



Financial Settlements on Divorce and Dissolution

These notes apply to both married couples who are divorcing and to civil partners wishing to dissolve their partnership.

Most divorcing and separating couples are able to agree a financial settlement. Generally, they negotiate a settlement which is similar to the sort of order a court would be likely to make, with as much or as little help from legal advisers or mediators as they need. Sometimes, but by no means always, the court process is used to provide a timetable and structure to the negotiations. The court can also assist with the negotiation process and the majority of cases which use the court process still settle by agreement.

If there is a divorce (or dissolution of a civil partnership), an order should be made by a judge confirming the terms of the financial agreement to make it absolutely binding. If the settlement has been agreed this can be done by post without the parties going to court.

Basic Principles

There are no absolute legal rules about how assets are divided and about how much money has to be paid to one or other spouse, since this area of the law is based on discretionary principles. Those principles are set out in the Matrimonial Causes Act 1973 and guidance is given by the courts from time to time about how that Act should be interpreted.

There is no presumption that each spouse is automatically entitled to 50% or any other share of the joint assets and income, but equal sharing of assets has become increasingly common, particularly where the marriage has been a long one.

The aim is to find a tailor-made solution, whether by negotiation or through the courts. There is a list of factors (known as the "Section 25 factors", from the Matrimonial Causes Act 1973) which must be considered. They include the present and future financial needs, resources and earning capacities of both parties, their ages, the length of the marriage or civil partnership, their health, their standard of living during the marriage and the contributions of each to the family and finances. First consideration must be given to the welfare of any dependent children.

In many settlements, the predominant consideration is future needs and the solution is based on the level at which it is appropriate for those needs to be met. If there are more than enough assets to meet needs, the court will often expect a broadly equal division of the assets and pensions. If one party does not want an equal division, he or she may wish to argue for a departure from equality, on one or more of the following grounds:

1. Inherited wealth.
2. Assets owned before marriage.
3. Illiquidity of assets.
4. Unequal earning capacities.

After a long marriage it may however be difficult to argue for an unequal division. That is because the courts now consider that financial and domestic contributions should be given equal weight and that this should be reflected in the asset division.

Short Marriages

Where the marriage has been short, the court will consider whether the assets were built up before or during the marriage. Assets built up during a marriage and the family home ("marital property") will usually be divided equally. Assets acquired before the marriage and sometimes inherited property ("non-marital property") may be ringfenced and therefore not subject to the same equal division.

The Effect of Behaviour

Unreasonable behaviour is only relevant to a financial settlement if it is so extreme that it is far outside the range of normality. A great many spouses have complaints on marriage breakdown about the other's behaviour, but only a tiny minority will have behaved in such a way that their conduct will be taken into account in making the financial settlement.

Financial misconduct during the divorce process (such as a failure to disclose assets) may however lead to a financial penalty.

Maintenance and the Clean Break

A clean break is a settlement in which it is ordered that neither party can make any financial claims against each other in the future after the settlement is concluded. If one party cannot earn at all, or can only earn a little, a clean break will only be possible if he or she has enough capital to meet future needs.

There is no fixed percentage for spousal maintenance, but in many cases it will be in the bracket of 30%-40% of net income. It may be much less if the recipient has independent earnings. The courts encourage women who have not worked to be financially independent after divorce and to earn what they can, subject to their age, health, family commitments, and the availability of appropriate employment. An older woman with no employment history will not be expected to work if there are assets or income available to support her.

If the income is very high, maintenance orders may be made to allow the recipient to build up capital to meet needs in retirement.

Where there are dependent children, a clean break settlement will not be ordered unless there is sufficient capital to meet the needs of the parent who cares for them.

One party can be ordered to pay maintenance to the other for an indefinite period, or sometimes for a specified time. A short term order may be appropriate if a wife needs time to re-train. Maintenance orders come to an end automatically only if the recipient remarries or forms another civil partnership, and in the meantime either payer or recipient can apply to the court for a variation if circumstances change.

A party who receives maintenance can also come back to court years after a divorce to seek a cash sum or pension sharing order to "buy out" claims to maintenance. For the paying party, this is a big incentive to achieve a clean break at the time of the divorce.

