

A Guide to Divorce & Financial Provision: Dividing up the assets

WinckworthSherwood



Winckworth Sherwood Family Guide

This guide is intended to provide an overview of financial provision in divorce and includes:

- the principles of financial provisions
- the financial orders that the court can make
- the alternative options to issuing proceedings
- issuing court proceedings

If you would like to discuss anything raised in this guide, our experienced family law team is here to help. Their contact details can be found on the final page.

For more information, please visit
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Sorting out the finances on divorce can be the most difficult part of marriage breakdown to resolve. However, financial settlements can be reached swiftly, fairly and amicably with early legal advice.

The Courts have a wide discretion when dividing up assets and income on divorce and will be guided by the statutory factors set out in section 25 of the Matrimonial Causes Act 1973.

The Court has a duty to consider all the circumstances of the case, with the first consideration being the welfare of any children of the family.

The factors that the Court will have regard to can be summarised as follows:

- the parties' financial needs;
- the parties' financial resources;
- the standard of living enjoyed by the parties before the breakdown of the marriage;
- the parties' ages and the duration of their marriage;
- any physical or mental disability;
- all contributions made by the parties, be it financial or in relation to the parties' children and their home; and
- in exceptional circumstances, the conduct of the parties, for example making false statements or wilful non-disclosure during Court proceedings.

The Court also has a duty to consider whether a clean break, which has the effect of severing the parties' financial obligations to one another, is achievable. An income clean break will rarely be appropriate if the parties have young children and/or there is a financially weaker party. In such circumstances, the Court is likely to order, at a minimum, 'nominal' maintenance payments. A capital clean break, however, can usually be obtained.

Principles

The law surrounding financial remedies is discretionary and each case will depend on its specific facts, but through case law several principles have emerged.

1 Sharing: The division of assets will be measured against the 'yardstick of equality'. This provides that matrimonial assets will generally be divided equally and there should only be a departure from this if there is good reason. The primary reason to depart from an equal division will be to meet the needs of one of the parties. This is common in situations where one party needs the family home, or a greater percentage of the proceeds of sale, in order to raise the children. Where there are enough assets to meet the needs of both parties, the Court will look to divide the matrimonial assets equally. If a party's needs can be met from their share of the matrimonial assets (plus their non-matrimonial assets, if any), the other party's non-matrimonial assets (which can include their pre-marital and/or inherited assets) will usually not be divided.






2 Needs: When deciding whether it is necessary to depart from an equal division of the matrimonial assets, the Court will first make sure that the needs of both parties are met. These include, but are not limited to, housing needs, income needs and the needs arising from raising children. Needs will be assessed generously and the Court will relate needs to the standard of living enjoyed by the parties during the marriage.

3 Non-discrimination: In dividing the assets, except in the most unusual cases involving huge financial contributions (hundreds of millions of pounds), the Court will not discriminate between the financial and domestic contributions of the parties.

4 Compensation: The Court can take into account any financial disparity between the parties caused by the way they lived during their marriage. For example if one party stopped working to raise the children, then that party can be compensated for the loss of earning potential caused by spending time out of work. However the principle of compensation is very rarely raised successfully and in a recent and well reported case in which an award of compensation was made, the judge was careful to note that it is unusual to find significant relationship generated disadvantage that may lead to a claim for compensation. Instead the result of any disparity is often reflected in an award to meet needs.

Financial orders that the Court can make

The Court has wide powers to make orders. The most common orders are:

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Periodical payments (spousal maintenance): the ordering of maintenance payments will be suitable when the receiving party has insufficient assets of their own income to have a clean break straight away. These will be aimed at meeting the income needs of the financially weaker spouse. Parties should work towards financial independence from their former spouse as soon as practical and it is increasingly rare to see maintenance provisions for life. Periodical payments are usually for a fixed period (which in some cases can be extended) and can be tapered down. A flexible approach is taken in order to meet the needs of the specific family concerned.
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A lump sum payment: this may be appropriate when there is sufficient capital for the parties to have a clean break for both income and capital. It may also be appropriate when transferring an asset, such as a property, to one party in exchange for a lump sum.
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Property adjustment order: this provides for the transfer (which could be an outright transfer or a transfer subject to a charge) or settlement of property (creating a trust over property) between the parties.
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Order for sale: the Court may order that one (or more) of the parties' properties is sold and the proceeds divided (in whatever shares are appropriate) between the parties.
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Pension sharing order: this may be appropriate where one spouse has much greater pension assets than the other which were built up during the course of the marriage, or simply to equalise pension provision on retirement.

What about child maintenance?

Apart from when the parties have agreement, the Court does not have jurisdiction to make orders for child maintenance. Assessments of child maintenance are within the remit of the Child Maintenance Service ('CMS'), except where one of the parties is an exceptionally high earner or where school fees are concerned (when the court has jurisdiction).

Orders for maintenance for children made by consent are only binding for the first year in which the order was made, after which time either parent can apply to the CMS for the level of child maintenance payable to be reassessed.

