk and usher;
- Parties in the case, including their legal representatives (solicitors and/or barristers), witnesses and others directly connected with the case;
- Representatives of the media;
- Any other person who the court considers has adequate grounds to be present, and therefore, allows to attend.

The only exception to this is when the proceedings before the Family Proceedings Court are brought under the **Adoption and Children Act 2002**, when only persons in categories 1 and 2 above are allowed to be present.

The Family Proceedings Court can prevent any of the people set out above, apart from category 2 above, from entering the court after having heard or received relevant evidence.

The Family Proceedings Court does not have to have evidence to hear the proceedings in private; it can do so whenever it thinks it is best to do so in the interests of the child.

In the **county court** and **High Court**, all proceedings are heard in private unless the court considers it appropriate to do otherwise.

Any papers held in relation to Family Law proceedings are also deemed confidential, and as such, there are strict rules relating to the media publishing details of certain cases.

In the **Family Proceedings Court**, publication is banned which is intended or likely to identify:

- Any child as being involved in any proceedings where powers under the **Children Act 1989** or the **Adoption and Children Act 2002** may be used; or
- The home address or school of the child involved.

Any person who breaks these rules can be guilty of a criminal offence.
In the **county court** and **High Court**, the rules relating to the publication of proceedings are set out in section 12 of the Administration of Justice Act 1960:

‘(1) The publication of information relating to proceedings before any Court sitting in private shall not of itself be a contempt of court except in the following cases, that is to say:

a. where the proceedings:
   
i. relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
   
ii. are brought under the **Children Act 1989** or the **Adoption and Children Act 2002**; or
   
iii. otherwise relate wholly or mainly to the maintenance or upbringing of a minor;’

This rule also bans the following items from publication, as was decided in the case of **Re B (A Child) (Disclosure) [2004] 2 FLR 142**:

- Accounts of what has gone on before the judge;
- The contents of any statements, affidavits, reports or other documents filed in the proceedings;
- Notes of the evidence of the proceedings;
- Notes of the judgment.

These matters are important to stress to any client who seeks advice in relation to Family Law proceedings.

Confidentiality is maintained in many Family Law proceedings by making the case name anonymous, as can be seen with the case of **Re B (A Child) (Disclosure) set out above**. In this case, the child that was the subject of the proceedings is referred to simply as ‘B’. This can lead to confusion as this is not the only case known as **Re B**, hence the bracketed words after the name of the case to allow it to be distinguished from other cases with the same name, and to give an idea of what the case is about.

**Task 2:**

Using the website [www.bailii.org](http://www.bailii.org) (British and Irish Legal Information Institute), on which it is possible to find a large number of reported Family Law cases, find the case of **Re T (Children) [2004] EWCA 558**.

[In order to find this, you will need to look on the site for decisions of the England and Wales Court of Appeal (Civil Division).]
In the first five paragraphs of the judgment, how are the parties and others involved in the case described?

5.1 General duty of confidentiality

For those of you working in solicitors offices, in addition the confidentiality issues discussed above, there is also the general duty of confidentiality to client. Chapter 4 of the SRA Code of Conduct 2011 sets out the duties you owe to the client and it can be found at the Solicitors Regulation Authority’s (SRA) website as: www.sra.org.uk

6. Legislation and Case Law in Family Law

Already in this module, you will have seen references to case law. The decisions made in cases set important precedents for how other cases will be decided in the future. Changes brought about by case law allow Family Law to develop and take account of the changes in society.

Where a case is not deemed to be confidential, the parties’ names are used. The first case set out at the start of this Unit is: Gammans v Ekins [1950] 2 KB 328.

The name of the case demonstrates the names of the people involved in the case, also known as the ‘parties’. In this case, ‘Gammans’ is Mr David Gammas and ‘Ekins’ is Mr J. J. Ekins. The ‘v’ between the names stands for ‘versus’.

The year, 1950, is the year the case was reported and is also usually the year that the case was decided.

‘2 KB 328’ refers to where the case is reported. Here, this is shorthand that demonstrates the case can be found in the second volume of the 1950 ‘King’s Bench’ law reports, beginning at page 328.

