



Financial Settlements: Alternatives to Court

There are a range of different ways in which a financial settlement can be reached between a couple on the breakdown of their marriage. The options range from the least legal involvement through to full use of the court process.

The Options

1. Agreement between husband and wife, with background legal help

It may be possible for an agreement to be reached in discussions, without any involvement from solicitors, or with some advice in the background if either party requires it. If an agreement can be reached this way, the only legal assistance required may be

- (a) an overview of whether the terms of the agreement are broadly fair and in line with normal legal principles and
- (b) drafting of the documents required to achieve a binding agreement or court order.

It is still recommended that each party takes independent advice, and there must be an exchange of financial information, though this can be quite limited if that is agreed.

Neither party has to attend court to obtain a financial order by consent.

If a financial agreement is not recorded in an order of the court, it will not usually be enforceable or binding, and each party's financial claims against the other remain open. It is therefore strongly recommended that an informal agreement should be translated into a binding order of the court, made as part of divorce proceedings, in order to obtain certainty and finality.

2. Mediation

If both parties agree, they can see a specialist family mediator to assist in reaching a financial settlement. We can provide the details of specialist mediators if required. The mediation process usually involves each party meeting the mediator separately to begin with, and then joint meetings are arranged in which the mediator assists in resolving issues in dispute.

The mediator cannot give advice. For that reason it is common for each party to have a legal adviser in the background from whom he/she can take advice as the mediation process progresses.

If an agreement is reached in mediation, the mediator will draft a Memorandum of Understanding, which is still an "off the record" document which is not enforceable. It is therefore normal practice for each party to take independent advice after reaching an agreement in mediation, with a view to getting a binding agreement or order drawn up.

The procedure is then the same as at 1 above.

3. Collaborative Law

Collaborative Law is a comparatively new process in which each party instructs a specialist collaboratively trained lawyer. The clients and the lawyers then sign up to a Collaborative Law Agreement in which they agree to cooperate to work out arrangements for their divorce and the financial settlement, and to work within the principles of the collaborative process.

If an agreement cannot be reached within that process, the stakes are high because the solicitor has to stand down and the client has to start again with a new lawyer.

The exchange of information and the negotiation around the finances takes place largely in meetings rather than in correspondence. For Collaborative Law to work, there must be a real commitment on both sides to reaching an agreement, and a willingness to be completely frank about exchanging financial information.

We have two trained collaborative lawyers at Burges Salmon. More information can be obtained about the collaborative process at www.resolution.org.uk "alternatives to court".

4. Voluntary disclosure between solicitors, agreement in negotiation

If it is too difficult to discuss financial matters directly with the other spouse, and particularly where the finances are complex, it may be unrealistic to think that direct negotiations or mediation will work. This is particularly true where one party has more financial information or knowledge than the other, so that there is a sense of imbalance in the negotiation process.

In these circumstances it is recommended that each has their own solicitor, but this does not mean that there has to be a battle. Most family solicitors are willing to work towards a negotiated agreement without using the court process and will commit to negotiating in a non-confrontational way, if that is what their client wants.

It is therefore very common to agree between solicitors at an early stage that they will each provide and exchange detailed financial information on an agreed timetable, followed by discussion about settlement either by correspondence or in meetings with everyone present. It may be necessary to obtain valuations of properties or other assets as part of the negotiation process.

The voluntary process does rely on both sides cooperating in providing full financial information, and answering questions raised.

continued

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Once a settlement has been agreed, an order has to be drafted, signed and filed with the court to make the settlement binding. As before, neither party is required to attend court.

5. The Court Process

At any time after divorce proceedings have been filed, either spouse can file an application at the court office for a timetable to be fixed for reaching a financial settlement. This may be necessary where

- (a) negotiations have broken down without a settlement being reached, or
- (b) one party does not cooperate/is unlikely to cooperate with providing financial information, or
- (c) there is a dispute about the true value of an asset which cannot be resolved, or
- (d) there is a willingness to reach an agreement but a determination to do this within a strict timetable, so that there will be a definite end to the process.

The application starts a court timetable running, which both parties have to comply with. Even if the court process is used (for example to obtain missing financial information), the vast majority of people reach an agreement along the way.

The court process involves the following steps:

(a) Disclosure

The court timetable provides for each party to complete a sworn financial statement called a "Form E", seven weeks after the application to the court is made and five weeks prior to an initial hearing.

If that statement is incomplete, each party can file a questionnaire raising additional questions.

(b) First Directions Appointment ("FDA")

The FDA is an administrative court appointment designed to get all the necessary financial information together. The District Judge can order either party to answer further questions about the finances, and may order that there should be valuations of assets. The court will then set the date for the next hearing.

If the issues are simple there can be negotiations even at this early stage.

(c) Financial Dispute Resolution Appointment ("FDR")

The FDR is a court-led settlement meeting where the judge hearing the case gives an opinion on what the outcome might be if the matter went to a final hearing, and encourages a negotiated settlement where possible.

The court cannot impose a decision at the FDR. It is intended just to encourage settlement. The judge who hears the FDR cannot then deal with the matter again as he/she will have heard about the negotiations that are taking place, and about offers for settlement made prior to that date.

Many cases settle at the FDR stage, or soon after it. It is possible to reach a settlement at any stage in the court process, and negotiations will usually continue, and are encouraged, after the FDR stage, with a view to avoiding the need for a final hearing.

(d) Final hearing

If an agreement is not reached, a further hearing is scheduled where each party's case is put before the court and the judge decides how the finances should be settled. Very few cases get to this stage, known as the "Final Hearing" and there are strong incentives not to go that far.

The costs are significant, and it is a stressful process. Final hearings can also be risky and unpredictable, as the judge has a wide discretion as to the orders he can make.

It will however be necessary to go this far if there is a failure to negotiate, or one person takes a completely unreasonable negotiating position.

This whole process from start to finish can take around a year from the initial application to a final hearing. In most cases however a final hearing is not necessary, as an agreement is reached, so the timescale will be much shorter.

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