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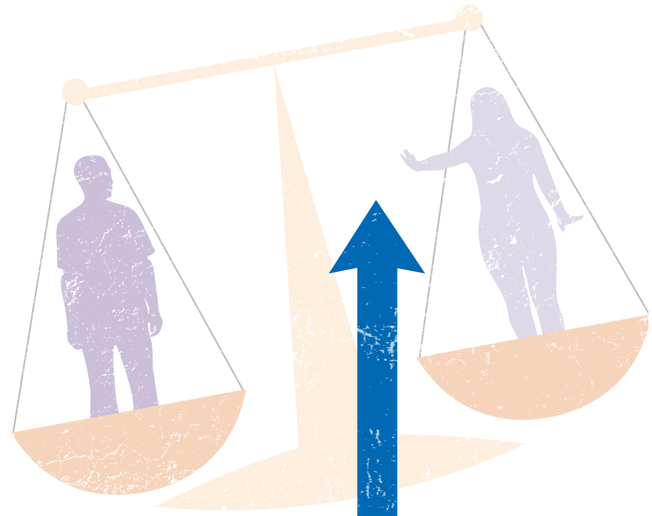

# Matrimonial *survey* 2012

## ...let no man put asunder.

## Are there now too many alternatives for divorcing couples?

There have been some significant changes in the family law arena in 2011. The main legislative change was the Family Procedure Rules (FPR) 2010 which came into force in April 2011.

The FPR 2010, together with the Practice Directions, now provide a single set of rules for family proceedings in the High Court, county courts and magistrates' courts in England and Wales. Our survey looks at what impact the FPR 2010 have had on the work of family lawyers, as well as looking at what further changes in legislation are still required.

One area of change that has been consistently requested is better protection for co-habiting couples. However, a statement from the Justice Minister in September 2011 means that there is unlikely to be any change in the near future. Therefore, family lawyers are still reliant on case law and, in November 2011, the Supreme Court handed down its decision in Kernott v Jones. Our survey asks what effect this will have when advising co-habiting couples.

Following the launch of the Institute of Family Law Arbitrators in February 2012, and the increased focus placed upon alternative dispute resolution methods by the FPR 2010, we take a closer look at this area. Are there now too many choices for divorcing couples and are these choices working in practice?

This year's annual matrimonial survey by leading business advisers, Grant Thornton, looks at the divorce arena in detail as well as the key issues in the forefront of the minds of family lawyers.

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The survey canvassed the opinions of 139 of the UK's leading family lawyers based on their client work in the 2011 calendar year.

# The FPR 2010 and the divorce debate

**Figure 1** What do you think is the biggest benefit of the FPR?

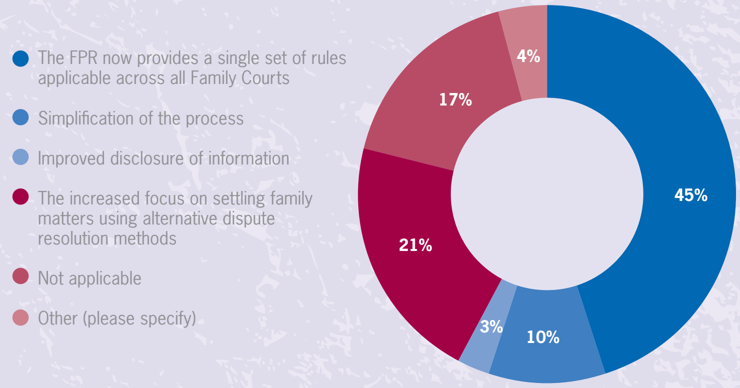
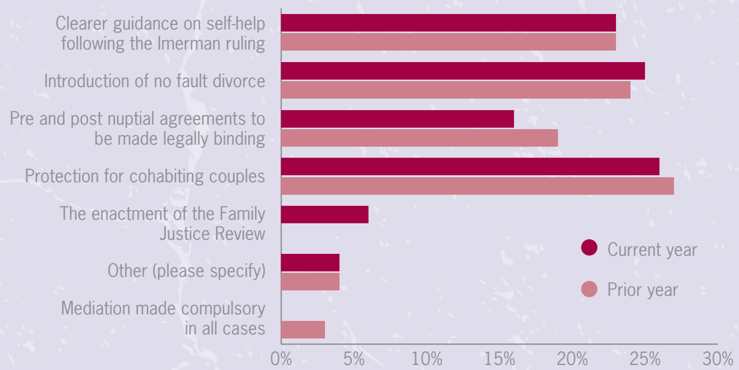



