

### GUIDANCE SHEET

The central concern to many parties upon a marriage breakdown is how the assets will be divided and how they will be able to provide for the future. We can advise you as to your position and settlement options.

Either party to the marriage can apply to court for financial provision, known as Ancillary Relief.

#### What is taken Into Account?

The Court takes various matters into account when considering what order should be made. All of the circumstances of the case are considered but the first consideration is the welfare of any children of the family under the age of 18 and, in particular, the court has regard to the following matters:

- (a) The income, earning capacity, property and other financial resources which each spouse has or is likely to have in the foreseeable future including, in the case of earning capacity, any increase in that capacity which it would be, in the opinion of the court, reasonable to expect a person to take steps to acquire.
- (b) The financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future.
- (c) The standard of living enjoyed by the family before the breakdown of the marriage.

- (d) The ages of each spouse and the duration of the marriage.
- (e) Any physical or mental disability of each spouse.
- (f) The contributions which each spouse has made or is likely to make in the foreseeable future to the welfare of the family, including any contribution by looking after the home or caring for the family.
- (g) The conduct of each spouse, if that conduct is such that it would in the opinion of the Court be inequitable to disregard.
- (h) The value to each spouse of any benefit which one spouse because of the divorce will lose the chance of acquiring (most usually pension provision).

The aim of the Court is to achieve fairness. Following a landmark decision called *White v White* in 2000, the Court has to consider an equal division of assets built up during the marriage, unless the marriage was of short duration, or the assets are insufficient to satisfy capital needs in particular rehousing. Often a key factor is the reasonable needs (especially housing needs), which often overrides an equal division of assets.

In most cases, the courts no longer have power to make orders for child maintenance except by agreement; an application to the Child Support Agency has to be made for child maintenance to be assessed.

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We will advise you which factors in your particular case are relevant.

### What Orders Can Be Made?

Spouses and former spouses have rights to make financial claims against each other which include:

#### (a) Transfer of Property

This property could be the former matrimonial home or other property i.e. a business, contents, investments, policies and any item of value.

The property could be transferred by one spouse to another or to a child of family. The property could also be sold.

#### (b) Lump Sum

Payable to one party for their own benefit or for a child.

It may be paid to 'balance' the respective financial position of the parties.

#### (c) Maintenance

Known as periodical payments.

This can be monthly/weekly or annual payments for as long as the Court thinks fit for an adult, and for a child usually under the age of 17.

Applications to Court for child maintenance are limited, as maintenance is generally arranged via the Child Support Agency.

#### (d) Pensions

There are several options regarding pensions:-

- I. **'Off-setting'**. The court looks at the transfer value of the pensions and decides that the person without significant pensions should receive an equivalent payment in capital from some other source. This is only possible where there is spare capital available after rehousing you and your spouse.
- II. **Pension sharing**. This means that an existing pension fund is divided, not necessarily 50–50, and passed over to the other person which, in practice, in most cases, will then have to be invested in a new pension.
- III. **Pension Attachment**, formerly known as 'earmarking'. The court has the power to order that a proportion of a pension, once received both as to the annual income and the lump sum, should be paid to the other spouse. The court has the power to order that a proportion of any death in service benefit should be paid to the other spouse as well.

The problem with pension attachment orders is that they are complicated and if the person receiving the attachment order remarries then no continuing annual payment will be made. If someone changes job then that will mean that an order regarding a death in service benefit will be of no effect.

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This is a highly complicated area and almost every case is different. We will advise you as to the best option for your circumstances.

### What Do I Do If I Think My Spouse Is Disposing Of Assets or spending money down?

If you believe your spouse has disposed of assets with a view to frustrating your claims for a financial settlement or is about to do so, the court has wide powers to deal with such situations, and you should let us know immediately.

Under section 37 of the Matrimonial Causes Act 1973, the court can stop someone from carrying out a transaction or from transferring assets out of the country or to someone else. The court can set aside (i.e. unscramble) certain transactions which have already been carried out where they were planned with the intention of defeating a claim for financial settlement.

These powers can be used whilst a financial application is proceeding or, ongoing in some cases after a financial provision order has been made. However, the Court cannot order a transaction to be set aside if someone bought the asset from your spouse without knowing that the motive behind the sale was to reduce the assets to defeat your claim.

If you apply to set aside a transaction made by your spouse then, if the transaction took place less than three

years before your application, the Court will presume that the transaction took place to frustrate your financial claim unless there is convincing evidence to the contrary.

### How Do I Bring The Right to Make a Financial Claim To An End?

These rights can only be brought to an end in two ways: -

1. A Court order.
2. Where one or both spouses do not wish to proceed with financial claims then, provided the court agrees that such an order would be appropriate, an order can be made dismissing the financial claims.
3. Someone obtains a divorce and then re-marries.
4. Unless that person has already applied for an order for a lump sum or transfer of property which they are seeking either in the divorce petition or by way of formal application on Form A before they re-marry, then they are caught in 'the re-marriage trap'. The effect of this trap is that they have lost the right to make those financial claims against their former spouse.

Should the spouses decide not to obtain court orders dealing with financial provision and in the event that the re-marriage trap does not

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apply, then the claims which each of them have against the other are simply left open. This situation is unsatisfactory in that it creates a degree of uncertainty because it leaves the possibility of one spouse making a claim against the other at any time. However where one spouse's financial position is likely to improve substantially it may be in the other's interest to delay a final financial settlement.

Where neither spouse wants to claim against the other it is usually better for an application to be made by consent for the respective claims of each spouse to be dismissed.

Clearly, this is an important matter and please telephone us if you wish to discuss it in further detail.

