



BRIEFING

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Divorce and Financial Provision: Dividing up the assets

Introduction

Sorting out the finances on divorce can be the most difficult and acrimonious part of a marriage breakdown to resolve. Financial settlements can, however, be reached both swiftly and amicably, as this briefing note will hopefully demonstrate.

In England and Wales there are no rules setting out precisely how assets and income will be divided on divorce as the Courts. Instead, the Courts have a very wide discretion and must take into account all the circumstances of each individual case and the factors set out in a statute called the Matrimonial Causes Act 1973 at section 25.

These factors include:

- The parties' financial needs;
- The parties' financial resources;
- The standard of living enjoyed by the parties before the breakdown of the marriage;
- The ages of the parties and the duration of the marriage;
- Any physical or mental disability of either party;
- All contributions made by either party, including any contribution made by looking after the house or caring for the family; 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 each. 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 now use when deciding financial provision cases. Since the House of Lords (now the Supreme Court) case of *White v White [2001]* we have two important guiding principles:

- That financial and domestic contributions should be treated equally.
- That the “yardstick of equality” (the equal sharing principle) should always apply, unless there are good reasons to depart from it.

More recently in the jointly heard case of *Miller v Miller; McFarlane v McFarlane [2006]* 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. That there should be compensation for any economic disadvantage suffered by a party.
- iii. If (i) and (ii) have been met, the principle of “sharing” the fruits of the marriage should then apply.

The Courts strive to ensure that financial provision is “fair” between the parties. However, 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 any minor children and the aim is to provide a result that is fair without discrimination.

Once a Court has determined how the assets are to be divided, the Court may make a variety of financial orders, including maintenance payments, lump sum payments and property transfer and pension orders to give effect to their decision.

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 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.

The parties may also seek to reach agreement through mediation, which is, on the whole, more cost-effective and efficient than Court proceedings. A mediator will meet with the parties and identify the issues that remain in dispute and will assist the parties in trying to reach a fair agreement.

Alternatively the parties may engage in a round table meeting with their solicitors to try and resolve issues directly through face to face discussions with the support of their legal team.

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 and determine what further steps, if any, the parties must take. 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 a final order determining the financial provision of the parties on divorce.

Initiating Court Proceedings – The Procedure

Eligibility

Either party to divorce proceedings (i.e. the Petitioner or the Respondent), can apply for a

financial order. If, however, a party has remarried without having made an application, either in the divorce petition or separately, then they are barred from applying for a financial order unless they are applying for a pension sharing order or are applying on behalf of the children. If, on the other hand, the party remarries after making an application but before a Court Order has been made, the application will still proceed. The person making the application is known as the Applicant, and the person against whom the application is made is known as the Respondent, regardless of the role each party took, or is taking, in the actual divorce proceedings.

Which Court?

The application for financial orders must be issued in the same Court as the divorce proceedings.

Mediation Information and Assessment Meeting (MIAM)

Before an Applicant can issue financial proceedings, they must attend a mediation information and assessment meeting, or MIAM. There are exemptions to the requirement for a MIAM, such as cases where there is evidence of domestic violence, child protection concerns or the Respondent is unwilling to attend a MIAM by way of example. During the meeting, the Applicant will consult with a mediator and determine whether the dispute could be resolved other than through court proceedings, for instance, through mediation. The Respondent is expected to attend the MIAM but they are not obliged to do so. The Applicant and Respondent may attend the MIAM together or, if appropriate, separately.

If, having attended the MIAM, the Applicant still wishes to issue Court proceedings, the Court may enquire at the first hearing as to whether either or both of the parties attended a MIAM. Before proceedings can be issued, the MIAM mediator must certify that the Applicant has attended an information meeting.

Application

In order to make an application for financial orders, the Applicant must complete a Form A and file it at Court, even in cases where a financial order application was made in the prayer of the divorce petition. When completing the Form A, the

Applicant must specify which financial orders they are seeking from the Court.

Preparing for the First Appointment

Once an application has been 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 a range of financial information, stipulated under the Court rules. The disclosure requires supporting documents to be provided, including 12 months' bank statements and house valuations.