**Figure 2** Please select the top three areas in which you would like to see a change in legislation:




The FPR 2010 came into effect on 6 April 2011 and so we asked respondents what effect this has had on their work. Nearly half of the respondents (48%) stated that there had been a moderate effect on their work, 29% stated there had been an occasional impact, 11% said there had been a significant impact and 12% said there had been no impact at all.

It was the opinion of 42% of the respondents that the FPR 2010 had improved the process. However, 19% believed it had not, with the remaining 39% saying there was no change.

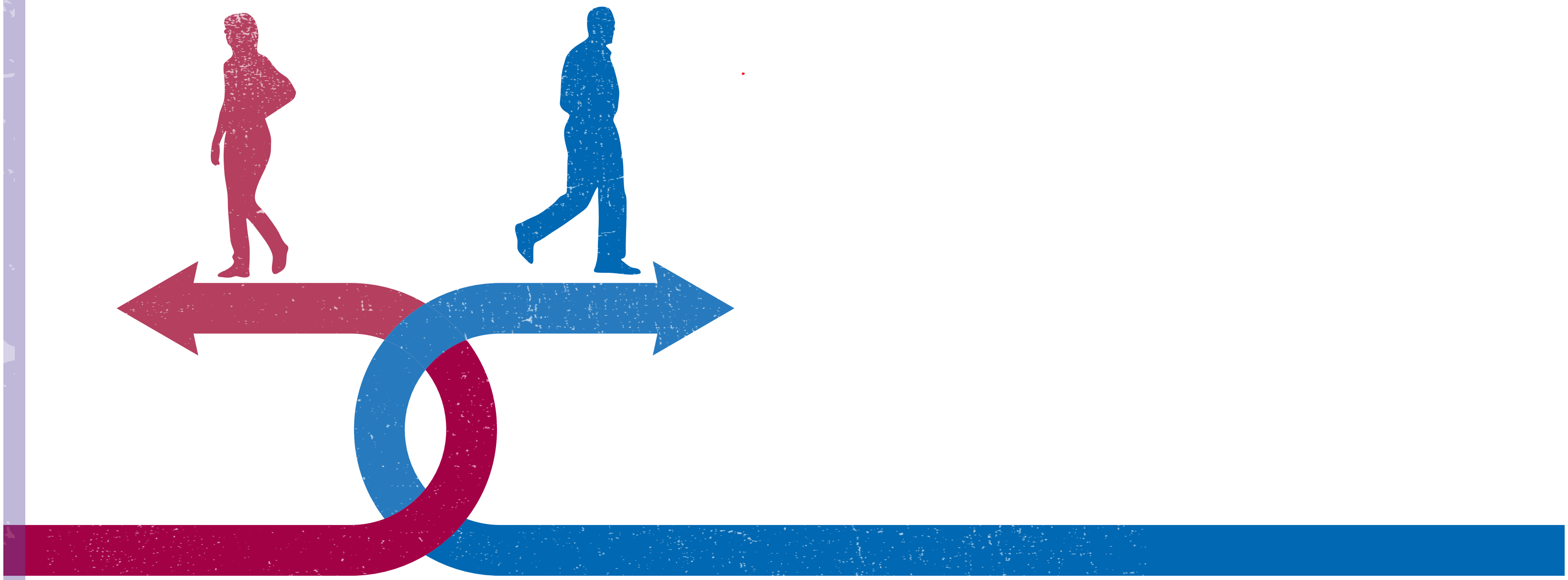
In a further question, we asked what had been the biggest benefit of the FPR 2010. We have set out the results opposite (Fig 1).

The interesting thing to note is that 21% of respondents felt that the biggest benefit is the increased focus on settling family matters using alternative dispute resolution, an area we will look at in more detail in pages 4 and 5.