Alternative options to issuing proceedings

Resolving finances on divorce does not have to be litigious, and there are various ways in which negotiations can take place outside of Court.

- 1 Pre- and post-nuptial agreements:** Provision for what will happen to your assets in the event of marital breakdown is likely to be set out in a pre- or post-nuptial agreement if you and your spouse have entered into one. Contact us for our guide to Pre-nuptial and Post-Nuptial agreements.
- 2 Negotiation:** Negotiation will usually be conducted through solicitors. The process begins with both parties providing voluntary disclosure of their assets, liabilities and income. Then, through proposals, the parties decide how to divide the assets and their agreement is recorded in a consent order which must be lodged with the Court for its approval.
- 3 Mediation:** The parties will conduct negotiations through a mediator who will identify the issues in dispute and assist the parties in narrowing these in order to reach an agreement. Mediation can take place over several meetings and, if an agreement is reached, it will be put into a consent order.
- 4 Round table:** Round table is a form of negotiation conducted by the parties and their solicitors. Round table negotiation will always be face to face and involves the parties and their solicitors going into a room and trying to divide up the assets. It can be an effective way of making a lot of progress to get matters agreed. If an agreement is reached the terms will need to be put into a consent order.
- 5 Arbitration:** If the parties cannot reach an agreement but do not wish to enter into court proceedings, an arbitrator can be jointly instructed. The financial disclosure process would need to be completed and the arbitrator would need to be given all the relevant facts, based on which (s)he will make a decision as to division of the parties' assets, which they will be bound by.

Issuing Court proceedings

Before an application for financial proceedings can be made, the parties (or just the applicant) must attend a Mediation Information and Assessment Meeting (MIAM). During the meeting a mediator will assess whether the dispute can be resolved without court proceedings. If it cannot, the mediator will sign a MIAM certificate which, save for some exceptional circumstances, is needed before a Form A can be issued.

Application

After the MIAM, an application for financial remedies can be made by completing a Form A and filing it at court. Once the Court has received this it will allocate a date for the First Appointment.

Prior to the First Appointment, both parties must disclose all relevant financial information regarding their finances by exchanging a Form E and supporting documents with the other party. Even once proceedings are issued, the parties can - and are encouraged to - attempt to reach settlement without the need for attendance at any Court hearings.

First Appointment

The object of the First Appointment is to define the issues in dispute and deal with ongoing case management but it also presents an opportunity for the parties to settle if the issues are capable of being resolved. The First Appointment must be attended by both parties and the judge will provide case management directions and schedule the Financial Dispute Resolution appointment.

Financial Dispute Resolution Appointment

The Financial Dispute Resolution appointment ('FDR') is a 'without prejudice' hearing before a District Judge. This means that the negotiations are intended to be genuine attempts to settle, and any concessions made by the parties in trying to reach settlement cannot be referred to in any other court context should the negotiations fail. During the FDR, a non-binding indication will be delivered by the judge explaining how that judge considers the case would be decided had it been the final hearing. The parties can then use this as a basis for their negotiations, and most cases will settle at this stage in the proceedings.

If the parties are unable to reach an agreement, the judge will give directions and list the matter for a final hearing before a different judge.

Private FDR hearings, which happen outside of court with the parties appointing the 'judge' jointly, are becoming increasingly popular (not least as a result of the Covid-19 pandemic) in place of 'in court' hearings. Such hearings can be conducted remotely with ease as necessary.

Final Hearing

The final hearing will usually last between 2 and 5 days, depending on the matters in issue. The judge will review documents and hear evidence from the parties, as well as expert evidence if required.

At the end of the hearing, the judge will give an order on the division of assets and whether one party should pay maintenance to the other. The Court will also decide who pays the costs of the proceedings. It is usual practice for each party to meet their own costs in financial remedy proceedings. If one party has been unreasonable in their position and has failed to negotiate, or has wilfully failed to disclose assets or income for example, this may result in that party being ordered to meet some of the other's costs, although each case is decided on a case by case basis.

It is important to remember that even once proceedings have started the parties are able to, and are encouraged, to reach an agreement at any stage before the final hearing.

Conclusion

Legal proceedings can be expensive and it is in both parties' interests to attempt to reach agreement between them as far as they can.

A genuine desire to reach agreement, together with the earliest, clearest legal advice, and utilising the best means of negotiation suited to each case, can and should lead to a fair agreement being reached without the high financial and emotional cost of litigation. Here at Winckworth Sherwood, we are committed to achieving exactly that.

Key contacts



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Tim is a Partner in Winckworth Sherwood's Private Client team. He regularly advises on trusts, estates and succession planning, including the many tax issues that arise with the same and the problems presented by the loss of mental capacity.



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- Tax and estate planning
- Succession planning
- Probate
- Trust management
- Family law
- Philanthropy
- Family office services
- Employment
- Commercial and residential real estate
- Dispute resolution
- Reputation management
- Cyber security
- Data protection
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