Maintenance for Children

A clean break settlement dismisses claims for maintenance between spouses, but claims for maintenance for children cannot be dismissed.

Maintenance for children is governed by the Child Support Agency though many people prefer to agree their own arrangements rather than use the CSA, which can be slow and inaccurate.

Under CSA rules, the non-resident parent will generally be required to pay 15% of net income for one child, 20% for two and 25% where there are three or more children to support, regardless of the circumstances of their main carer. There are upper limits on these figures for high earners. These figures can be reduced depending on the number of nights the child spends with the non-resident parent. Despite the apparent simplicity of the formula, there is considerable underlying complexity, particularly where the payer has investment income and capital.

School fees and provision for children in further education are still dealt with by the courts outside the CSA.

If parties to a separation, divorce or dissolution agree the level of child support they can apply to the court for an order to be made in the terms agreed and so avoid the CSA. However under the new CSA system those agreed arrangements cannot override the powers of the CSA indefinitely.

The Family Home

Both husband and wife have the right to occupy the family home until the marriage is ended by divorce, even if it is owned by one of them. This right can only be overturned where there has been violence. It may however be possible to agree that only one party occupies the family home while the financial settlement is worked out.

The family home is not necessarily sold when there is a divorce or dissolution. A sale and division of the proceeds to meet needs may be necessary if there are insufficient other assets available. The level at which housing needs should be met for both parties will be one of the first issues to be resolved.

Even in short marriages, where one party brought the family home to the marriage, it will normally be treated as marital property and subject to equal division in the financial settlement.

Business Assets

The value of a business will be taken into account in working out a division of capital, even if one party has been solely responsible for building it up, and even if the value in it cannot be realised immediately. Frequently an independent valuation of the business by an accountant will be needed before a settlement can be reached.

Whether a party runs a business alone or in partnership, or has shares in a private company, the courts are reluctant to make an order which will destroy that business or its viability. If capital is required from a business the aim will normally be to find out how it can be released without damaging the business.

The court will however consider forcing a sale of the business if there is no other way of raising an appropriate lump sum to compensate the other party.

Other Assets

All assets owned by the parties, from paintings to life insurance policies and from holiday houses to building society accounts, are taken into account in the financial settlement. The court can order the transfer of any assets from a husband to a wife, or vice versa, or order a sale as part of the financial settlement.

Some assets are more difficult to realise than others. It can be difficult to force the sale or transfer of overseas assets directly, but a lump sum can be ordered which means that overseas assets have to be sold in order to pay the lump sum.

Trusts and Inheritances

The court will look at the reality of the situation where one party is a beneficiary under a trust. For example, if trustees have been paying income to the beneficiary wife and providing capital on request, the court may assume that this will continue even if the trustees are not strictly obliged to pay her. If a trust is deemed to be a "nuptial settlement" then the court may order that the trust be varied as part of the overall settlement.

Expectations of possible future inheritance are usually irrelevant. The courts recognise that wills can be changed.

Where funds have been inherited during a marriage, it may be possible to argue that they should be excluded from the financial settlement, but this argument will not apply to most cases.

Pensions and Insurance

(This section assumes for the sake of a simple explanation that a wife wishes to claim against a husband's pension but the same rights apply vice versa, and to civil partners).

On the final decree of divorce, the wife often loses potential entitlement to a widow's pension or death in service benefits from her husband's pension and she may not have built up her own pension. The wife may need alternative provision.

Possible solutions include giving the wife maintenance or capital instead of pension, making alternative insurance arrangements or giving a proportion of a retirement lump sum to the wife when the husband receives it.

The courts can also order "pension sharing", the division of a pension fund between husband and wife at source. This gives the wife a freestanding pension fund to which she is entitled in her own right, and can be a convenient way of meeting future needs as part of the overall package.

New Spouses and Co-habitees

The financial situation of a new partner is usually only relevant insofar as it relieves the husband or wife of expense. If, for instance, the wife plans to live with her new partner who owns a house, less weight may be given to her wish to buy a house for herself in the immediate future.

Any maintenance order comes to an end when a recipient remarries. If a wife receiving maintenance cohabits instead and her new partner supports her, the ex-husband can apply to have the maintenance reduced or extinguished. However, living with another person will not in itself bring the right to receive maintenance to an end.

