

Resolution Specialist Accreditation

Example Case Account

BASIC CASE BACKGROUND

Jim (50): Self-employed barrister in London. Total net income of £6,000 p.m.

Mary (49): Volunteers at the local charity shop one day a week and has not worked regularly for the last 15 years.

Children: James (9), Rebecca (14) and Gemma (15). The eldest two are in private education (circa £25,000 pa).

Date of Marriage: 1 July 1992

Date of Separation: 2 July 2012

Mary and the children live in the FMH in Ross-on-Wye, estimated value of £950k, mortgage of £150k.

Jim moved out and lives in a bedsit in London, estimated value of £310k mortgage of £200k.

Debts: £100k to HMRC for unpaid tax.

Loan: loaned £100k to Mary's brother to help him buy a property.

Cash: £50k in ISAs

Pension: Jim has a pension CETV of £450k

OVERALL ASSESSMENT OF CLIENT'S NEEDS & RISK MANAGEMENT FACTORS

The client wanted a quick resolution. He was in a new relationship and wanted to move on. He was finding his inability to move forward and purchase a suitable home frustrating. HMRC were also actively seeking payment, which he found stressful.

His monthly cash flow was also causing him considerable anxiety. There were insufficient funds to live on each month. Jim's initial stance was to be quite "bullish" in his approach to dealing with Mary and her lawyer.

Mary had not been involved in their financial affairs throughout their marriage. She had only recently found out about the HMRC debt and Jim's new relationship. As a result, I was alert to the fact Mary was likely to react quite differently to Jim during the process.

Mary instructed solicitors in Ross-on-Wye who were not collaboratively trained.

OTHER CONSIDERATIONS

Jim was concerned that Mary was talking to the children about her unhappiness over the divorce.

- I acknowledged his concern and explained child arrangement orders¹.
- I explained the benefits of parents deciding child arrangements together and the Courts stance on this². Jim was reassured by this because he had immediately assumed the solicitors involved (or the Court) would dictate any future parenting arrangements.
- Jim and Mary's communication about the children had broken down. I suggested a Parenting After Parting seminar and explained what a family consultant or family therapist could do³.
- Jim and Mary could potentially mediate, especially in relation to their future parenting. Jim and Mary agreed to attend family therapy individually and with the children and mediation sessions to resolve issues about co-parenting. These were to be dealt with separately to any financial arrangements⁴.

In regards to the financial arrangements, Jim felt they needed more input from solicitors.

- Before seeking advice, Jim had drafted his own unreasonable behaviour petition and had given this to Mary. Mary had been horrified by the contents of the particulars; she had felt the relationship had broken down because of his adultery. Mary's reaction had convinced Jim to seek advice.
- I felt any settlement and prospect of co-operative parenting would be influenced by the handling of the case at this early stage⁵. I therefore advised Jim of Resolution's Code, explained why petitions should be produced with anodyne particulars⁶, drafts provided first, and how an open discussion about who should be the petitioner was helpful.
- A telephone call and letter⁷ to Mary's solicitors conveyed an apology from Jim, and a hope we could resolve this unfortunate start. As a result, it was agreed Mary would petition Jim on his adultery with an unnamed co-respondent.⁸

¹ s8 Children Act 1989

² s1(5) Children Act 1989, Resolution Code of Practice and Separation and Divorce: Helping parents to help children

³ Resolution Code of Practice

⁴ Resolution Code of Practice

⁵ Guide to Good Practice for Family Lawyers in Dealing with Clients (8) & (9)

⁶ Family Law Protocol 10.3

⁷ Guide to Good Practice on Correspondence (6) and Guide to Good Practice for Family Lawyers in Dealing with Clients (6-8)

⁸ Family Procedure Rules 2010 ('FPR') PD7A 2.1

As the financially stronger party, failure to give full and frank disclosure would lead to the case not settling/producing large costs and so it was important Jim understood that full and frank financial disclosure⁹ would be required and what that entailed.

