



# Turbervilles

Solicitors

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## Divorcing parents urged to put children's needs first

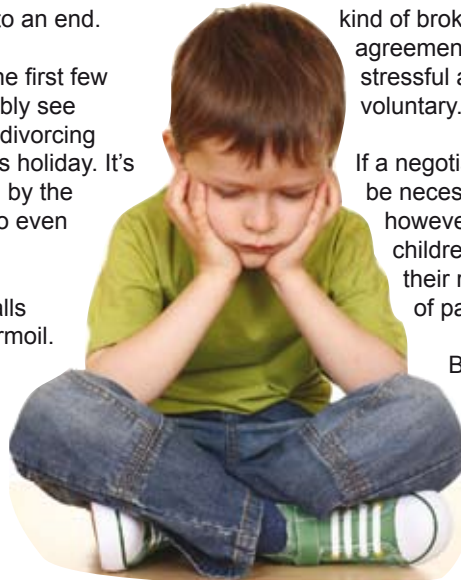
The charity Childline has urged divorcing parents to put the needs of their children first however difficult the situation may become as the marriage comes to an end.

The plea was timed to coincide with the first few months of the New Year which invariably see an increase in the number of couples divorcing following the stresses of the Christmas holiday. It's feared the extra pressures brought on by the current economic climate could lead to even more break-ups.

Childline says it has had numerous calls from children whose families are in turmoil. They tell counsellors that they are frightened by arguments between their parents and feel as though they are being made to choose between mum and dad. Some even feel the marriage break-up is their fault.

Divorce lawyers often come across these situations and will always try to advise parents against actions that may put extra pressure on their children. The first thing parents must do is put their emotions aside and be prepared to compromise to find a fair and workable solution.

Be prepared to negotiate over matters like where the children should live and the amount of contact they should have with each of you. Make sure you get good legal advice. This will help you reach a settlement which is good for your children and fair to both of you.



If negotiations become difficult then mediation may help.

This is where a trained mediator like a solicitor acts as a kind of broker and helps smooth the way to an amicable agreement. Arrangements made in this way are less stressful and more likely to stick because they are voluntary.

If a negotiated settlement proves impossible then it may be necessary to go to court. It's important to realise, however, that the courts place the needs of the children ahead of what parents may consider to be their rights. In fact, the law thinks primarily in terms of parental responsibility rather than parental rights.

Before making any decision, the court will work through a welfare checklist to determine what is best for the child. It will look at age and background, emotional needs, educational requirements and any other matters it considers relevant.

These factors are likely to weigh more heavily than any personal preferences put forward by mum or dad as to where the child should live or how much time they should spend with each parent. Once a court makes a decision then both parents must abide by it. Parents who try to thwart a court order can find that they have their contact rights reduced.

Thankfully, it should never come to that if both parents behave reasonably and follow the correct legal procedures. Please contact us if you would like more information about divorce and family issues.

## Oral agreement over pension fails to stand up in court

The need to ensure you have written evidence of important agreements was illustrated in a recent case involving a man who said his employers had given him verbal assurances that he would be entitled to enhanced pension rights.

The man had been the managing director of a firm which was then taken over by a larger company. His pension was absorbed into the scheme operated by the new company. It was a final salary scheme based on an accrual rate of 1/50 per annum.

However, he said he had attended a meeting with his new employers in 1991 when he was told that his pension would be improved to an accrual rate of 1/30 per annum.

There were witnesses to the agreement but nothing was put in writing so



there was no documentary evidence. Subsequent statements about the man's pension entitlement continued to quote the old rate of 1/50. He did not challenge these statements.

As he approached retirement the man then tried to confirm his right to the enhanced pension but was told the original lower rate would apply. He took legal action to enforce the alleged oral agreement but the court ruled against him.

The judge accepted that the witnesses

to the agreement were honest but felt that after a gap of more than 14 years their memories may not be completely reliable. The lack of documentary evidence and the fact that the man had not challenged the statements quoting the lower rate meant that the agreement could not now be enforced.

That ruling has now been upheld by the Court of Appeal.