The most common type of law reports used in Family cases is the Family Law Reports, which is abbreviated to ‘FLR’ after the name of the case.

This Unit has also contained references to legislation, notably the Children Act 1989 and the Adoption and Children Act 2002.

Task 3:

Using the government website www.parliament.uk find the online ‘Guide to Legislation’ and then answer the following:

Is it only the government who come up with ideas for legislation?

What is the difference between a Bill and an Act of Parliament?
When does a Bill move to the House of Lords?

What is meant by the term ‘Royal Assent’?

Do Acts of Parliament become law immediately after receiving ‘Royal Assent’? If not, why not?

Legislation sets out what Parliament intends the law to be. One of the roles of case law is to interpret legislation where Parliament has not set out precisely how the law should be applied to the practical situations that a court may face. A good example of this is the case of Re B, set out above.

In that case, the court was concerned with section 12 of the Administration of Justice Act 1960, a piece of legislation. The court decided that it was necessary to interpret the legislation and set out what specific items were banned from publication.

6.2 How Does Human Rights Legislation Affect Family Law?

One of the most important pieces of legislation of recent years for all aspects of the legal system was the Human Rights Act 1998. This Act incorporated into the law the majority of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950. This means that any future legislation must be compatible with the Convention, as must any future interpretations of the legislation.

Task 4:


The Convention itself is made up of a series of ‘Articles’ that are set out in a Schedule to the Act, which are as follows:

- The right to life;
- The right to liberty;
- The right to a fair trial;
- The right to respect for private and family life;
- The right to freedom of expression;
- The right to marry; and
- Prohibition on Discrimination.

The Articles which have most relevance to Family Law are the right to a fair trial and the right to respect for private and family life.
The relevance of these Articles will be particularly important to remember as you progress through the modules of this distance learning training. This will be especially true when we come to consider the following areas of Family Law:

1. **Occupation Orders under the Family Law Act 1996**

   These orders regulate who may occupy the family home, and may force the legal owner of a property to leave. Such orders can last indefinitely. Such orders will obviously have an effect on the right to private and family life of the person whom they are made against.

2. **The ‘paramountcy principle’**

   As we shall see, when courts determine any question relating to children, the Children Act 1989 provides that the welfare of the child shall be the court’s paramount consideration. The right to private and family life provided for by the Human Rights Act does not put the child in such an elevated position.

3. **Parental Responsibility**

   Parental Responsibility is a concept that we shall consider in some detail. In very simple terms, unmarried fathers may have different rights in respect to their children to married fathers. This may appear to be in breach of the Articles in relation to the right to private and family life and the prohibition on discrimination.

4. **Contact**

   The legislation and case law in relation to an adult’s (usually a parent or other relative) application for contact with (often colloquially referred to as ‘access to’) a child or children makes it clear that such contact is the right of the child and not the right of the adult. This again appears to be in contrast to the right to private and family life.

5. **Delay**

   As you will soon, or may already have experience of, Family Law proceedings can take a long time to conclude. This can be for many reasons and unfortunately is a common occurrence, despite the safeguards that are in place to attempt to prevent unnecessary delay for the parties. The right to a fair trial specifically states that cases are to be heard within a ‘reasonable time’.
7. Public Funding

The scheme for the public funding, commonly known as ‘legal aid’ for Family Law proceedings is provided by the Community Legal Service Fund, which is managed by the Legal Services Commission. The following provides a general overview of the public funding scheme.

The Legal Services Commission awards civil legal aid to those who meet certain conditions regarding

- financial means; and
- the legal merits tests laid down by parliament

The financial eligibility tests look at a client’s income and capital. The legal merits test looks at factors such as the case’s likelihood of success.

Public funding in Family law has been radically altered by the introduction of the unified contract in April 2007. The changes brought about by the new contract were introduced in October 2007. The Legal Services Commission changes were designed to ensure fair access to legal aid, best value for money and a sustainable legal aid system for the future. The schemes will enable providers to prepare for the introduction of a competitive legal aid procurement system based on best value tendering. A provider must be part of the unified contract scheme with the Legal Services Commission in order to offer public funding and the provider is required to provide all levels of service (i.e. controlled and licensed work – see later.)

