

## How Is A Divorce Settlement Reached?

In divorce or civil partnership dissolution the court's first consideration is given to the welfare of any children under the age of 18.

In financial proceedings the court will consider the following factors when reaching its decision on the settlement:

- The income, earning capacity, property and other financial resources which each of the parties to the marriage / civil partnership has or is likely to have in the foreseeable future, including (in the case of earning capacity) any increase in that capacity which would in the opinion of the court be reasonable to expect a party to the marriage / civil partnership to take steps to acquire.
- The financial needs, obligations and responsibilities which each of the parties to the marriage / civil partnership has or is likely to have in the foreseeable future.
- The standard of living enjoyed by the family before the breakdown of the marriage / civil partnership.
- The age of each party to the marriage / civil partnership and the duration of the marriage / civil partnership.
- Any physical or mental disability of either of the parties to the marriage / civil partnership.
- The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by looking after the home or caring for the family, recognising that contributions may not just be financial.
- The conduct of each of the parties, if that conduct is such that it would in the opinion of the court be unfair to disregard it.
- In the case of proceedings for divorce or nullity of marriage, any benefit (for example a pension) which by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The court will also consider whether a clean break is possible or whether there should be any on-going maintenance payments.

The court has a very broad discretion to redistribute spouses /former spouses assets and income as is considered fair in light of the above factors. In all cases

before issuing an application to the court we will try, either by referring the matter to mediation or by negotiation, to reach a fair divorce / civil partnership dissolution settlement to which both parties agree. Such a settlement would be negotiated on the basis of the above factors. Obviously it is not always possible for the parties to agree, and in this event an application to the court needs to be considered. It is always vital that both parties are honest and provide full details of their financial provision so a fair divorce / civil partnership dissolution settlement can be reached.

### **What Financial Claims Can You Make?**

On divorce, civil partnership dissolution or judicial separation you and your spouse / civil partner have the right to bring certain financial claims against each other. These are as follows:

The various Orders which can be made by a Divorce County Court are as follows:-

- 1 Maintenance for one of the parties;
- 2 Maintenance for a child of the family who is not a 'qualifying child' for the purpose of the Child Support Agency;
- 3 Lump sum provision ie payment of a specified sum of money by one party to the other to resolve division of the matrimonial home or other capital assets such as savings;
- 4 Property adjustment eg outright transfer of the matrimonial home to one party, sometimes subject to a charge back to the other party
- 5 Pension Attachment ie payment upon a former spouse's retirement of part of the retirement pension and/or lump sum to the other spouse
- 6 Pension sharing order

In many cases, none or only some of the various forms of relief will apply. An Order may be made by agreement or following dispute between the parties.

However NO lump sum or property adjustment order can take effect until after Decree Absolute.

### **What Is The First Step In Settling Your Financial Matters?**

Settling financial matters involves a two stage process.

## **Step 1**

You need to decide which is the best forum for you to discuss and resolve your financial affairs. The options are Negotiations between yourselves, Mediation, Collaboratively or Separate Legal Representation.

### **Direct Agreements:**

There is no reason why both you and your spouse or former partner cannot come to an agreement between you about how your assets will be divided between you and any relevant financial support, according to what you want for your future. You can arrange a session with one of our solicitors to go through the agreement you have reached with you and help and advise you on any part of it. Solicitors need not take over for you but can assist, advise and help you achieve the outcome that you want. The solicitor need not become too involved. This helps to keep your fees to a minimum and allows you to be in control of what you want for your future.

### **Mediation:**

Mediation needs the involvement of both parties and a trained independent mediator who is often a qualified lawyer who will try to find a solution to the dispute between you.

Mediation has potential benefits in that mediation may be quicker and cheaper and it is non-adversarial and so may reduce bad feelings. It also offers the parties more chance of retaining control over decisions and it can avoid Court proceedings. Whilst the process remains the same the tasks are undertaken yourselves utilising the Mediator to help you to explore all options ensuring the outcome is viable and practicable for you.

Mediation may not always be appropriate, for instance in cases where there has been domestic abuse between the parties. Either way the court now requires you to attend a Mediation Information Assessment Meeting with a Mediator before instigating the court process. If Mediation is not deemed appropriate the Mediator will issue you with a Certificate (FM1) confirming this. Proceedings cannot be issued without this save for exceptional circumstances.

## **Collaborative Law:**

A family law process whereby both you and your partner each have your own lawyer and then work together face to face with the lawyers as a team to address and resolve the issues. The aim of collaborative law is to resolve family disputes without going to court.

Whereby both you and your partner each have your own lawyers for individual help and advice. However you work together as a team to address The issues and conflict between you in order to achieve a resolution that is right for both of you.

It is non adversarial, and client focused. Your lawyers will not spend weeks exchanging letters but instead will arrange a series of four-way meetings whereby both you and your spouse meet with both lawyers who will help you to achieve the outcome you want.

