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2014 Matrimonial Survey

Self-advocacy: the rise of Litigants in Person



A time of change for family law



This annual matrimonial survey by leading business advisors, Grant Thornton, looks at key issues in the forefront of the minds of family lawyers, including detailed issues surrounding divorce in practice and in principle.

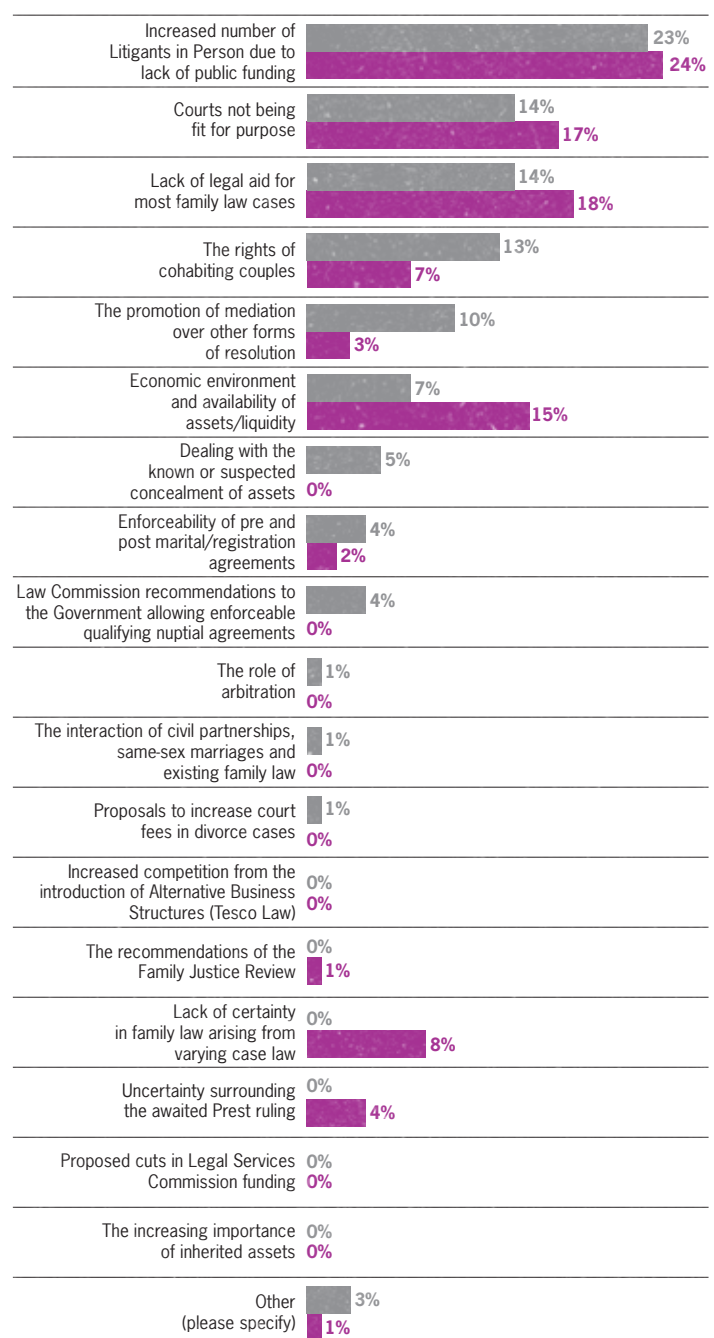
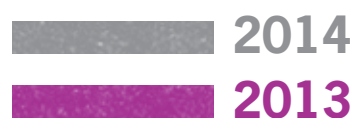
Again we report during a period of change for family law. The introduction of the single Family Court in April 2014, which Sir James Munby termed “the largest reform of the family justice system any of us have seen or will see in our professional lifetimes”, is a revolutionary change.

It has also been another year with high profile, high value divorce cases in the headlines. Whether it be record breaking asset values in the case of Hohn vs Hohn, disputes about jurisdiction in the case of Chai vs Peng, or issues of concealment in the case of Mr and Mrs Sharland, issues around divorce continue to be widely reported.

However, it seems that cases in the headlines are increasingly distanced from the day-to-day issues faced by family lawyers. The removal of legal aid for most family law cases, and the corresponding increase in Litigants in Person tops the agenda for many of our respondents, taking over from issues linked to the economy that we have previously reported. Our survey reflects on both of these issues.

The divorce debate

Each year we ask respondents which are the top three issues facing family law at the moment. The detailed results are shown here. The number one issue this year is the increase in Litigants in Person (LIPs) due to a lack of public funding, with 23% of responses citing this (24% in 2013). The most notable change, reflecting the UK's emergence from recession, was that only 7% of respondents said that the economic environment and the availability of assets was a key issue, compared to 15% in 2013 and 23% in 2012, when this was the top answer.