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

No later than 14 days before the First Appointment, the parties must file at Court and serve on each other:

- A Statement of Issues – which is a summary of the matters in dispute.
- A Chronology – including key dates showing the history of the marriage.
- A Questionnaire – which will set out, and request any further financial information or documents that the other party may think relevant.
- A Notice (Form G) stating whether it will be possible to use the First Appointment as a Financial Dispute Resolution hearing (FDR) (on which more below).

In addition, a summary of each party's legal costs to date (Form H) must be prepared and served on the other side at the hearing.

The First Appointment

This is the first Court hearing before a District Judge. It must 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 an FDR appointment which is usually scheduled within 6 to 8 weeks thereafter.

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. However, 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 or referred to again in another context 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. Each party must again provide a summary of their legal costs to date at the hearing.

The District Judge may not impose an order on the parties at an FDR but, if an agreement is reached, then he or she can grant an order on the terms agreed. If there is no agreement, the District Judge will generally set the matter down for a final contested hearing. The Judge who heard the FDR cannot conduct the Final Hearing.

The Final Hearing

The Final Hearing will usually last 2 to 5 days. The Judge will review documents and hear evidence from the parties, as well as expert evidence from accountants or valuers, where relevant.

At the end of the hearing, the Judge will make an order 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 in family proceedings is that each party bears their own cost unless one party has behaved badly during the process, for example, by failing to negotiate or hiding assets.

Once an order has been made the various provisions will need to be implemented. Matters for implementation can include the transfer of property, the sharing or splitting of pensions, drafting wills, taking out insurances, and raising and paying lump sums.

If the parties are unable to reach an agreement between them but do not wish to issue Court proceedings, they can also consider instructing an arbitrator to decide their case for them. The arbitrator would be instructed jointly by the parties and the instruction would need to be privately funded. The financial disclosure process would need to be completed and the arbitrator would need to be presented with all the facts of the case and both sides' arguments. The arbitrator would then confirm their decision as to an appropriate settlement which the parties would agree beforehand to be bound by.

Reaching an Agreement – an Alternative to Court Proceedings

Many parties reach agreement on how to divide the matrimonial assets without the input of the Court, either on the breakdown of their marriage or before the marriage itself, in what is known as a "pre-nuptial agreement".

For further information on such agreements, please see our Briefing Note "Pre-nuptial Agreements – a way of reducing resentment and uncertainty if your marriage breaks down".

If the parties agree to reach an agreement outside of the Court arena, it is common practice for the

parties to provide voluntary disclosure by way of Forms E. However, should a party not agree to voluntary disclosure, we would normally recommend that the other party issues Court proceedings as this will impose a Court timetable on the uncooperative party.

It is important to remember, that even once Court proceedings have been commenced, the parties are able to reach an agreement at any stage prior to the final hearing. Indeed the parties are encouraged to do so by the Court throughout the process.

The importance of having any agreement formalised as a Court order

The recent Supreme Court case of *Vince v Wyatt* [2015] has provided a salutary reminder of the importance of having any agreement reached between the parties confirmed by a Court order.

In that case, Ms Wyatt successfully argued that, despite the fact that the parties divorced in 1992 at a time when they were both penniless, she should be allowed to continue her claim for financial provision against her ex-husband, issued in 2011. This was only possible because the parties' potential respective claims for financial relief against the other were never dismissed. Such a dismissal is only possible by way of an order (whether by consent or not) made by a Court. At the time of the divorce Mr Vince was a new-age traveller with no financial resources, however, by 2015 he was the sole shareholder of a company worth an estimated £57million.

The facts of *Vince v Wyatt* are, of course, extreme and, although it seems unlikely, particularly given Lord Wilson's comments in his judgment in the case, that Ms Wyatt is unlikely to be awarded a significant sum of money by any judge, should the financial proceedings continue to trial, the case provides a wider lesson that must be emphasised to all clients. It is now absolutely imperative that parties finalise their financial arrangements and dismiss all future claims against the other by obtaining any agreement confirmed by an order of the Court.

The Court will not necessarily approve a consent order, as it is under a duty under the Matrimonial Causes Act 1973 to inquire whether the draft consent order represents a fair outcome. In

addition, the Court will not approve the consent order until a Decree Nisi has been obtained in the divorce proceedings.

Once approved, as with any other Court order, the provisions of the Court order will need to be implemented.

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 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 mediation, around the table meetings, or correspondence, can mean that Court proceedings can be avoided and an agreement reached without the high financial and emotional cost of Court proceedings.

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