### Procedure For Making A Financial Claim

This is only a summary and we will discuss the full procedure with you in more detail:-

- (a) **Application** lodged – Form A
- (b) **Disclosure** of finances by both parties – Form E
- (c) **First Appointment** – a short informal hearing before the District Judge. The purpose is to identify issues in dispute, to decide if further documentation (disclosure) is necessary and to allow the Judge to make any orders to assist the preparation of the case.
- (d) **Financial Dispute Resolution** appointment (FDR). A fuller but longer hearing, both parties are actively encouraged to negotiate a settlement. The Judge will give his opinion as to the merits of each parties case and explore the possibility of settlement. If no agreement is reached, a final hearing date will be fixed.
- (e) **Final Hearing** A different Judge will hear evidence and impose a decision on the parties.

### What is the Court's Role?

- The Court will ensure both parties are on an equal footing.
- The Court will aim to save expense and ensure that the proceedings are proportionate to the amount of money involved, and complexity of issues.
- It will fix timetables
- It will identify issues in dispute at the earliest opportunity.

You will be:-

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- Encouraged to cooperate with the other party.
- Encouraged to negotiate.
- Encouraged to comply with Court timetables.

**However if a party does not stick to the Court timescale or Order (s)he may be punished with a costs order.**

### Even Though Proceedings Are Ongoing Can I Make Offers to Settle?

It is in your interest to make offers of settlement and it is a requirement of the Court process. These proposals can only be made once we have received full financial disclosure and we will guide you and assist in formulating settlement offers. At the First Appointment and FDR the Judge will hear these proposals and will comment upon them.

### What Financial Information Do I Need To Prepare?

Both you and your spouse have an absolute duty of full and frank disclosure of your financial positions and of any significant changes during the case.

It is important that you keep all your financial documents, such as bank statements, credit card statements and pay-slips and P.60 and that you do not destroy them, since you may be required to produce copies of these documents to the Court. You will also

need to collate pension valuations, share certificates, mortgage redemption statements and details of all investment policies you own. We would suggest that you keep all financial documents in a ring-binder in date order.

With regard to your application for financial provision, it will be necessary for you to provide full disclosure of your financial position. This is to show the nature and extent of your income and assets past, present and future.

Even after court proceedings have commenced it is very important that we try to reach agreement with your spouse as to the order which should be made. Agreement is generally a more satisfactory way of resolving a dispute than a contentious court hearing because it avoids acrimony, ill-feeling and, it avoids additional costs being incurred.

### Can We Try and Reach Agreement Without Court Proceedings?

Court proceedings are expensive and we would encourage early settlement where possible. An agreed order therefore may very well save you money.

We must not aim for an agreed order however without ensuring that it is fair. We will only advise you to consent to an agreed order if we consider that the provisions of that order are appropriate.

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Should agreement prove possible, it is still necessary to obtain a court order reflecting that agreement. However, there is a simple procedure which avoids either of the spouses or their solicitors having to attend court. This involves preparing a 'statement of information' which is completed with some basic details including ages of the parties to the marriage, the length of the marriage and their respective financial means in terms of income, property and savings. This is then signed by you and your spouse. We will also prepare a consent order which embodies the agreement which has been reached and this is signed and sent to the court.

Provided the court is satisfied that the order is appropriate and fair in the light of the details on the statement of information, and the parties individual circumstances then the order will be made by the court.

### Costs

At every stage of appearance at Court we have to provide, as do your spouses solicitors, a schedule of costs to the Court, which has to be in prescribed form. The costs incurred by you in the financial court proceedings are incurred in particular in the preparation of your Form E, and before and at each appearance at court.

**The vast majority of cases are settled and never go to a final hearing. Our objective is for you to**

**reach an agreement if possible with your spouse earlier rather than later.**

The general rule is now that the court will not make an order requiring one spouse to pay the costs of another spouse. However the court may make such an order at any stage of the case where it considers it appropriate to do so because of the way in which one spouse has conducted their case, which includes before the case was started.

Therefore costs incurred by both spouses will be a liability, which will normally have to be financed out of existing assets during the case, in so far as this is possible.

In deciding what order if any the court should make regarding costs, contrary to the general rule that there should be no order made regarding costs, the court must have regard to:

- (a) any failure by a spouse to comply with court rules and guidance;
- (b) any open offer to reach agreement made in the case – this excludes any letters written on a 'without prejudice' or 'without prejudice save as to costs' basis;
- (c) whether it was reasonable for either spouse to raise, pursue or contest a particular allegation or issue;
- (d) the manner in which a spouse has pursued or responded to the

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- financial claims made, or any particular allegation or issue;
- (e) any other aspect of a spouse's conduct/behaviour only in respect of the case itself, which the court considers relevant; and
  - (f) the financial effect on either spouse of any costs order.

It is not possible to rely on any offer made, regarding costs, which is 'without prejudice'. It is no longer possible to make proposals to reach an agreement on a 'without prejudice save as to costs' basis, under what was known as the Calderbank rule.

We will always advise if it is appropriate to seek an order for costs.

### What About Wills?

If you own property jointly with your spouse you are likely to own the property as 'joint tenants'. This means that, if one of you dies, the survivor will be entitled to the whole property, even if divorce proceedings have been started or you are divorced, and irrespective of any provision in a Will or if no Will has been made irrespective of the intestacy rules.

It is possible to prevent this occurring by preparing a simple document known as a notice of severance which you should sign and which must be sent to your spouse for signature. Once you have both signed this it will then be lodged at the Land Registry. After the notice has been sent to your spouse, even if they do not sign and return it,

the property will then be owned by you both as 'tenants in common'. This means that, in the event of you dying before your spouse, your share in the property will pass according to the terms of your Will or under the rules of intestacy if you have no valid Will.

Therefore, in order to ensure that your spouse does not become entitled to your share in the property in the event of your death it will be necessary for you to prepare a Will and a notice of severance.