The focus is to look at what you want to achieve and to look at all the issues and areas of conflict. You can be supported and helped to come to a lasting resolution without destroying your parenting relationship in the process.

## **The Traditional Process:**

This is a process where we can help and advise you on how to achieve an outcome where communication with your spouse or partner has broken down. Both you and your spouse appoint solicitors independently of each other and each solicitor will represent your interests. If necessary court proceedings can be taken but this will only happen if other options have been exhausted. This process may be preferable to you particularly if you feel you need a lot of guidance about what outcome may be best for you. It will also suit you if you are in a situation whereby any communication with your spouse is difficult or where there is lack of co operation This process is often most effective in emergency situations where an urgent remedy is sought.

## **Step 2**

Next is to gather information about your and your spouse's / civil partner's financial position. This is known as providing full and frank disclosure. Without this, we will not be able to advise you as to what your entitlement is or on the suitability of any proposal made by your spouse / civil partner. The duty to give

disclosure is continuing and therefore if circumstances change during the course of the case these changes must also be disclosed. Failure to make full disclosure can be a serious matter.

The information that will be required is as follows:

- Your last three months wage slips, your P60 or evidence of receipt of any state benefits.
- The last 12 months bank statements for each bank account.
- Details of any stocks and shares and their current value.
- The CETV (Cash Equivalent Transfer Value ) of your pension. This can take up to three months to be produced by your pension company.
- Details of any liabilities that you have.
- If you have a business, your last two years accounts.
- An estimate of the value of any properties you own and a statement from your mortgage company showing how much is owed.
- Details of your outgoings on a monthly basis.

This can seem very daunting. Further information may be required depending on your circumstances. The government has produced a free easy to use website, [www.moneyadviceservice.org.uk](http://www.moneyadviceservice.org.uk). This site can help manage your money and make informed decisions. It aims at helping people at various stages in their lives when money advice is essential.

There is a budget calculator to help you construct a budget. There are also links to the benefit agency to help ascertain whether or not you are entitled to any state benefits. There is also a very useful divorce calculator that is interactive. This can help you and your lawyer consider various options together.

### **Step 3**

Once you and your spouse / civil partner have collected all this information together it will be presented in a financial statement known as a Form E. The Form Es will then be exchanged and you and your lawyer can then consider your options.

The Form E document is a Statement of Truth and therefore if it is not accurate and complete the party making the document can be in contempt of Court

and the consequences of this may be serious (these include financial penalties and even in rare cases imprisonment). Also if a final Order is made without there having been full disclosure it is possible for a Court subsequently to set the Order aside.

## **Step 4**

### **Joint Accounts and Credit Cards**

Where the parties hold joint accounts it is important to ensure that one party is not able to continue to draw money out of that account or indeed leave the account to be overdrawn. This can be avoided by contacting the relevant bank or financial organisation seeking to freeze the joint accounts or to make the parties joint signatories. Special care needs to be given to joint credit cards and loan accounts as in almost all cases these are joint and several debts which are enforceable by the bank or other organisation against either or both of the parties. Again it is important that such accounts, and in particular credit cards, are frozen. We would recommend however that you discuss this with us before taking any action given the implications this can have both practically with Direct Debit Mandates etc and by way of setting the tone for future negotiations.

### **Matrimonial Home**

In many instances the main asset is the family home. Where a property is held jointly by two parties it may be held in one of two methods which are either as joint tenants or as tenants in common. When the parties are joint tenants the property is owned equally in law and if one of the parties dies the property automatically goes to the survivor. Where the parties are tenants in common the property can be held either equally or in unequal shares. If one party dies then that party's share in the property devolves via his or her Will or if there is no Will under the Rules on intestacy and does not automatically go to the other. Most matrimonial properties are held as joint tenants. It is possible to "sever the joint tenancy" by either party giving notice to the other of doing so. It is important that you consider at an early stage whether it is of benefit to you to sever the joint tenancy.

Where the property is in one person's name then it is open to the other to register their Matrimonial Home rights at the Land Registry in order to protect their interests pending an overall financial settlement.

Just because the house is in one parties name does not mean the other does not have a claim upon it. If it has been treated as a home by you both then it will be deemed to be a Matrimonial Asset.

### **What Will Happen To Your Pension?**

Your pension is a marital asset, and will be taken into account during proceedings.

There is no set framework for dealing with pensions in divorce / civil partnership dissolution, but a pension is considered part of your marital / partnership assets, whether it belongs to you or your husband / wife / civil partner, and it must be considered in divorce proceedings.

The court will look at provision for the family and assess what resources are available to all parties. If the court rules that the pension is to be shared, there are two ways this can be achieved:

- The capital is divided at the time of the divorce.
- The pension is divided to make equal income for retirement.