The key issues – Litigants in Person

The increased number of LIPs has again attracted a strong response from family lawyers. In addition to the 23% listing LIPs as an issue, a further 14% list the lack of legal aid for most family cases as a key issue (37% in total).

The issues surrounding LIPs have also been linked to a number of other themes in this survey. Respondents see forms of alternative dispute resolution (see page 9) as linked to the level of LIPs, where forms of resolving matrimonial disputes (other than attending court) may become more popular if courts are increasingly clogged with LIPs.

Lawyers have also expressed concern that family law in general is being ‘dumbed down’ to make way for more LIPs, whilst others reflect that they have experienced problems dealing with/helping LIPs and have seen judges becoming frustrated as a result.

Other key issues

Some respondents feel that the removal of Legal Aid, whether or not it has resulted in more LIPs, reduces the ability to access justice for many individuals. This feeling is mirrored by Andrew Caplen, President of the Law Society, who said¹ “There can be no access to justice when citizens...do not understand their rights, do not understand the legal system or cannot afford to obtain redress”.

A large number of respondents also think that the courts are not fit for purpose, with one in seven reporting this as a key issue. In responses from London lawyers, this was the top answer. It is too early to say whether the introduction of the Family Court in 2014 will have improved this sentiment.



¹ As quoted in the Law Society Gazette, 28 July 2014.

A change in legislation?

We asked what respondents felt were the top three areas where they would like to see a change in legislation.

There has not been significant movement in the top areas for change from 2013, with the top three unchanged and the top four accounting for about 90% of responses.

The introduction of no fault divorce and rights for cohabiting couples are both causes which have support from Sir James Munby and from many in the wider family law community. Both flow from the fact that the current law on both issues is considered to be outdated and not in line with societal attitudes.

There was also a regional variation in response to this question. All regions reported the same top areas for a change in legislation with the exception of London, where respondents would like the reintroduction of Calderbank offers generally in financial proceedings (26%), with the introduction of no fault divorce being only the third most popular answer.

Perhaps the most significant movement in the results to this question is that no respondents in 2014 listed the requirement for guidance following Imerman as a key change, compared to 19% in 2013 and 23% in 2012. This may be related to Mostyn J's guidance in *UL v BK* which sets out definitive principles relating to self-help.

2014		2013
25%	Introduction of no fault divorce	24%
24%	Protection for cohabiting couples	21%
20%	The reintroduction of Calderbank offers generally in financial proceedings	19%
18%	The Law Commission's recommendations on nuptial agreements	n/a

The statistics

Who? We asked respondents what was the most common age of their clients. There is an emerging trend of an increase in the age of people getting divorced, a pattern observed by **40%** of respondents. An overwhelming majority said **40-49 (87%)**, which was consistent with the prior year. A change this year was that the next most popular answer was **50-59 (8%)**, whereas in our 2013 survey we reported that **30-39** was the next most common age group (**10%**).

When? **11-20** years is the length of marriage dealt with by the majority of respondents, with **70%** of responses, and this is consistent with prior years. Last year we reported the highest proportion of long marriages ending in divorce, with **20%** being over 20 years. This trend has reversed in the current year with only **9%** of respondents saying the most common length of marriage ending in divorce was over 20 years.

Why? We have asked about the reasons for divorce since we started the survey, and there has been little change this year, with 'growing apart' still topping the results with **26%**, and extra-marital affair following closely behind with **23%**. What is surprising about this year's results is that, in a period of economic recovery, the number of people recording financial/money worries as a reason for the split has increased to **9%** from **6%** in the prior year.

How much?

Following an apparent increase in asset values recorded last year, the trend appears to have reversed in the current year, with **53%** of respondents reporting average total family assets of under **£1 million**. **5%** of respondents cited total assets below **£250,000**, compared to **none** in the prior year. Only **7%** of respondents recorded asset values of **£4 million** or above, compared to **15%** in 2013.

The economy

– *the effect of recovery*

We have addressed the effect of the economy on divorce for a number of years, particularly since the start of the recession in 2008. We have previously reported that the recession led to a delay in people seeking a divorce, and that respondents had seen a fall in the number of divorces due to the recession. With a recovery in the economy, we have taken the opportunity this year to ask whether this has led to a corresponding increase in the divorce rate.

“Our experience has been that the economic downturn held back divorces, as much due to restricted liquidity as to reduced valuations, reflecting the practicalities of funding divorce settlements and awards.”