Oral agreements are legally valid as long as you can prove they took place. This can be difficult, even if you have witnesses as in this case. It is better to get legal advice and obtain written evidence, especially when dealing with something as important as pension entitlement.

Please contact us if you would like more information.

## Man successfully challenges his uncle's 'second will'

A man has successfully challenged the validity of a second will made by his uncle at a time when his health was failing and he was no longer able to read.

The court heard that the uncle had made his first will when he was in good health and there was no doubt that he knew what he was doing. This will left all his estate to his nephew who was also appointed as sole executor.

Later however, the uncle's health began to deteriorate and one of his friends began to act as his carer, managing his financial affairs including drawing his pension.

The uncle then made a second will dividing his estate into three parts. His nephew was to receive half the estate while the carer and another friend were each to receive a quarter.

At the time he made this will, the uncle had medical conditions that affected



both his hearing and his ability to read. However, the solicitor who drew up the will was satisfied that he had sufficient testamentary capacity and so knew what he was doing.

Later, the carer wrote to the solicitor saying that the uncle wanted to execute a codicil – that is to make an amendment – to change this second will. This change would give half the estate to the carer and reduce the nephew's share to 25%. The uncle was unable to read the wording of this change and so the solicitor had to read it to him.

When the uncle died, the nephew challenged this second will and the codicil on the basis that they had been

brought about by the intervention of the carer. He submitted that his uncle had been too ill to approve them.

The court held that if a person, as in the case of the carer, had helped to draw up a will in which he was a beneficiary then there was an onus on him to demonstrate that the process was legitimate. The court had to be confident that the will represented the deceased person's true wishes and that he had not been unduly influenced by anybody else.

In this case, the second will and codicil had been influenced by the carer at a time when the uncle's health was failing. The carer had not given any reason for the nephew's share being reduced and had failed to establish that the second will truly represented the uncle's wishes.

Therefore, the court ruled that the second will was invalid and the first will, leaving everything to the nephew, should be re-instated.

## Avoid all the legal pitfalls if you rent out your home

More and more homeowners who can't sell their properties in the current downturn are starting to rent them out to tenants instead, according to new research.

A survey by the LV insurance company showed there was a 56% increase in the number of properties available for rent in the final three months of last year. Nearly nine out of ten of those properties belonged to homeowners who had decided to let rather than sell in a depressed market.

Letting a property in this way will have some advantages but people new to the market should make sure they are meeting all the legal requirements that go with being a landlord. According to the LV research, many are not. For example, only 27% have signed up to a



Tenancy Deposit Scheme (TDS) even though they are obliged to do so by law and risk being fined if they fail to comply. The scheme is designed to protect a tenant's deposit in the event of a dispute.

If a landlord fails to sign up to a TDS then the tenant can apply for a county court order forcing him to do so. New landlords should select a suitable scheme as soon as possible. There are other legal requirements depending on the kind of property you own and an array of potential pitfalls.

For example, all landlords run the risk of sometimes having to deal with problem tenants. Some may fail to keep up with the rent or not treat your property as well as they should. In these circumstances you may need legal advice so you can take action to recover rent arrears or to recover your property from bad tenants when necessary.

Please contact us if you would like more information about tenancy deposit schemes or any aspect of property law.

## Neighbours stop extension that would spoil scenic views

A group of neighbours on a housing development have successfully taken legal action to prevent the building of a three-storey extension which they feared would spoil the view from their homes.

The houses on the development had been sold subject to two restrictive covenants. The first was that homeowners could not erect buildings without the approval of the management company; the second prevented homeowners doing anything that would annoy or create a nuisance to other people on the estate.

One homeowner was then granted

planning permission to build a three-storey extension. He also obtained approval from the management company on condition that the development would be in keeping with existing properties and the boundaries would not be altered.

However, the neighbours objected because they felt the extension would spoil their views over a nearby river and so breach the covenant by causing an annoyance. The homeowner argued that the permission granted by the management company should take priority over the nuisance and annoyance element of the covenant and so the development should be allowed

to go ahead. The court, however, ruled in favour of the neighbours. The judge held that there was no reason why both elements of the covenant should not apply so that a development could only go ahead if it had the approval of the management company and did not cause a nuisance to others on the estate.