All practitioners are under an obligation to advise clients of the existence of the public funding scheme and to identify when a client is eligible.

FEE STRUCTURE

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Family Mediation
7.1 Level 1

**Initial advice and assistance and divorce proceedings**

There is a single fee payable at this stage irrespective of the number of issues that a client presents. Level 1 covers the initial meeting with the client and any work immediately flowing from the meeting such as a letter of advice following the meeting, making a telephone call on behalf of the client, or writing to the other party on behalf of the client in order to move the case forward. It also covers general advice about the dispute and methods of dispute resolution such as mediation.

Level 1 alone will cover: Change of Name applications and Wills. These issues cannot proceed to Level 2. There are no exceptional cases at this level other than in the three instances listed below. If a case would be exceptional at this level, it is more appropriate that the case should proceed to Level 2.

*D Domestic Violence and Emergency Representation*

Where a case involves only domestic violence issues at Level 1 and there are therefore no children/financial issues to move the case onto a Level 2 fee, there is no exceptional case limit of three times the fee. Calculation of an exceptional case is based on and paid at applicable Legal Help hourly rates for fee earners.

**Level 2 – Negotiation**

Level 2 fees are national fees with a London uplift.

The Level 2 fee is payable where there is a significant family dispute (as defined in the Contract Specification) relating to children and/or finance that requires work beyond the initial interview and follow up. Counsel costs are included in the fees, although we would not expect counsel to be instructed at this level.

*Children*

Level 2 covers all work up to but not including the issue of proceedings in children cases. Where it is necessary to issue proceedings in children cases to attend the directions hearing/conciliation appointment then this will be done under a certificate. Level 2 will include the issue of proceedings for the purposes of obtaining a consent order in finance cases, in which case it also includes completion of work necessary to obtain the order.

A case is settled in this context where the parties reach agreement on issues such that they do not require further legal representation. The definition of agreement does not require that it is embodied in a consent order. However, it should arise from negotiations carried out by the solicitors leading to the agreement between the parties as to their mutual rights and how they will be recognised or, if necessary, enforced.
Finance

The scope of the Level 2 finance fee includes all work up to but not including the issue of proceedings except where proceedings are issued for the purposes of obtaining a consent order, in which case it covers completion of the work necessary to obtain the order. Circumstances when the consent order/agreement needs enforcement, in the grant of a certificate, will be appropriate.

There is an additional payment for settlement at Level 2 if a case is settled at this level. A case is settled in this context where the parties reach agreement on issues such that they do not require further legal representation and the agreement is embodied in a consent order or other binding agreement.

If the settlement breaks down before the matter has been claimed – then the case should be continued under the same matter.

We anticipate that the emphasis that Level 2 has on achieving early settlement where appropriate, through the inclusion of a settlement payment, will result in fewer certificates being issued.

Children and finance

Where a case involves significant family disputes relating to children and finance issues then both the children and finance fees may be claimed.

Significant family disputes are defined as those that on their own require detailed and specific further advice to the client to address issues which are unresolved between the parties and would be likely to lead to proceedings if unresolved.

Where there is a case involving both children and finance elements and only one of the issues (i.e. children or finance) is settled then the settlement fee is only payable on that issue.

Exceptional cases

Cases can be exceptional to Level 2. The exceptional case threshold will be calculated on the basis of three times both the Level 1 and Level 2 fees.

Exceptional cases will be calculated without taking into account the settlement payment. However, where a case is exceptional the settlement payment will not apply.

Where a case involves both significant children and finance issues then it will only be exceptional when the costs reach three times the total standard fees payable for children and finance.
When calculating whether a case is exceptional at Level 2 the Legal Help hourly rates should be used. When a case is exceptional then it will be paid at Legal Help rates.

**Level 3 – Representation** – this covers certificated work where representation at court is required.

*Contributions – from client*

Contributions do not apply at Levels 1 and 2 and will be applicable once a certificate is issued. The level of contribution will be based on monthly disposable income and capital. The LSC will remain responsible for collecting contributions from October 2007.

**Other Issues**

Where there is an award of other side’s costs the solicitor will be able to retain any sums in excess of the legal aid costs payable (standard fees or hourly rates for exceptional cases).