Chris Clements, Forensic Partner and Mediator at Grant Thornton

Number of divorces

We asked if lawyers had seen a change in the number of divorces now there are signs of an economic recovery. The results are included in the chart (having excluded those who thought it too early to say), and appear to support the assertion that the recession had depressed the number of divorces.

Expectations

We also asked about expectations if the economic recovery continues. A majority of 68% expected to see an increase in the number of divorces, with a further 17% being undecided. Only 14% did not expect to see a change.

Petitioners for divorce

Our final economy related question was whether lawyers expected to see a change in the types of people petitioning for divorce as a result of economic recovery. 50% of respondents stated that financially dependent spouses would be more likely to petition now there was a better prospect of receiving a reasonable settlement, although our analysis of asset values suggests that any significant improvement in prospects may be some time in the future. 41% of lawyers said they did not expect to see a change.



Cohabitation

This year, the rights of cohabiting couples have featured strongly as one of the main issues facing family lawyers, with 13% saying they thought it was one of the top three issues (up from 7%).

In addition, protection for cohabiting couples continues to rank highly in the areas where lawyers would like to see legislative change, with 24% of lawyers selecting that as their top area for change, as for last year.

Desire for protection for cohabiting couples does not equate to providing the same rights as for married couples for the majority of our respondents. 59% of lawyers said that cohabitants should not have the same rights (43% saying no, and a further 16% saying no subject to certain conditions).

In general terms, respondents suggested that rights should be given which should provide a safety net for cohabitants, rather than the level of settlement that might be expected following a marriage. The most common conditions suggested included the ability to opt-out of any such rules, and that rights should only accrue after a certain period of cohabitation or on the birth of children.

However, an increasing number of respondents said that cohabitants should be on an equal footing with married couples, with 19% agreeing with this, up from 8%.

Will there be legislative change?

Notwithstanding the desire for change, 40% of lawyers did not think there would be legislative change in the next five years, despite the recommendations of the Law Commission in 2007. 34% of respondents thought that there probably would be a change in the next five years.

As reported last year, the main barrier to the introduction of legislative protection for cohabitants was considered to be political pressure to protect the institution of marriage (63% of responses). A further 20% of respondents thought that it is too complicated to accommodate all possible connotations into such legislation.



Alternative dispute resolution

The field of alternative dispute resolution (ADR) is one that attracts significant comment from family lawyers. In practice, ADR seems to be used somewhat less than the apparent appetite for it.

For example, in 2013 61% of respondents settled three cases or less using mediation, and 74% of respondents dealt with three cases or less collaboratively. Many lawyers note that round table discussions are widely used in preference to a formalised process.

Only 14% of lawyers said that the most frequently used method of resolving disputes in family cases was via mediation or collaboration (10% and 4% respectively).

Mediation and collaboration – key findings

- **65%** of lawyers had not seen an increase in the use of mediation following the requirement for Mediation Information Assessment Meetings (34% had seen an increase)
- **59%** of respondents do not think the Government's efforts to promote mediation will lead to an increase in its use – a further 25% think it will, but only due to the removal of Legal Aid
- **84%** of lawyers support the use of collaborative law, but only 66% are collaboratively trained or intend to undergo training
- **39%** of lawyers consider that the use of collaborative law in the future will be curtailed by the fact that it is not suitable for all situations
- **27%** of lawyers consider that the prospect of additional costs if the collaborative process fails are a deterrent to its use and will limit the uptake

What is evident from the survey results is that Government efforts to promote mediation have had little effect in increasing the uptake. Recent findings published by the Ministry of Justice show that the number of mediation cases dropped 38% in the year following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act.

“Based on our experience, there is no doubt that arbitration has a place in settling certain matrimonial disputes, however, our experience indicates that it has most relevance where the matter involves high value assets and/or individuals with a public profile.”

*Nick Andrews,
Forensic Partner at
Grant Thornton*

Arbitration

89% of respondents have never referred a case to arbitration, which is a slight reduction from the previous year (92%). However, 76% of lawyers surveyed would recommend it as a method of settling matrimonial disputes (although this has also reduced, from 81% recorded in the prior year).

Of those who support the use of arbitration, many emphasise that it will still only be appropriate in certain cases. There is also a regional divide, with respondents in regions that do not currently have significant court delays feeling less driven to recommend arbitration in order to facilitate a speedier resolution, as opposed to those who are experiencing delays. Supporters of arbitration also mentioned that they were aware of experienced local arbitrators, which would make them more likely to recommend this as an option.

For those who would not recommend arbitration (24%), the reasons were mainly the availability of other forms of ADR, the lack of competent arbitrators and the potential costs.