The next issue to resolve was whether or not the interference with the scenic views would cause annoyance. The judge held that most reasonable people would say that it would indeed cause annoyance within the meaning of the covenant and the development should therefore not be allowed to go ahead.

# Know your rights if redundancy threatens

The worsening economic climate means that thousands of people are being made redundant every month.

It's a worrying time for everyone but people facing the threat of redundancy should know that they have legal rights to ensure they are treated fairly and get the best possible severance deal from their employer.

To begin with, your employer should consult with you individually or, if there's to be a large number of redundancies, with your staff or union representatives as soon as possible. This should be at least 30 days before the first redundancy if between 20 and 99 jobs are to go and at least 90 days in advance if the number is over 100.

You should be provided with written details about such things as the reasons for the redundancies, the numbers and categories of people involved and how the employees affected will be selected. The company can decide how the selection process will work but it must be fair and based on evidence rather than who the employer likes or dislikes.

If you are selected then your employer should consult with you individually and explain why. He must also consider whether there are any alternatives to redundancy. If the employer fails to do this then the redundancy may be considered unfair.

If you feel you have been selected unfairly then you can appeal and if necessary take your case to an employment tribunal. You will be entitled to statutory redundancy pay if you have worked continuously for your employer for two years

or more. The entitlement varies from half a week's pay for each year of service to one and a half week's pay depending on your age. The statutory maximum weekly pay has just risen to £350 but your firm may have an in-house agreement providing better terms. The first £30,000 of redundancy pay is tax free.

You are also entitled to work your full notice period or be paid in lieu if your employer wants you to leave earlier.

Your firm may want to enter into compromise agreements with redundant staff. The agreements set out the terms and conditions relating to the termination of employment and once signed will prevent the employee bringing tribunal claims in future, except for personal injuries or pension issues.

The firm may provide an enhanced redundancy package to encourage you to sign. Because you will be waiving the right to bring an employment claim in future, you should receive independent legal advice before entering into a compromise agreement to ensure you know and understand all the implications. This advice should be provided by a law firm that is experienced in employment

matters and is not acting for the company making the redundancies.

The costs are often paid for by the employer of the redundant workers as it provides a cost effective way to reach a settlement. The agreements are not restricted to financial matters.

For example, confidentiality clauses are quite standard procedure these days to prevent the employee from disclosing the terms of the agreement.

It is also possible to include clauses preventing the employee making derogatory statements about the company or its management. Of course, the employee may also wish to include conditions such as requesting that the employer provides a reference.

There is no legal obligation on the employer to do this but if they do then the reference must be accurate and fair. Compromise agreements can be beneficial to both sides as long as you are fully aware of what you are doing.

Redundancy can be a very difficult period in a person's life and the rules and regulations covering it seem daunting so it is always advisable to seek legal advice if there are issues you are unsure about.

Please contact us if you would like more information about redundancy or any aspect of employment law.



## Declaration of trust protects wife's house from husband's creditors

A court has ruled that a woman should be allowed to keep her family home even though her husband's creditors wanted it to be sold to help clear his debts.

It is an unusual case and illustrates the benefits that can arise from making a declaration of trust.

The husband had bought the house several years before in his own name. However, he had an alcohol problem and also liked gambling. Eventually, his wife became concerned about the family's financial security. To protect her future, she insisted that her husband made a declaration of trust in her favour which effectively handed the house over to her.

At the time this was done the husband had no significant debts and was able to meet all his mortgage payments. That changed a few years later, however, when he fell into serious debt and was declared bankrupt.

The trustees in the bankruptcy applied for an order setting aside the declaration of trust the husband had made regarding the house and his wife. They argued that it had simply been a way of putting the property beyond the reach of his creditors.

The husband denied this and said the declaration had been made at his wife's insistence. She had threatened to divorce him if he didn't sign over his interest in the family home to her. The only reason she had in taking such assertive action was to maintain her family's financial security.

The court ruled in the family's favour. The judge said he was satisfied that the main reason for the husband's action was to maintain his marriage. The effect was to place the house beyond the reach of the creditors, but while that might now be a beneficial consequence of the declaration of trust, it was not the reason for making it in the first place.