*Family Mediation*

There are several changes to the current family mediation contracting arrangements. The key change is that the not for profit (NfP) mediation providers, who had previously been paid under a separate scheme, will now be paid under the same scheme as for the profit (fp) providers.

Willingness Tests – the mediation providers are required to attempt to contact the second party.

The Funding Code requires that the service attempt to contact the second party through a letter and 2 attempts over the telephone. In addition this work need not be undertaken by a mediator but suitably trained administrative staff.

*Willingness Test (Excluding VAT)*

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*Assessment meetings*

The LSC will pay for an enhanced assessment meeting, in order for mediators to provide a more holistic service, which will assist clients to proceed to mediation.
7.2 Emergency Representation

Emergency Representation is only available for Legal Representation, as Legal Help, Approved Family Help and Family Mediation are not available on an emergency basis.

When applying for Emergency Representation, the same criteria must be satisfied as when an application for Legal Representation is made. In addition, it must be demonstrated that the certificate must be granted as a matter of urgency, because it is in the interests of justice.

This will usually mean that representation is required in:

- emergency proceedings, such as an injunction;
- existing proceedings;
- proceedings where a limitation period is near to expiry.

The majority of standard applications for Legal Representation are processed within a fortnight, and so there must be real urgency when making such an application.

**Task 5:**

(a) Visit the community legal services website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk) Locate the funding code Decision Making Guidance - family (section 2) Sept 07. Familiarise yourself with 20.8-20.13 regarding Funded family Services.

(b) Visit the Community Legal Service Fund website, at [www.clsdirect.org.uk](http://www.clsdirect.org.uk) Using the legal aid calculator that you will find on the site, determine which of the following are entitled to Public Funding:

John is 47, separated from his partner and living in rented accommodation. He is unemployed and in receipt of Income Support. He has no savings to speak of and no possessions of any significant value. He comes to you with a problem for which you feel it may be appropriate to use Legal Help. According to the calculator, is he entitled?

Beth is 35 and at the moment lives with her husband Mark who is 39. They are joint owners of their house which Beth thinks is worth £119,000 with an outstanding mortgage of about £70,000. They share the house with their two children Tim, who is 11 and Kate who is 7. Both Beth and Mark are employed; Beth earns £135 per week and pays £128 in income tax per month, Mark earns £200 per week and pays £190 in income tax per month. Beth receives Child Benefit of £80 per month and Tax Credit of £40 per month.
They have a car which is worth around £1,000 but no other valuables to speak of. There is no other money coming into the household, neither parent has a pension or any other forthcoming financial entitlement. Beth comes to you with a problem for which you feel it may be appropriate to use General Family Help. According to the calculator, is Beth entitled?

The public funding scheme is constantly subject to revision and review. The Legal Services Commission were due to introduce new contracts for family practitioners in October 2010 however the introduction of these new contracts has now been postponed to November 2011. These changes need to be viewed against the backdrop of the announcement by the Government in November 2010 to significantly reduce public funding in family and civil matters.

8. Costs

An important topic following on from a consideration of Public Funding is that of costs. Who will have to pay the costs of proceedings and how much that will be, are two questions that your client may be quick to ask, even when they are publicly funded but particularly when they are paying for yours and the court’s services privately.

8.1 Background

The rules that decide the award of costs and the procedure that must be followed when awarding costs are the Civil Procedure rules 1998. There are only two ways in which costs can be recovered by a party:

- by the parties’ consent; or
- by order of the court. In the county court and the High Court, any order for costs is completely in the court’s discretion.

Does the party that ‘wins’ get their costs?

The Civil Procedure rules provide that, generally, the party that has been unsuccessful in the proceedings will pay the costs of the successful party. Under the Family Proceedings (Amendment) rules 2003, rule 10.27(1)(b), this is a rule that does not apply to Family proceedings. However, the Court of Appeal in the case of Gojkovic v Gojkovic (No 2) [1991] 2 FLR 233 determined that when deciding who should pay costs in Family proceedings, the judge will normally take as his or her starting point that the costs will be awarded to the successful party (the reported case of H (S) v H [2005] EWHC 247 (Fam) in Family Law Week gives a more detailed analysis of the Gojkovic case, this can be found at:

http://www.familylawweek.co.uk/library.asp?id=421)
8.2 Costs Awarded Against Other Party to Proceedings

It is possible for any party to apply for costs at any point during the proceedings, however, applications for costs are most common after the court has dealt with an application or made an order. This is because the court will have just heard the application and will be in a better position to determine the factors, which are set out below.