## The future

As with previous years, we asked survey respondents to select the top three areas in which they would like to see a change in legislation. We have set out the results opposite (Fig 2).

It can be seen that there has been little change since last year, with the most popular area of reform still being protection for co-habiting couples. The Family Justice Review was published in November 2011 and has made numerous recommendations to overhaul the family justice system and 6% of our respondents stated that these should be enacted.

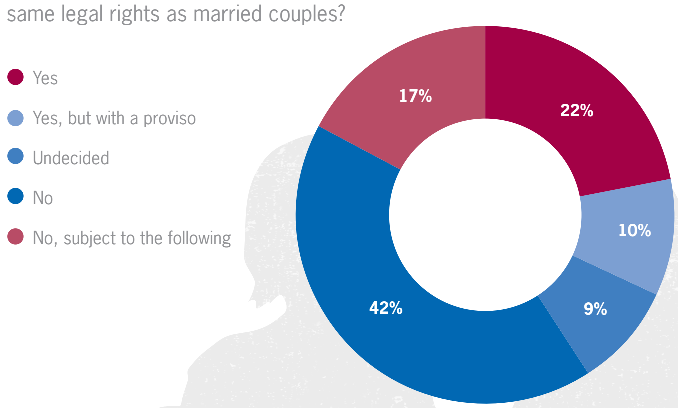


## Co-habitation

The Law Commission published its report “Cohabitation: The Financial Consequences of Relationship Breakdown” in July 2007. The report recommended, inter alia, the implementation of a new statutory scheme designed specifically for co-habitees on separation.

However, following research into the Scottish legislative system, which provides co-habitees with basic legal rights through the Family Law (Scotland) Act 2006, the current administration concluded in September 2011 that this was an insufficient basis to justify a change in the law at the moment.

**Figure 3** Do you think cohabiting couples should be given the same legal rights as married couples?




This decision has been met with some disappointment across family law practitioners and so it is no surprise that this continues to be the top area in which respondents would like to see a change in legislation (see page 2).

However, when asked whether co-habitees should have the same rights as married couples, there appears to be a division in opinion between the respondents (see Fig 3).

It seems clear from our survey that, whilst the view is that some rights should be given, the general consensus remains that they should not equal the legal rights given to married couples. We again gave respondents the opportunity to qualify their answers and the main point raised this year was that any system implemented should be on an “opt in” basis.

The Supreme Court decision in the case of Kernott v Jones was delivered in November 2011, receiving mixed responses from family lawyers. The Supreme Court allowed the appeal of Ms Jones and restored the award of the High Court which gave her a 90% share in the property.

We asked respondents whether they expected to see a rise in advisory work in relation to co-habiting couples following Kernott v Jones. 36% of respondents said that they do expect an increase and 33% stated that they have already experienced an increase.

# Alternative dispute resolution

## Mediation

The coming into force of FPR 2010 has placed an increased emphasis on parties to consider alternative means of settling disputes. We have used our survey to take a look into the options available to the parties and whether, in our respondents' opinion, they are working.

Whilst parties are now expected to attend a Mediation and Information Assessment Meeting (MIAM) under Practice Direction 3A, unless exempted from doing so, our survey has shown that only 32% of respondents have attended a MIAM. However, what is more promising is that of the respondents who had attended a MIAM, 82% went on to use mediation to facilitate a settlement.

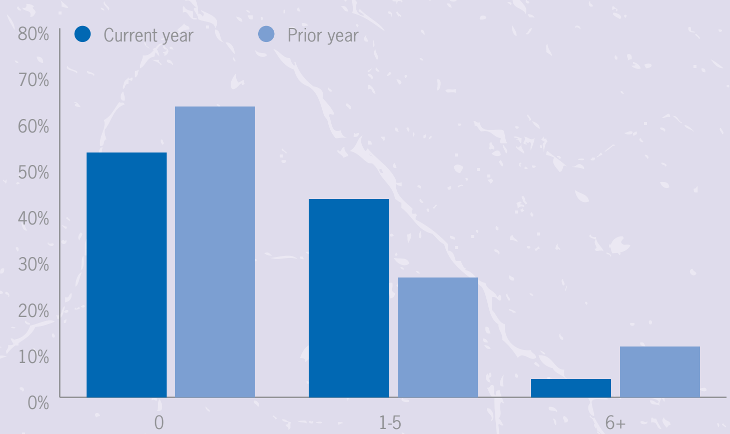
In a further question, we asked what the biggest issue was regarding MIAMs. The biggest issue, with 47%, was the cost involved to undertake the MIAM, with a further 19% of respondents saying that the MIAM placed undue pressure to mediate, resulting in the weaker party being disadvantaged.