Concealment and non-disclosure of assets

In the last few years, there has been a raft of high profile cases where concealed assets were suspected or discovered. In cases of suspicion and where there has been an absence of concrete evidence of concealment, adverse inferences have been drawn by the judge in some cases relating to lack of disclosure by one party.

How many cases?

Only 6% of respondents said that they had no cases where significant concealed or missing assets were revealed (9% in 2013). This is a substantial fall from 2012 where 20% of respondents said that they had no such cases. Despite this, 91% of respondents said cases of concealed assets had not increased from previous years. In line with previous years, the most common answer was that concealed or missing assets were revealed in 10% of cases, with 55% of responses (49% in 2013). A further 25% of respondents said that 20% of their cases uncovered significant concealed assets.

Enforcement

Where awards have subsequently been made on the strength of the concealed assets, enforcement of judgements has become a problem. Michael Prest is yet to comply with the order relating to the monies awarded to his former wife. Mr Prest has received a suspended jail sentence for this failure, with the judge commenting on evidence of Mr Prest's lifestyle during the period where he claimed that he did not have sufficient funds to meet the order.

Public reaction

In respect of the 'adverse inferences' drawn against Mr Prest, we asked respondents whether they thought that this would affect the behaviours of spouses in respect of concealment or non-disclosure of assets. The overwhelming answer was no, with

78% of responses. We asked why this was, and the most common answer was that spouses who were determined to conceal assets would do so in any event, regardless of case law. Comments were also made that the effect of the Imerman case has been to reduce the ability of parties with a suspicion of concealed assets to obtain evidence that can be used against the allegedly dishonest spouse.

Key issue

We asked what lawyers thought was the key issue in cases with suspected concealment or non-disclosure of assets. The key responses were:

- **48%** of respondents cited the expense of obtaining orders to prove or investigate the existence of concealed assets as making further action prohibitive in most cases
- **44%** of respondents cited the lack of sanctions that are imposed when there is a suspicion of concealed assets or deliberate non-disclosure

Neither Mr Prest, nor the husband in *M v M* or *US v SR*, faced a custodial sentence for their lack of disclosure or attempts to conceal the true position. It will be interesting to see the outcome of the case of *Sharland v Sharland* at the Supreme Court next year, and what guidance that case provides for instances where there have been non-disclosure or concealment of assets or relevant information.



Our matrimonial team

This annual survey of the UK's leading law firms specialising in family law was carried out by Grant Thornton's Forensic and Investigation Services practice. We are regularly called upon to provide advisory or expert witness services to assist lawyers, their clients and the Court in investigating and understanding the financial aspects of family cases. Our partners frequently act as Single Joint Expert or as 'shadow' expert advising one party.

We advise on a full range of resolution methods, including traditional litigation as well as alternative dispute resolution methods such as collaboration and mediation. We have a team of specialists that has the experience to provide relevant and cost effective advice to lawyers and lay clients.

Within this context, we advise clients in a wide range of sectors, both in respect of their individual and corporate arrangements. We are able to draw on this experience when valuing businesses and advising on liquidity, taxation and personal financial planning as an individual or between married couples. We can also advise on corporate arrangements and restructuring, including issues arising from assets held abroad.

About Grant Thornton

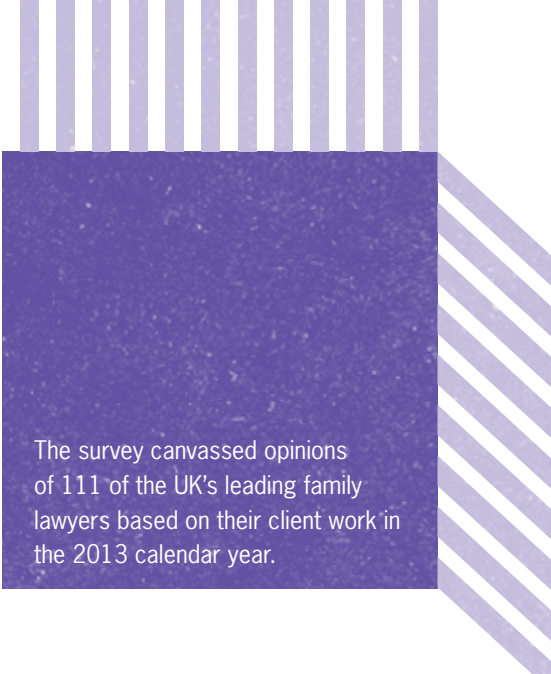
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The survey canvassed opinions of 111 of the UK's leading family lawyers based on their client work in the 2013 calendar year.

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