The ruling does not mean, of course, that a person facing difficulties can avoid creditors by simply placing assets in someone else's name. However, it does show that a declaration of trust made in good faith can help to protect a family's financial security.

Please contact us if you would like more information.



# HIPs to provide more information for home buyers

The Government has introduced new measures to provide more details in Home Information Packs (HIPs) and ensure that they are available as soon as a house is put on the market.

Sellers will have to include a Property Information Questionnaire (PIQ) covering areas such as the property's service charges, flood risk information, structural damage, gas and electricity safety and parking arrangements. The PIQ is in addition to the other required documents such as the Energy Performance Certificate rating the property's energy efficiency, evidence of title, the results of standard searches and the terms of sale.

HIPs will also have to be made available to buyers as soon as the property is put on the market. Sellers used to be able to request and pay for a HIP and then start marketing their property up to 28 days before the HIP was ready and available.

The new provisions, effective from 6<sup>th</sup> April this year, mean that HIPs and PIQs have to be available from the outset. The PIQ



will also be required for leasehold properties and will include a summary of the leasehold arrangements.

The temporary leasehold information provision was made permanent on 1<sup>st</sup> January. It means that a copy of the lease remains the only extra information needed for leasehold properties.

HIPs are required when selling homes of all sizes. Please contact us if you would like more information.

## Family lawyers oppose 'draconian' measures against absent parents

The family lawyers' association, Resolution, is urging the Government to drop plans that would give civil servants increased powers to clamp down on parents who fall behind with child maintenance payments.

The proposal, which Resolution describes as draconian, is contained in the Welfare Reform Bill now making its way through parliament. It would allow the Child Maintenance and Enforcement



Commission (CMEC) to confiscate the driving licence or passport of defaulting parents without the need to obtain a court order.

The Department

for Work and Pensions says the measure would only be used as a last resort after all other sanctions to make parents pay had failed. It believes that allowing civil servants to take such direct action would be faster and easier and beneficial to the taxpayer. It will be tested in certain areas of the country before being adopted nationally.

The new powers are opposed by Resolution. A spokesman said: "We agree with the government's aim that all parents meet their pastoral and financial responsibilities toward their children.

"However it is well known that the administration of child support in this country is riddled with errors and bureaucratic failures. Until the system is fixed, running smoothly and has public confidence there can be no justification for not allowing a right to challenge such draconian measures in the courts."

The subject of child maintenance payments often evokes strong feelings on both sides of the argument. Many parents, usually but not always mothers, can suffer great hardship when their former partner fails to pay child maintenance.

On the other hand, many other parents, usually but not always fathers, often feel they are being hounded unfairly.

Whatever view one takes there is little doubt that there is a determination on behalf of the Government and CMEC to make sure more parents face up to their responsibilities.

Parents on both sides of the argument who are affected by these issues should seek legal advice to protect their interests.

### Head Office

Hill House  
118 High Street  
Uxbridge  
Middlesex UB8 1JT

T 01895 201700  
F 01895 273519

### Chorleywood Office

Witton House  
Lower Road  
Chorleywood  
Hertfordshire WD3 5LB

T 01923 284112/285869  
F 01923 284909



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[www.turbervilles.co.uk](http://www.turbervilles.co.uk)

### Department Heads

Commercial Litigation John Clement

E [john.clement@turbervilles.co.uk](mailto:john.clement@turbervilles.co.uk)

Corporate/Commercial Sess Sigre

E [sess.sigre@turbervilles.co.uk](mailto:sess.sigre@turbervilles.co.uk)

Employment Robert Dixon

E [robert.dixon@turbervilles.co.uk](mailto:robert.dixon@turbervilles.co.uk)

Licensing and Crime David Smith

E [david.smith@turbervilles.co.uk](mailto:david.smith@turbervilles.co.uk)

Private Client/Family Law Russell Hallam

E [russell.hallam@turbervilles.co.uk](mailto:russell.hallam@turbervilles.co.uk)

Property Andrew Cameron

E [andrew.cameron@turbervilles.co.uk](mailto:andrew.cameron@turbervilles.co.uk)

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