A party who has had an order for costs made against them has 14 days to comply from either the date of the court’s judgment or order that has fixed the amount of costs, or, if there is a ‘detailed assessment’ of the costs [see below], the date of the certificate following that assessment.

If a party is not present in court when any costs order is made against him, his solicitor must notify him of the order within seven days.

Rule 44.3(6) of the Civil Procedure rules sets out the orders that a court may make in relation to costs.

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<th>Task 6:</th>
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<td>Using the Ministry of Justice website <a href="http://www.justice.gov.uk">www.justice.gov.uk</a>, locate the Civil Procedure rules. Find Part 44.3 (6), and list the seven orders, which are given as those which a court may make against a party in relation to costs.</td>
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There are several types of costs orders that a court may make. Some of the most common that you will see include:

**Costs in any event**

The party in whose favour the order is made is entitled to the costs of the interim application, irrespective of any other costs orders that may be made in the proceedings.

**Cost in the case/application**

The party in whose favour the court makes an order for costs at the end of proceedings is entitled to their own costs of the interim application.

**Costs reserved**

The issue of costs is deferred to a later occasion, when if no later order is made in relation to costs, costs are in the application.
Applicant’s/Respondent’s costs in the application

If the party in whose favour the costs order is made is awarded costs at the end of proceedings, then that party is entitled to the cost of the interim application. If another party is awarded the costs at the end of the proceedings, each party then bears their own costs for the interim application.

No order as to costs

Each party shall pay their own costs.

8.3 General Factors to be Considered in Proceedings Other than Ancillary Relief

Rule 44.3(6) of the Civil Procedure rules sets out the factors that the court will consider when deciding what order for costs is appropriate. The court must have regard to all the circumstances of the case, specifically including:

a. the conduct of all the parties;
b. whether a party has succeeded on part of his case, even if he has not been wholly successful;
c. any payment into court or admissible offer to settle made by a party which is drawn to the court’s attention.

8.3.1 ‘Conduct’ in Proceedings other than Ancillary Relief

The court is given some guidance as to what should be taken into consideration when assessing the conduct of the parties. This guidance is set out in rule 44.3(5) of the Civil Procedure rules, and is said to include:

a. conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
b. whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
c. the manner in which a party has pursued or defended his case or a particular allegation or issue; and
d. whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

These are not the only matters that the court will take into account when assessing the parties’ conduct.
8.4 General Factors to be considered in Ancillary Relief Proceedings

The position is slightly different in Ancillary Relief Proceedings, where the issue of costs is governed by the Family Proceedings rules 1991. Rule 2.71(4) states as follows:

a. The general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party; but

b. The court may make such an order at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).

8.4.1 ‘Conduct’ in Ancillary Relief Proceedings

In Ancillary Relief proceedings, conduct has a different definition to other types of proceedings. ‘Conduct’ is set out in rule 2.71(5) of the Family Proceedings rules, which states that the court must have regard to:

a. any failure by a party to comply with [the Family Proceedings] rules, any order of the court or any practice direction which the court considers relevant;

b. any open offer to settle made by a party;

c. whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

d. the manner in which a party has pursued or responded to the application or a particular allegation or issue;

e. any other aspect of a party’s conduct in relation to the proceedings which the court considers relevant; and

f. the financial effect on the parties of a costs order.

In contrast with determining the relevance of ‘conduct’ in other Family Proceedings set out above, this is an exhaustive list of what the court will consider.

8.5 Wasted Costs

‘Wasted costs’ is the costs order that legal representatives seek to avoid the most. A Wasted Costs Order may be made against a legal representative personally when they have behaved in a manner that is determined to be ‘improper, unreasonable or negligent’. This definition is taken from section 51(7) of the Supreme Court Act, and each term was defined further in the case of Ridehalgh v Horsefield [1994] 2 FLR 194:

Improper is behaviour that amounts to a significant breach of professional conduct.
Unreasonable is conduct for which there is not a reasonable explanation.

