

## Financial Settlements on Divorce – 1. The Law on Finances

This series of 3 factsheets provides an overview of Financial Settlements on divorce.

The first factsheet gives answers to the following questions:

- What does the law say about how assets should be divided on divorce?
- What are the main principles involved in deciding on a fair settlement?
- What factors are taken into account?

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## The Law on Finances

The aim of this resource is to provide a guide to what the law says about calculating a fair financial settlement. Although there are varied guidelines and benchmarks defined in Family Law and clarified by Case Law, it remains notoriously difficult to work out a precise settlement.

### The Law

The Court has wide sweeping powers in divorce, nullity and judicial separation proceedings to make a number of financial orders in favour of either party to the proceedings and/or for the benefit of any children of the family.

The range of Orders include:

- lump sum Orders
- property adjustment Orders
- pension sharing/earmarking Orders (in the case of divorce or nullity proceedings)
- interim and/or final periodic payments Orders, and
- maintenance pending suit Orders.

When deciding what Orders to make, the Court has a very wide discretion. By Section 25 of the Matrimonial Causes Act 1973, all the circumstances of the case must be taken into account and first consideration must be given to the welfare of any minor child of the family who has not attained the age of 18.

Section 25 directs the Court to have regard to the following matters:

- The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future (including any benefits under a pension scheme which a party to the marriage has or is likely to have), including in the case of earning capacity, any increase in that capacity which it would in the opinion of the Court be reasonable to expect a party to the marriage to take steps to acquire
- The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future

- The standard of living enjoyed by the family before the breakdown of the marriage
- The age of each party to the marriage and the duration of the marriage
- Any physical or mental disability of either of the parties to the marriage
- 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 by looking after the home or caring for the family
- The conduct of each of the parties if that conduct is such that it would in the opinion of the Court be inequitable to disregard it
- In the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of 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.

### Equality (White vs White)

In October 2000, the House of Lords delivered a very important judgment in a case involving "big money", called *White vs White*. In that judgment, the House of Lords said that:

- In seeking to achieve a fair outcome, there was no place for discrimination between husband and wife and their respective roles
- The Court's aim should be to achieve a fair result and before making a division of assets a judge should check his tentative views against the yardstick of equality. As a general guide, equality should be departed from only if, and to the extent that, there was good reason for doing so
- Where a wife does not work (or only works part time) and instead looks after the home and children, her contributions must be regarded as equally valid and valuable in the overall family's partnership as those of the husband who makes the main financial contributions (the same principles apply where it is the husband who looks after the home and the wife is the main breadwinner).

There have been a considerable number of decisions of the Court of Appeal since adding more guidance as to how the law should be applied and in 2006 the House of Lords delivered a further important Judgement in the cases of Miller and McFarlane.

Although these cases also involved "big money" there was useful guidance for all cases:

- The court has to try and arrive at a fair result for the husband and wife and three principles have emerged
- Firstly, the assets of the husband and wife should be divided primarily to make provision for their housing and financial needs to take into the account the various criteria
- In most cases once you have achieved that, that is the end of the matter as there rarely sufficient resources to provide adequately for the needs of two homes.
- Secondly, in some cases the husband and wife may have organised their affairs so that one of them is severely disadvantaged financially and should receive some sort of compensation for that. An example of this is where you have two potentially high earning spouses and one of them gives up their career to look after a child.
- There is then a third principle of sharing which comes from the concept of the husband and wife committing themselves to sharing their lives and when the partnership ends they are each entitled to an equal share of the assets unless there is a good reason to the contrary. However, this does not necessarily dictate a mathematical equal division of the assets for often where there are children one spouse will earn substantially more than the other and that higher earning power is a substantial resource. The ultimate object is to give each of the husband and wife an equal start on the road to independent living.
- There is a distinction between what is referred to as matrimonial property and non-matrimonial property. Matrimonial property is that acquired during the marriage (other than by inheritance or a gift) and will include assets such as the family home. The non-matrimonial property is property that the husband and wife bring with them into the marriage or acquire by inheritance or gift during the marriage.

- In the case of a short marriage then fairness may well require that the matrimonial property should be divided equally, but not the non-matrimonial property. As years go by and the marriage is longer, the distinction between matrimonial and non-matrimonial property will diminish.

The full implications of these decisions continue to be debated by the lawyers and judges practising in the Family Division and there is considerable uncertainty as to how income should be dealt with in cases where there is both substantial capital and income but not enough capital to enable both spouses to be fully independent of each other. Each case will continue to be argued on its own facts.

### The Overriding Objective

The ancillary relief rules are a procedural code with the overriding objective of enabling the Court to deal with cases justly.

Dealing with a case justly includes, so far as is practicable:

- Ensuring that the parties are on an equal footing;
- Saving expense;
- Dealing with the case in ways which are proportionate:
  - to the amount of money involved
  - to the importance of the case
  - to the complexity of the issues; and
  - to the financial position of each party
- Ensuring that it is dealt with expeditiously and fairly; and
- Allotting to it an appropriate share of the Court's resources, while considering the need to allot resources to other cases.

The Court must seek to give effect to the overriding objective when it:

- Exercises any power given to it by the ancillary relief rules;  
or
- Interprets any rule.

The parties are required to help the Court to further the overriding objective.

## **The parameters**

The factors that directly impact the shape of the order that a court is likely to make (if an agreement cannot be negotiated) include:

### **The length of the marriage**

- Co-habitation versus marriage
- Co-habitation before marriage

### **Income**

- Earning capacity
- Ability to work / illness
- Support whilst re-training

### **The needs of each party**

- What is really meant by need and how it is calculated

### **Conduct (if serious)**

- What conduct is considered and how it is factored in

### **Assets/Liabilities**

- Matrimonial versus non-matrimonial assets
- Former Marital Home
- Pensions
- Cars
- Chattels (house contents)
- Debts/Loans/Credit Cards
- Mortgage
- Growth of assets since separation
- Disposal of assets

### **Contribution**

- Contribution of the homemaker vs breadwinner
- What counts as an exceptional contribution?

### **Children**

- Number and ages of children
- Educational plans / expectations for children
- Residency plans for children

### **Lifestyle during marriage**

- House/Cars/Holidays/Private Schooling
- Typical monthly expenditure during marriage

### **Compensation**

- Main carer's career sacrifice