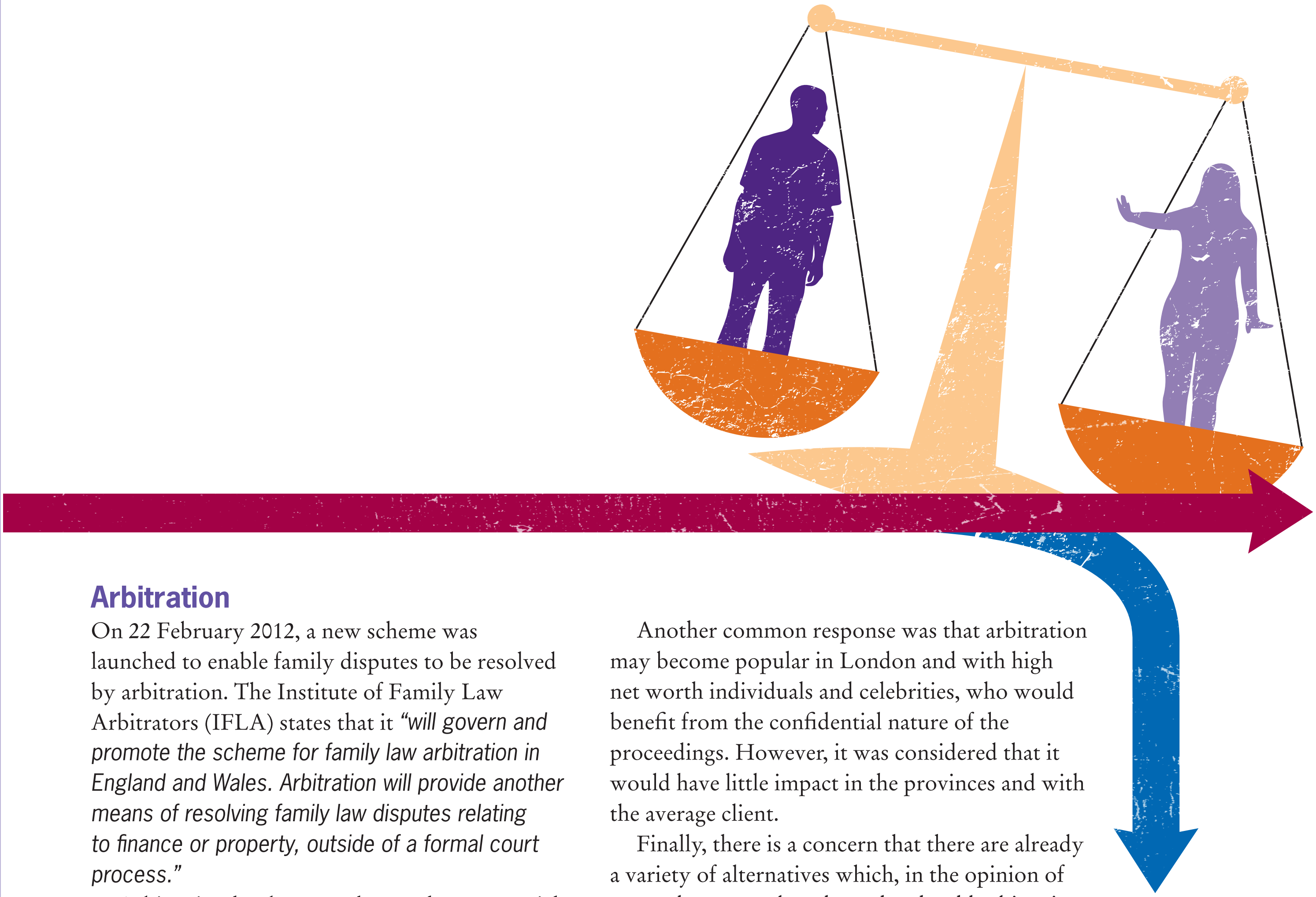
## Collaborative law

Once again the responses in relation to the collaborative process are mixed. On the one hand, 90% of respondents stated that they support the process (compared to 82% in 2011). Further, our survey has shown the highest number of collaboratively trained lawyers since our survey began (58% of respondents), resulting in more cases being dealt with collaboratively (see Fig 4).