Negligent is a failure to act with the competence that can be expected of ordinary members of the profession.

It is not only a representative's conduct in court that may see them held liable for a Wasted Costs Order; relevant conduct also includes advising clients, drafting and settling documents in relation to the proceedings.

In determining whether to make a Wasted Costs Order the court must apply the three-stage test that was set out in the case of Re a Barrister (Wasted Costs Order) (No.1 of 1991) [1993] QB 293:

- Has the legal representative acted improperly, unreasonably or negligently?
- If so, did such conduct cause the Applicant to incur unnecessary costs?
- If so, was it in all the circumstances just to order the legal representative to compensate the Applicant for the whole or the part of the wasted costs?

8.6 Orders for Costs Against a Party in Receipt of Public Funding

Although it may appear surprising that it is possible to order costs to be paid by a party who is in receipt of public funding (and has, therefore, been determined to be unable to pay the costs of court proceedings), the court has the power to make such an order. A costs order against a party who is in receipt of public funding is often referred to as a 'section 11(1) order', and can be applied to all Family Proceedings.

8.6.1 Factors to be considered

An order for costs against a publicly funded party must not exceed what is a reasonable amount for the party to pay. In determining what is a reasonable amount, the court will have regard to section 11(1) of the Access to Justice Act 1999. The court will therefore consider all the circumstances of the case, including:

- the financial resources of all the parties; and
- the parties' conduct in connection with the dispute

9. Marriage

In legal terms, marriage remains the traditional symbol of a family relationship. Marriage is defined by a contract between the parties entering into the marriage; a contract that has set rules for its formation and ending.
Individuals engaged to be married receive some rights, as will be seen in particular when we consider injunction proceedings in later modules. These rights have always existed, but have gradually diminished as the law has progressed.

A definition of marriage known by most lawyers and most television viewers can be found in the old case of *Hyde v Hyde (1866) LR 1 P&D 130*, which states that marriage is:

“The voluntary union for life of one man to one woman to the exclusion of all others”

How much this remains true is debatable, given the amount of marriages that now end in divorce.

9.1 Legal Requirements of Marriage

1. Different genders

Those who wish to marry must be male and female. Following the *Gender Recognition Act 2004*, transgender persons may marry those of the opposite sex to that of their current gender.

2. Requisite Age

Persons wishing to marry must either be 16 and have the written consent of all those who have Parental Responsibility (a topic we shall cover in later modules) for them, or 18 and above. In a situation where those with Parental Responsibility refuse to give their consent to a 16 or 17 year old marrying, those wishing to marry can apply to the court to do away with the need for their consent.

3. Prohibited Degrees of Kindred

The following are Prohibited Degrees of Kindred, which marriage is forbidden between:

a. father/daughter;
b. mother/son;
c. niece/uncle;
d. nephew/aunt;
e. brother/sister;
f. grandparent/grandchild;
g. half-siblings; and
h. adopted child/adopted parent.

4. Bigamists
Those who are already married may not marry again in England or Wales. By virtue of section 11(d) of the Matrimonial Causes Act 1973, the polygamous marriage of those who marry in a country where such marriages are legally recognised, are recognised as parties to a valid marriage in the UK. In immigration terms, however, entry to the country to settle as part of a family is limited to one spouse only.

5. Mental Capacity

It is not easy to define what level of mental capacity is required to marry. A party to marriage must have sufficient mental capacity to understand the nature of the marriage contract; however, there is no document that sets out precisely what is entailed by ‘signing up’ to a contract of marriage.

9.2 Arrangements for Marriage

Marriages must be open to public access, the only exception being Jewish and Quaker marriages which, for religious reasons, are held in private. The venue for the marriage must be licensed to hold the ceremony and usually only take place between 8am and 6pm. In the vast majority of circumstances, those wishing to marry must give 15 days’ notice to the Registrar of Marriages. Different religions have different procedures by which their followers can marry.

9.3 A Presumption of Marriage?

We have already considered that there is no such thing in law as a ‘common law’ marriage. Where, however, there is a marriage that does not comply with legal formalities, it may still be possible to declare that there is a valid marriage by cohabitation and repute.

