

NOWELL MELLER SOLICITORS LTD FAMILY LAW SERVICE

LEAFLET NO.8 – DIVORCE OR SEPARATION AND FINANCIAL MATTERS

When a married couple separate or divorce, or when a civil partnership is dissolved, there are usually a number of practical issues which need to be addressed.

Divorce or dissolution proceedings merely enable a marriage or civil partnership to be dissolved. In most cases (although pension rights may automatically be lost) finances will be unaffected. So, for example, joint bank accounts or mortgages will remain in joint names. That is why it is very important for financial matters to be dealt with so that a fair division of all family property can be carried out.

Reaching Agreement and Consent Orders

All property - typically a house, car, savings and shares are matrimonial assets. A pension fund is an asset, even if the pension is in payment. If the parties cannot agree on a fair division of these, the Court can order any of the property to be transferred from one party to the other or sold. It does not matter whether the property is in joint names or in the name of just one party to start with.

Hopefully, even though a relationship may be over, and even though relations may have broken down between the parties, a couple can still often cooperate sufficiently to reach a workable agreement in respect of their assets and liabilities (their debts), so that each party and any children of the family can be properly provided for, not only at the time of the termination, but in the future. Of course, this depends on how much money is available.

Solicitors can assist the parties in reaching agreement because they can apply the legal principles to the particular circumstances of the case. Each case is different, so even through well-meaning friends and relatives may want to give advice, it is essential to get professional help since you may be bound by an agreement which could affect your whole financial future.

The starting point, before any negotiations begin in respect of financial settlement should always be a full and frank disclosure by both parties so that each and their advisor are aware of the true extent of the assets and liabilities. Only then can negotiations start with a view to reaching a workable agreement.

If an agreement is reached, and a Decree has been made (see Divorce Leaflet), the parties can apply to the Court for a consent order to confirm their agreement and to give it the legal status of a binding order. This is the only way to ensure that all existing and future claims between the parties are disposed of and is essential if a 'clean break' is desired.

What happens if no agreement is reached?

If agreement cannot be reached, then a party may ask the court to decide by making an order reflecting their view of what the settlement should be. These proceedings are usually called 'Ancillary Relief Proceedings' as the decision is secondary or 'ancillary' to the termination of the relationship.

Even if court proceedings for Ancillary Relief have started, they can be stopped if the parties reach an agreement. Most cases end in this way avoiding a final court hearing which would increase both tension between the parties and emotional and financial costs.

It is possible for the parties to agree terms of settlement that a Court would not be able to impose upon them. This means that an agreed settlement can be very flexible and is more likely to fit the circumstances of the case with both parties feeling that they have had a say.

Basic Principles

The criteria which the Solicitor uses for the purposes of negotiations and which the Judge will use if there is a contested hearing are to be found in Section 25 of the Matrimonial Causes Act, 1973.

Factors which will be taken into account include:

- (a) the needs of any children of the family,
- (b) the length of the relationship,
- (c) the earning capacity of each party, now and in the future,
- (d) the state of health of each party,
- (e) the contributions made to the marriage by each party,
- (f) the needs of both for income and capital.

In the widely reported House of Lords case, that of *White v White* in 2001, it was emphasised that the court's objective is fairness to both parties. This can often mean something different to each party.

It is clear, however, that there is no place for discrimination on the basis that the parties have taken different roles in the marriage, e.g. with the wife staying at home to look after the children and the

husband being the main earner. That case also said that the Judge should consider what would be an equal division of the assets and give clear reasons for explaining why the actual order departed from that yardstick of equality, as it would be likely to do in most cases. However, later cases have emphasised that it is not so much equality of division as equality of outcome that should be considered here. The objective here is fairness, not equality.

Further guidance has been given by the House of Lords in the linked cases of *Miller v Miller* and *McFarlane v McFarlane* in 2006. Three important principles may justify the redistribution of resources from one party to the other:

- (1) the needs generated by the relationship between the parties;
- (2) compensation for relationship-generated disadvantage (e.g. where one party foregoes a career in order to focus on the upbringing of the children);
- (3) the sharing of the fruits of the matrimonial partnership.

These factors will differ in importance from case to case and the ultimate objective is to give each party an equal start on the road to independent living.

Conduct

The conduct of the parties or the blame for the breakdown of the relationship would be taken into account in only the most exceptional circumstances (e.g. severe financial mismanagement or heavy gambling leading to bankruptcy). 'Ordinary' behaviour such as adultery or domestic violence is not usually taken into account when finances are being considered.

In the vast majority of cases, the court will not seek to weigh the parties respective conduct or attitudes in an attempt to assess responsibility for the breakdown of the marriage, or to attribute legitimacy or reasonableness to the wish of one party to continue the marriage against the wishes of the other.

Contribution

The question of contribution is now approached in much the same way as conduct. Only if there is such a disparity in the parties respective contributions to the welfare of the family that it would be inequitable to disregard it, should this be taken into account in determining the shares.

Periodical Payments (Maintenance)

A periodical payments order can be made to afford compensation to a party as well as to meet their financial needs. A clean break is not to be achieved at the expense of a fair result. Similarly, there is no reason to limit a periodical payments order to a fixed term in the interests solely of achieving a clean break.

Assets

The views of the court differ as to the treatment of assets. Some senior judges accept the notion of family assets, ie. Those generated by the joint efforts of the parties and so would exclude not merely property brought by the individual into the relationship or acquired by inheritance during the marriage, but also business or investment assets generated solely or mainly by the efforts of one party during the marriage.

The duration of a marriage may justify a departure from the yardstick of equality of division in relation to non-family assets. The nature and source of the property and the way in which the couple had run their lives might also be taken into account. However, in the vast majority of cases, which are driven by need, such arguments will be irrelevant.

Separation Agreements

Sometimes separating couples agree not to divorce or to divorce after 2 or 5 years separation. In these circumstances if they are able to agree on financial matters at the time of their separation, a formal separation agreement can be drawn up clearly stating the terms of the settlement.

Such an agreement can have the legal status of a contract. If both parties have had legal advice and provided there has been full and frank disclosure by each, the agreement will be binding and legally enforceable.

On a later divorce, the separation agreement can be redrafted into the form of a court order and an application made to the court by the parties for an order by consent as detailed above.

It is important to remain aware that you cannot in a separation agreement remove the power that the Court has to come to a different settlement if it considers this just. If the agreement is properly prepared and has been entered into freely with proper legal advice the Court is less likely to set it aside.

Any agreement or Court order obtained by fraud or where there has not been full and frank disclosure is open to later challenge. The Court will not hesitate to set aside any order obtained in such circumstances. The dishonest party may have to bear all the legal costs involved and may also be prosecuted for perjury. Honesty really is the best policy.

NOTE: The above is intended as a general guide for your information. It is NOT intended as a substitute for proper legal advice. Each case is different and advice cannot be given without a proper analysis of your own circumstances.

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