



Divorce and Financial Provision: Dividing up the assets

BRIEFING

Introduction

Sorting out the finances on divorce can be the most difficult part of marital breakdown to resolve.

In England and Wales there are no rules setting out precisely how assets will be divided on a divorce. There are a variety of financial orders that can be made, including maintenance payments, lump sum payments, and property transfer and pension orders.

The courts have a very wide discretion to re-distribute all the assets of the parties having regard to all the circumstances of the case, first consideration being given to the welfare of any minor child or children of the family.

The powers of the court and the factors that the court must take into account are set out in a statute called the Matrimonial Causes Act 1973.

The factors include:

- The parties' financial needs;
- The parties' financial resources;

- The standard of living enjoyed by the parties through the marriage;
- The ages of the parties and the duration of the marriage;
- Any physical or mental disability of either party;
- The contributions made by either party; and in exceptional circumstances, the conduct of the parties.

A wide discretion

The Matrimonial Causes Act gives very little guidance on how to apply the above factors and what weight to give them. This has resulted in judges deciding cases using their discretion, and the cases have over the years laid down the guiding principles that all courts use when deciding financial provision cases. Since the House of Lords case of *White v White* we have two important guiding principles:

- Financial and domestic contributions should be treated equally.
- The "yardstick of equality" should always apply, unless there are good reasons to depart from it.

More recently in the cases of *Miller v Miller* and *McFarlane v McFarlane* the House of Lords offered new guidance and decided that a further three principles apply, namely:

- i. The needs of the parties must be satisfied first.
- ii. There is to be compensation for any economic disadvantage suffered by a party.
- iii. If (i) and (ii) have been met, then the principle of "sharing" the fruits of the marriage applies.

The courts strive to ensure that financial provision is "fair" between the parties but, given their wide discretionary powers, it is difficult to predict what will happen in each and every case. The first consideration is always the welfare of the children and the aim is to provide a result that is fair without discrimination.

Do all financial provision cases go to court?

No! There are various ways in which negotiations can take place outside of the court arena to try to reach an agreement. The most straightforward way of resolving a case is for the parties to provide voluntary financial disclosure of all their assets, liabilities and income. The parties then enter into a process of negotiation, usually through solicitors, aimed at arriving at a fair agreement.

In some cases, however, it is not possible to settle without commencing court proceedings and, if this is the case, then the court will lay down a timetable which must be followed. Most cases settle at some stage during the timetable. If the case does not settle, then it will proceed to a trial and the court will make an order determining the financial provision of the parties on divorce.

What does an application for financial provision to the court involve?

Once an application is lodged, the court will fix a First Appointment hearing to take place 12 to 16 weeks after the filing of the application.

At least 35 days before the First Appointment both parties must disclose all relevant information with regard to their finances. The disclosure is made by way of a sworn statement (called a Form E) which sets out the range of financial information needed as stipulated under the Court rules. The disclosure requires supporting documents to be provided, including bank statements and house valuations.

Once this process is complete, the parties may be able to start negotiating a settlement.

14 days before the First Appointment, the parties need to file at court and serve on each other:

- A statement of issues – a summary of matters potentially in dispute.
- A chronology – comprising key dates showing the history of the marriage.
- A questionnaire – which will set out any further information or documents that the other party may require.
- A notice stating whether it will be possible to use the First Appointment as a Financial Dispute Resolution hearing (FDR – see below).
- A summary of each party's legal costs to date.

The First Appointment

This is the first court hearing before a District Judge. It has to be attended personally by both parties unless the court orders otherwise.

The object of the First Appointment is to define the issues in dispute. The District Judge will give directions as to the further

conduct of the case; this will include a review of the questionnaires and consideration of what further documents or valuations should be produced.

The District Judge will then usually direct that the case be referred for a FDR (see below) which is then scheduled in the following eight weeks.

In rare circumstances the District Judge may order that the case be set down for a final hearing or adjourn the proceedings to allow for mediation.

The District Judge can also make an urgent Order dealing with, for example, maintenance. Usually, if an application for interim maintenance is made, it is the subject of a separate hearing.

The Financial Dispute Resolution appointment

This is an informal hearing before a District Judge, the purpose of which is to reach an agreement through negotiation with the assistance of the parties' legal representatives and the judge. As with the First Appointment, both parties must personally attend unless the court orders otherwise.

This hearing is "without prejudice" – which means that the negotiations are intended to be part of a genuine settlement attempt and any concessions made by the parties in trying to reach a settlement will not be held against them in the event the negotiations fail.

At least seven days before the FDR the applicant must send to the Court details of all offers (including those marked without prejudice) so the District Judge can see how far the parties have come towards achieving a settlement.

If an agreement is reached, the District Judge can make an Order. If there is no agreement, the District Judge will generally set the matter down for a final contested hearing. The judge who has heard the FDR can no longer be involved in the case.

The final hearing

If the parties are not able to reach a settlement, then the case will proceed to a final hearing. At this hearing, a judge will hear evidence from the parties, review documents and there may be expert evidence from accountants or valuers.

At the end of the hearing, the judge will make orders determining the division of the family assets and whether one party should pay maintenance to the other. The court will also determine who pays the costs of the proceedings. The usual order for costs is that each party bears their own unless one party has behaved unreasonably during the case, for example, by failing to negotiate or hiding assets.

Once an order has been made its various provisions need to be implemented. This can involve the transfer of property, the sharing or splitting of pensions, drafting wills, execution of insurance policies, raising and paying lump sums.

Important considerations

Given the discretion of the court, it is unlikely that any party or lawyer involved in the case will be able to predict with absolute certainty the outcome of any court hearing. However, after full and frank disclosure, it is possible to predict a range of possible outcomes and to advise on the level of financial provision that it may be possible to obtain.

Legal proceedings can be very expensive. It is in both parties' interests to try to reach agreement as far as they can. A genuine desire to settle, coupled with utilising the best means of negotiation suited to each case, whether collaboration, mediation, round-table meetings, or correspondence, can mean that the court process is avoided and a financial settlement agreed without the high costs and high emotional stress of court proceedings.

For further information, please contact:



Carol Ellinas | Partner

T: 020 7593 5032

E: cellinas@wslaw.co.uk



Emily Brand | Partner

T: 020 7593 5121

E: ebrand@wslaw.co.uk