Courts vary in the approach they take, but there are two ways in which pensions can be dealt with:

#### **1. Offsetting**

This is where one party is compensated for the loss of interest in their spouses / civil partners pension by that person receiving a greater share of the other available assets. This will depend upon the value of the pension concerned and the value of the other assets.

#### **2. Pension Sharing**

This is where one part of one party's pension is taken and paid into the other party's pension.

## **Bankruptcy In Divorce / Civil Partnership Dissolution**

Bankruptcy can have serious implications for the financial settlement on divorce / civil partnership dissolution so it is advisable to seek legal advice where the bankruptcy of one of the parties is a real or possible risk.

In bankruptcy, almost all of the assets of the bankrupt person are transferred to the Trustee in Bankruptcy which is likely to have serious implications for the bankrupt's spouse / civil partner.

If the matrimonial / partnership home was jointly owned by the bankrupt and his spouse / civil partner, the house cannot be transferred into the spouse's / civil partner's sole name without the Trustee in Bankruptcy's consent. The Trustee is only likely to give consent if the spouse / civil partner can buy the bankrupt's share at a reasonable market value.

In addition the bankrupt person is unlikely to be able to pay any lump sum or maintenance to the spouse / civil partner, as their savings and much of their income will be used by the Trustee to discharge their debts.

It is wise to sort out a settlement as soon as possible before the bankruptcy starts, as it is often threatened before any action is taken. A prompt application to the family court may allow appropriate orders for financial settlement to be made before a bankruptcy takes effect. Even if the bankruptcy is already in effect, the bankrupt's spouse / civil partner may be able to apply to the court to annul the bankruptcy if the bankrupt is not, in fact, insolvent.

### **Step 5**

#### **Consent Order**

Where terms can be agreed between you, then these will be incorporated into a draft Consent Order and presented to the Court, together with a Statement of Information which summarises your financial position. The draft order will then be checked by the District Judge and, if satisfactory from the Court's point of view, made into a Court Order.

It is certainly simpler, quicker and very much cheaper to deal with your financial affairs by agreement. Reasonable compromise is therefore advisable if it will achieve this result.

## Step 6

### Financial Proceedings

Where agreement cannot be reached or where it is necessary to timetable progress we will advise you to issue financial Proceedings.

The basic procedural steps in disputed proceedings are as follows:-

- 1 One party makes application for a Financial Order. Once this application is made the Court issues automatic directions which include a direction for the filing of a Form E and also the Court fixes a first hearing date.
- 2 Both parties file Statements of Truth relating to their financial Affairs (referred to as Form E) documenting as fully as possible their income and expenditure and their capital resources;
- 3 There is a hearing before the District Judge called the First Appointment to define the issues and to try to save costs. The District Judge will give directions on things that need to be considered such as valuations. This hearing usually takes place between 12 and 16 weeks after the application is made to Court.
- 4 The District Judge will then usually fix a Financial Dispute Resolution Appointment, (FDR) when you will both attend Court for the purpose of discussion and negotiation to try to resolve the matter. This will usually take place between 4 and 6 weeks after the first appointment depending on the outstanding documentation to be produced and delays in court listing.
- 5 If the matter cannot be resolved at the FDR Appointment the matter will be listed for a final hearing, when a different District Judge from the one who was present at the FDR appointment will make final orders. The final hearing will generally take place between 4 and 8 weeks after the FDR depending on delays in Court listing. Normally the final hearing is the first occasion on which the parties give evidence direct to the Court.

The procedure may, of course, vary from the above in individual cases depending upon the matters arising. The proceedings from start to finish can take 6-9 months.

The Court will encourage the parties to reach an agreement at all stages of the proceedings. The resulting Order will then be by consent.

In making his decision the District Judge has to have regard to various factors set out in the relevant Act of Parliament (Matrimonial Causes Act 1973). Subject to this, he has a very wide discretion as to the Order which he can make. This wide discretion makes it difficult to predict beforehand the precise outcome. In other words, there is always a risk in ancillary relief proceedings that the decision may not turn out as desired.

It is not possible in this Sheet to set out the pros and cons involved in disputed financial proceedings. All will depend on the individual case and its facts. Specific advice should be sought.

## **Step 7**

### **Dismissal**

The Court can make an Order dismissing all or some of the ancillary relief claims. For example, a spouse's rights to maintenance can be dismissed or further capital claims between the parties can be dismissed. The effect of a dismissal Order is to terminate once and for all the right to the particular financial relief sought. In the first example above, the spouse would not at any time in the future be able to make a maintenance claim. This is known as a "Clean Break Order". Such Orders are desirable because they give certainty and normally avoid any need to go back to Court. However to make sure that a Clean Break Order is effective it is important that there has been full financial disclosure as set out above.