However, the main hurdles continue to be the lack of clients for whom the process will be suitable (35% of respondents believed this to be the case) and a further 27% of respondents believed that lack of awareness to be an issue. One interesting point to note is that collaborative law has been promoted as a cheaper option than litigation; however 10% of respondents have commented that this is not the case.

**Figure 4** How many cases have you dealt with collaboratively?



## Arbitration

On 22 February 2012, a new scheme was launched to enable family disputes to be resolved by arbitration. The Institute of Family Law Arbitrators (IFLA) states that it *"will govern and promote the scheme for family law arbitration in England and Wales. Arbitration will provide another means of resolving family law disputes relating to finance or property, outside of a formal court process."*

Arbitration has been used to settle commercial disputes for a number of years, but does arbitration have a place in family law? Or will arbitration just become another process, along with mediation and collaboration, that family lawyers have to explain to their clients?

We asked respondents whether they thought arbitration would become a significant method for resolving family disputes in the next five years. The profession appears to be split down the middle with 48% of respondents saying that it would and 52% saying that it would not. We asked respondents to provide reasons for their answers, and whilst there were some varying views, there were some common themes.

Those who believed arbitration will take off thought it would be cheaper and quicker. Speed would be a key advantage for arbitration over court proceedings, as 71% of respondents said that the average time taken from filing the petition to reaching settlement was between seven and twelve months, with 17% saying that the average time was between one and two years.

Another common response was that arbitration may become popular in London and with high net worth individuals and celebrities, who would benefit from the confidential nature of the proceedings. However, it was considered that it would have little impact in the provinces and with the average client.

Finally, there is a concern that there are already a variety of alternatives which, in the opinion of some, do not work and so why should arbitration be any different? This will be an issue that the IFLA will need to address if family arbitration is to be successful.

> Arbitration is the only form of dispute resolution with adjudication. The parties themselves control the procedure governing the resolution of their financial case. The Arbitrator, an accredited expert with years of specialist experience will quickly and fairly make a final and binding award. The court operates to support, not undermine, the arbitration process. From start to finish an arbitration may take 4 to 6 months, if that. The Court process is infinitely more unwieldy and is ponderously slow by contrast. Arbitration is intended to assist everyone, not just the rich, the elite, or a core of London based lawyers and their clients. Rather, arbitration has national appeal.
>
> Andrew Breakwell is an MCIArb Qualified Family Arbitrator. He is Chairman of the Family Arbitration Marketing/PR Sub Committee Working Party and a Partner with Shakespeares.

# Who, when, why and how much?

**Who** - Wives continue to petition for divorce more, with 59% of respondents stating this was the case, and only 1% of respondents said that husbands had petitioned more than wives. The remaining 40% of respondents said that it was equal between husbands and wives.

**When** – In our 2010 survey, we highlighted that 70% of divorces were from marriages which had lasted between 11 and 20 years. We repeated the question this year and our findings show that there has been a gradual return to the "seven year itch". Whilst 11 to 20 years was still the most common length of marriage (with 57% of divorces), 32% of divorces came from marriages which had lasted between six and ten years (compared to 20% in 2011).

**Why** – We again asked respondents about the most common reasons for divorce (see Fig 5a). Last year was the first year when the most common reason cited was parties who said that they had simply grown apart or fallen out of love. It can be seen from the results in Fig 5a that there has been little change from 2011 and that growing apart continues to be the most common reason given for divorces. Extra marital affairs remain a close second.

**How much** – Our survey has highlighted that the recession continues to be an issue for parties considering divorce. The impact of the recession may account for the fall in family assets, with the average total value of family assets being less than £500,000 in 35% of cases compared to only 18% in 2010 (see Fig 5b).