MANAGEMENT STRATEGY AND RATIONALE

In terms of how to progress the case the following occurred:

- The various process options¹⁰, and their suitability, were explored with Jim, along with costs¹¹ and timings. Jim felt Mary would not welcome mediation as he felt she would need more 'hands on' guidance. I explained it was an option that could be left open for consideration at any point.
- It was important to establish a good relationship with Mary's solicitor quickly and a voluntary exchange for Forms E was agreed. There was clear relief from Mary's side; they had been concerned this case would be litigated aggressively.
- I advised Jim that, in order to reduce the questions, it would be sensible to give comprehensive information. We could then try and narrow the issues for Mary to address.
- Everybody would work proportionally¹² towards exchange and then hold a constructive round table meeting where settlement could be discussed.
- A single joint¹³ pension expert was agreed. I explained to Jim I was unable to give financial advice on pensions and we needed to obtain an expert to do this. I explained pensions are a unique asset and we needed to explore the type of pension he had (and the disadvantages and advantages of sharing it¹⁴) and the division of pensions on an equality of income basis rather than equality of capital (because of their age).

The next consideration was to resolve the interim arrangements:

- Mary felt she might have grounds to issue an application for interim maintenance¹⁵ and to pay her legal fees¹⁶.
- Jim could not afford to pay any legal fees from his income and he was also finding it difficult to pay general interim maintenance (combined mortgages of £2,200, plus

⁹ FPR PD9A Pre-Application Protocol and I v I [2008] EWHC 1167 (Fam)

¹⁰ Guide to Good Practice on Discussing Dispute Resolution Options

¹¹ Costs rules and their implications see Part 28 FPR 2010 and for legal cost estimates see SRA Code of Conduct 2011, see a case example in CKFT v Minkin [2012] EWCA Civ 546

¹² r1.1FPR

¹³ Best Practice Guide for Instructing a Single Joint Expert and Part 25 FPR

¹⁴ s21A Matrimonial Causes Act 1973 ('MCA')

¹⁵ s22 MCA and FPR r9.7 and Part 18

¹⁶ s22ZA and s22ZB MCA 1973 and see Rubin v Rubin [2014] EWHC 611 as the most recent case example.

£2,100 pm for school fees, left Jim and Mary with £2,200 per month to live on).

- Options were explored, including: raising a mortgage on the FMH; a litigation loan; and further bank lending.
- It was agreed the ISAs would be cashed in to pay school fees for six months and to give both a contribution towards legal fees. After an exchange of budgets they agreed a monthly interim maintenance figure.

Mary had not been aware of the HMRC debt and struggled with the idea this might have to be paid out of the joint assets¹⁷. Equally, Jim wanted to investigate the £100k loan they had made to her brother and the prospect of repayment. Mary's solicitor indicated Mary was embarrassed to ask her brother about repayment. It was agreed between the solicitors that both of these issues needed to be explored (the last resort being her brother seeking legal advice/joinder¹⁸) so everybody had sufficient information to try to reach a settlement.

It became clear, through the process of disclosure, that Mary was extremely anxious about a possible move out of the FMH. Mary produced a budget which Jim found extremely difficult to digest. He felt it was exaggerated and out of kilter with their standard of living during the marriage.

The relevant legal considerations of this case were considered.

- I explained that the court's first consideration would be the needs of the children.¹⁹
- Historically Mary's claim would have been limited but now we look to achieve a fair outcome and equality is now the starting point for division²⁰ unless there is a good reason to depart from it.
- Consideration of Mary and Jim's housing needs²¹ must be given and - if the sharing principle can meet Jim and Mary's needs - then their assets would be divided equally.
- I also explained the concept of compensation could be utilised if Mary could argue she had given up her career to care for the children. This did not seem relevant in this particular set of circumstances.
- This seemed a case of sharing because the marriage was seen as a partnership of equals and, therefore, the assets would be shared and then cross-checked against factors to see if there is a reason to depart from sharing.²²

¹⁷ s25 MCA

¹⁸ r1.4(2)(b)(ii) FPR

¹⁹ s25(1) MCA

²⁰ White v White [2001] 1 A.C 596 and Charman [2007] EWCA Civ 503

²¹ Miller v Miller; McFarlane v McFarlane [2005] EWCA Civ 984 and s25(2)(b) MCA

²² Miller v Miller (supra)

- The length of marriage and standard of living added weight to the sharing principle.²³

SETTLEMENT FOCUS

After exploring how the round table should be conducted Jim and Mary were keen to have a meeting together to talk through their financial assets and possible outcomes. They were aware, if discussions became difficult, they were each able to 'take time out' and this may also be necessary so they could each receive legal advice.