Timing

A financial settlement can be worked out at whatever time one is needed. This may be:

1. when a couple decide to separate and find a solution by voluntary agreement; or
2. when divorce proceedings are issued (or any time afterwards, as long as the person applying has not remarried).

Assets are valued at the date when the financial settlement is being worked out, which may be different from the date of separation.

Orders requiring parties to transfer property, pay lump sums to each other, or share their pensions can only be made after a decree nisi of divorce or dissolution. Spouses are, however, legally obliged to maintain each other and their children during the marriage as well as after the marriage has ended. The court can order regular monthly or weekly maintenance payments to a party while the marriage still exists and after it has ended.

Even if everything has been agreed, a court order should be made in the terms agreed. If no order is made, claims may be made many years after the end of the marriage.

Tax and the Date of Separation

If assets are sold or property transferred between the parties, capital gains tax may be a problem. It is essential that advice is taken as early as possible during the tax year in which separation (not divorce or dissolution) takes place.

Gathering Information

The first step towards a settlement is for both parties to exchange full details of their financial circumstances. Neither the solicitors, the court, nor the parties themselves can know whether a settlement is reasonable unless they have all the relevant information.

All assets, liabilities, income and likely changes of circumstances must be disclosed to both solicitors. If either party intends to remarry or live with a new partner, that too must be disclosed.

Information is often exchanged on a voluntary basis, but if either party refuses to provide the information or answer reasonable questions, the court can insist they do. There is a standard form on which financial information is normally exchanged. Decisions are made at that stage about which assets must be independently valued by property or business valuers, if their values cannot be agreed.

Failure to disclose information can lead to a settlement being set aside even after a court order has been made.

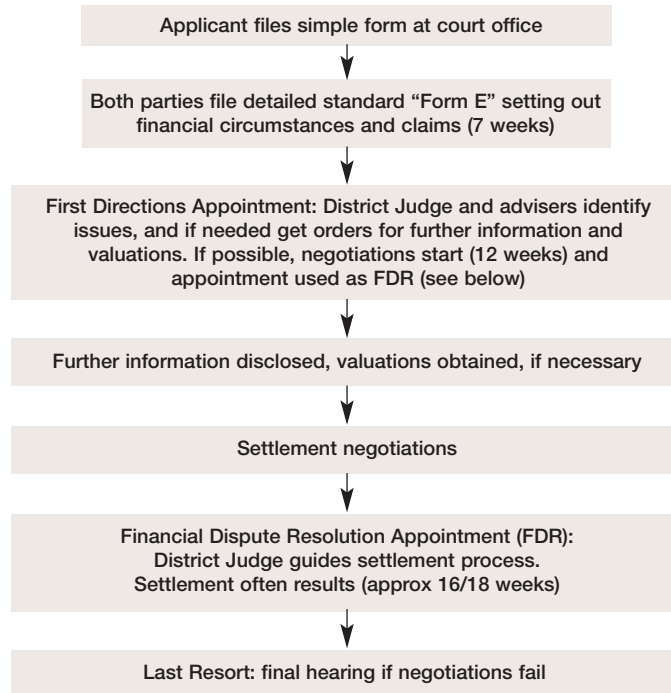
Agreement or Court Process?

The next step is to try and negotiate a settlement. A meeting in the early stages between the parties and their solicitors may be helpful, even if it only narrows down the areas of agreement and dispute. Agreement is often reached by correspondence between solicitors, and the court will then be asked to confirm the agreement so that it becomes binding.

If agreement cannot be reached or there is a refusal to cooperate with disclosure or the negotiation process, the court process can be an effective way of achieving results. Negotiations can continue throughout, and there is a court directed negotiation process in all courts. Only if the negotiations break down will there be a final hearing. The majority of cases do not go to a final hearing, but at that stage a final order can be imposed by a judge. A flowchart is attached which shows how the court-directed process works.

A final court hearing is however usually a last resort. At the final hearing the decision on all issues is made by one judge, who has a wide discretion. It is therefore risky and should only happen where all possibilities of settlement have been exhausted.

Finances: How the Court-Directed Process Works



Where possible the First Directions Appointment (FDA) and the Financial Dispute Resolution Appointment (FDR) will be heard together to save time and costs.

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