Following some notable decisions, such as Jones v Jones, we asked respondents what had been the average final division of total family wealth between a divorcing couple. Interestingly, there was an equal split between husbands and wives in 32% of cases. However, wives received more than their husbands in 62% of cases, with husbands only receiving more than their wives 6% of the time.

**Figure 5a** Please select the three most common reasons for a marriage breakdown leading to one or both parties seeking a divorce

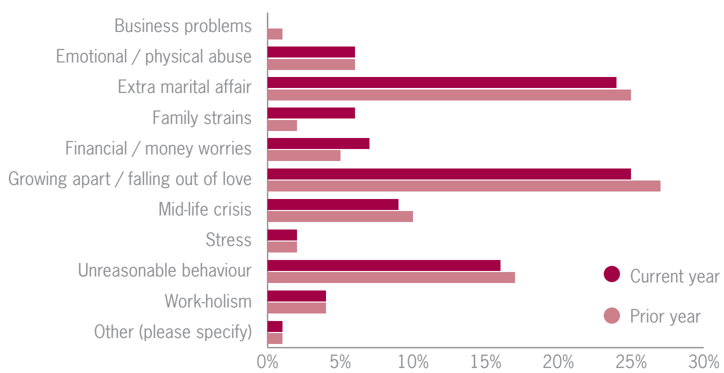
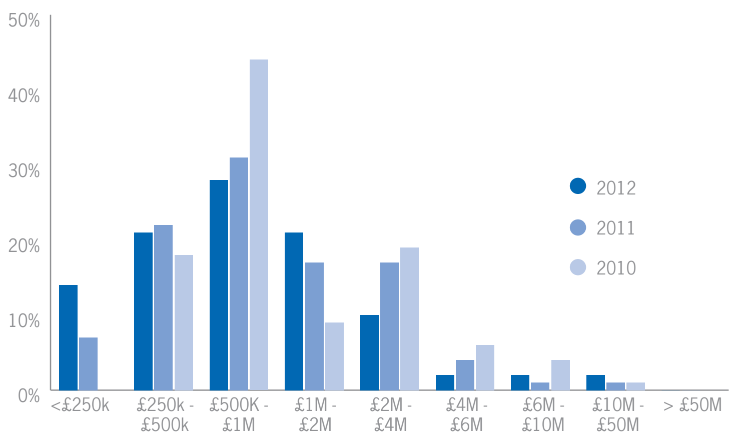
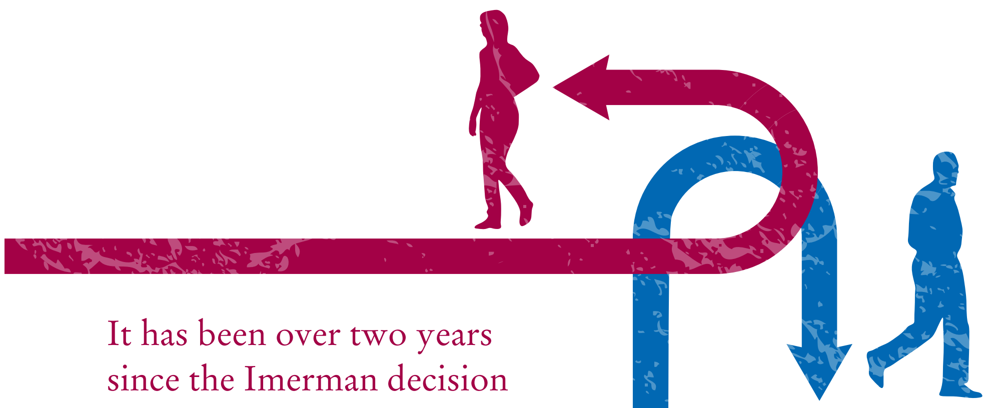



**Figure 5b** What is the average value of total family assets distributed between the divorcing parties? (select one)




> Whilst women are still the main instigators of divorce and appear to get the lion's share of the matrimonial assets, the recession continues to have an effect on financial orders. Firstly, the recession has driven down the value of matrimonial assets, especially the family home. Secondly, and of increasing importance, is the impact the recession has had on the parties' ability to extract funds for a settlement. Banks are becoming increasingly reluctant to lend money to fund divorces, which has meant that the Courts are having to resort to more innovative settlements.
>
> Sally Longworth, Partner, Forensic and Investigation Services

# Concealment of assets - nothing to declare?



It has been over two years since the Imerman decision in August 2010. Last year our survey highlighted a number of concerns. This year we look to see whether those concerns were justified.