The initial focus was Mary and the children's future housing. It was suggested Mary explore other housing options. It became clear Mary could re-house from the net proceeds of the sale of the FMH. Mary found this difficult to deal with, and it was important all parties acknowledged Mary's concerns. Upon analysing property particulars, Mary thought she could contemplate a replacement property for around £475k, plus purchase costs of approx. £25k. Mary acknowledged liabilities had arisen due to their overspending and private school fees. She understood the need to discharge the debts so they could move forward debt free. Due to the financial imbalance between the parties, Mary requested a couple of separate discussions with her solicitor and these were given graciously by Jim.

Financial information provided by Mary's brother showed he could repay Mary and Jim their £100k within 12 months.

Exploring Mary's budget it became clear she had based it on having a property worth £950k. The affordability of keeping two of the children in private schools was weighed against a need for Mary to receive spousal and child maintenance. Jim and Mary explored the idea the children attend a state school for their A-Levels so they would only pay school fees for the next year or so.

As Mary has never budgeted before she found the process of justifying and curtailing her expenditure a struggle. My focus was to help Jim understand this was a difficult process for Mary, both emotionally and practically, it may take her time to get to grips with the figures, and feel confident managing them. During the round table meeting it was important to 'reality check' the position with Mary and Jim.

OUTCOMES, CONCLUSION AND LEARNING OUTCOMES

Not all the detail was agreed at the round table²⁴, but Jim and Mary managed to agree broad heads of terms (signed by all parties) in relation to: capital division; income requirements;

²³ s25(2)(c) and (d) MCA

²⁴ *Advised of Xydias v Xydias* [1999] 2 All E.R 386

and pension division with a slight departure from equality for needs. The agreement reached was broadly as follows:

- If Mary downsized at a cost of £500,000 then, after discharge of the HMRC debt, there would be £200,000 left to assist Jim with housing.
- Jim needed a property of around £500,000 in London. Selling the bedsit would realise £100,000. This would leave a disparity but, if he could wait 12 months, the £100,000 loan to Mary's brother would be repaid and £400,000 would be available to purchase a property with a small mortgage. The risk involved in repayment of the loan and various mortgage considerations were explained to, and accepted by, Jim.
- It was agreed, due to their ages the pension be divided giving Jim and Mary equal income²⁵ upon retirement.
- Mary would receive spousal maintenance²⁶ to dovetail with drawing her pension share. Jim was advised on joint lives, and extendable and non extendable term orders²⁷ and the concept of a clean break²⁸
- Child Maintenance was agreed and the limitations of the court's jurisdiction were explained.²⁹

As things progressed, Jim accepted Mary was emotionally in a different place to him, was anxious about her financial future, and she needed more time to digest the issues and the figures. Jim found the round table meeting frustrating. As it was not carried out in a collaborative context, care was taken about giving formal advice (in the context of legal privilege). Although the round table meeting helped Jim appreciate Mary's thought process; he remained focused on the 'end result', adding to his frustration. In hindsight, more time could have been spent with Jim explaining the parameters of these meetings, and to better prepare him to manage his frustrations.

The process also took longer than anticipated and if negotiations had broken down then having to issue would double account costs (a negative) but would have set a timetable (perhaps a positive).

Although heads of terms were reached, it took a further three months to negotiate the drafting of the Consent Order. The momentum was lost after the meeting; perhaps arranging a further meeting or agreeing the full terms of the Consent Order at the meeting

²⁵ Case example RP v RP [2007] 1 FLR 2105 noted in B v B [2012] EWHC 314 (Fam).

²⁶ s23 MCA

²⁷ s28 (1)(A) MCA

²⁸ s25A MCA

²⁹ s8 Child Support Act 1991

would have saved time and costs.

Mary had wanted to retain the family home but, after looking at the options and exploring the effect of a settlement on her, she understood the outcome. The communication with Mary's solicitor in this case meant difficult emotional aspects were acknowledged and discussed and the practical realities dealt with. Mary and Jim could move forward feeling empowered by their financial settlement.

Jim felt incredibly relieved the HMRC debt would be paid. Although he accepted slightly less in terms of the financial division as Mary needed more, he understood his mortgage capacity assisted him and the short timescale in which he would have to wait to purchase the property was a good compromise in order to be debt free and be able to purchase a suitable property in London.