Such marriages will require there to have been long periods of cohabitation, where the reputation of the couple is one of a married couple. This concept is particularly relevant where a couple have married outside England and Wales and have always believed that their marriage was a legally valid one in the UK. In such circumstances, the parties may be keen to establish a legally valid marriage, not least because its absence may prevent legal entitlement to benefits arising from the marriage.

It is rare that the concept can be applied to a marriage between British parties.

Where the cohabitation has been for long enough for them to acquire the reputation of man and wife, despite the absence of specific proof of marriage, the presumption that there has been a marriage can only be rebutted by ‘strong and weighty’ proof.
An example of such a scenario can be found in the case of **A-M v A-M [2001] 2 FLR 6**. In this case, the couple had lived as husband and wife for twenty years. There were two marriage ceremonies, the first an Islamic ceremony in London, for which both parties were aware that the husband was already married. The parties sought to regularise the wife’s status in English law and attempted to marry again, four years later, in Sharjah, a country that recognises polygamous marriages. This was not possible and the couple returned to Britain where the wife obtained British citizenship.

The court decided that there was a presumption of a valid marriage by cohabitation and repute, and there was not the required strong and weighty proof to remove that presumption. To be a valid polygamous marriage in an Islamic country the wife would have had to sign a ‘power of attorney’. The wife used to sign documents without thoroughly checking what they were and as there was no strong and weighty proof that one such document was not a power of attorney, the presumption of marriage applied.

10. **Civil Partnership**

Much has been written in the press about the **Civil Partnership Act 2004**. You will have seen across the media references to this Act creating what is often termed as ‘gay marriage’.

With the **Civil Partnership Act 2004**, however, the government specifically stated that it was not seeking to create same-sex marriages. Whilst this is what is repeatedly stated to be the case, the reality is that the differences between civil partnership and marriage are difficult to see.

10.1 Legal Requirements of Civil Partnership

1. **Same Gender**

Those who wish to register a civil partnership must be of the same gender. It is possible for transgender persons to enter into a civil partnership with a member of their new sex, if they have the requisite Gender Recognition Certificates from the Gender Recognition Panel.

The conundrum that you may find yourself faced with is when approached by unmarried cohabitees who are not of the same gender who want to formally regulate their affairs, outside of marriage, in the same way that parties to a civil partnership are able. This is, however, not possible.

2. **Requisite Age**

Persons 18 or over can register a civil partnership. It is also possible for 16 and 17 year olds to register a civil partnership.
Task 7:
Consider Schedule 2 of the Civil Partnership Act 2004 (accessible online). Is it possible for a 16 or 17 year old to register a Civil Partnership when an “appropriate person” refuses to give their consent? If yes, how, and if no, why not?

3. Prohibited Degrees of Kindred
The Prohibited Degrees of Kindred for a civil partnership are the same as for marriage, and are set out in Schedule 1 of the Civil Partnership Act 2004.

4. Already Married or a Civil Partner
Either of these relationships must be formally and legally ended before registering a civil partnership.

5. Mental Capacity
Similarly to marriage, those wishing to register a civil partnership must understand the nature of the relationship and the consequences of it.

10.2 Arrangements for Civil Partnership
As with marriage, the information relating to proposed registration must be available to the public. Registration can take place in licensed venues, again usually between 8am and 6pm. 15 days’ notice of the registration is required, unless one or both parties are ill and may not survive.

11. Forced Marriage (Civil Protection) Act 2007
The new Forced Marriage (Civil Protection) Act 2007 came into effect on 25/11/08. It provides protection for the victims of forced marriage and prevents others from suffering the same fate.

It will enable the courts to prevent forced marriage and order those responsible for forcing another into marriage to change their behaviour or face imprisonment. It also provides recourse for those already forced into marriage.

The Act is a result of collaboration between the Home and Foreign office to form a joint Forced Marriage Unit. The Act gives the courts flexibility to deal sensitively with each individual case and employs civil remedies that offer protection.

For further information and a copy of the Act go to www.opsi.gov.uk

Remember to log in and attempt the multiple choice questions at www.paralegaldistancelearning.co.uk