It would appear, in some instances, that family lawyers had a right to be concerned, as 29% of respondents stated that they had knowledge of hidden assets but were unable to rely on any documents that had been obtained (up from 22% in 2011).

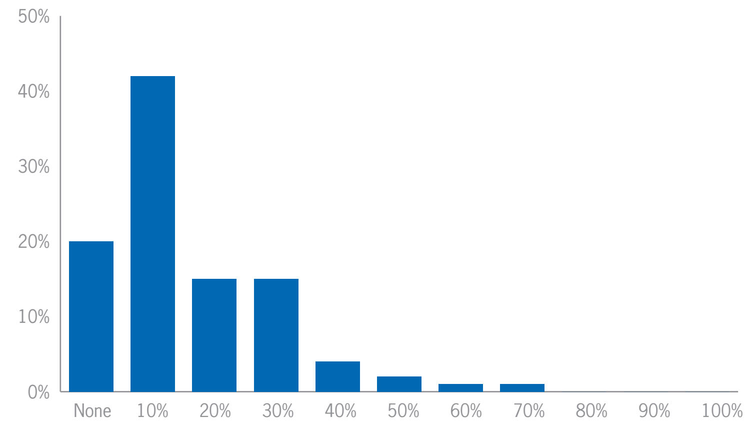
However, not all fears have materialised. Even though 80% of respondents stated that they had had cases where there were concealed assets (see Fig 6), 77% responded that they had not seen any increase in the number of cases since last year.

Further, respondents continue to be concerned that their clients are not obtaining a fair settlement due to concealed assets; however this is down from 30% in 2011 to 21% in 2012.

Respondents have also commented on the increased burden on them to explain to clients what they can and cannot do in relation to self-help, which is why 23% of respondents would like clearer guidance on self-help rules.

Whilst family lawyers cannot rely on Hildebrand documents, our survey has shown that this has not stopped 9% of spouses reporting their partners to Her Majesty's Revenue & Customs (HMRC), who have no such rules regarding Hildebrand documents when it comes to undisclosed income and assets.

**Figure 6** How many cases revealed significant concealed/missing assets or income? (select one)




> I am not surprised that in nearly 10% of divorce cases one spouse has gone as far as reporting the undisclosed assets of the other spouse to HMRC. This kind of information is really valuable to the Revenue, as it is usually accompanied by very detailed information about account numbers and the amounts involved.
>
> However, the size of the cake left for division may be much smaller after the taxman has taken his slice!
>
> Paul Roberts, National Head of Tax investigations at Grant Thornton

# Contacts

Should you require any further information in respect of Grant Thornton's Forensic and Investigation Matrimonial Services please contact:


**National**
**Michelle Buckley**
Associate Director
**T** +44 (0)121 232 5196
**E** michelle.buckley@uk.gt.com

**London**
**Will Davies**
Partner
**T** +44 (0)20 7865 2545
**E** will.h.davies@uk.gt.com

**South West and Wales**
**Geoff Mesher**
Partner
**T** +44 (0)29 2034 7547
**E** geoffrey.l.mesher@uk.gt.com

**Midlands and North**
**Sally Longworth**
Partner
**T** +44 (0)161 953 6314
**E** sally.longworth@uk.gt.com

**Midlands and East**
**Chris Clements**
Partner and Mediator
**T** +44 (0)1223 225 515
**E** chris.m.clements@uk.gt.com


## Our matrimonial team

This ninth 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.

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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Through empowered client service teams, approachable partners and shorter decision-making chains, we provide a wider point of view and operate in a way that's as fast and agile as our clients. The real benefit for dynamic organisations is more meaningful and forward-looking advice that can help to unlock their potential for growth.

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