

## **FINANCIAL CLAIMS UPON DIVORCE**

### Introduction

When couples separate one of the most challenging and difficult matters that they can grapple with is that of money and how to deal with the assets that they both have. More often than not these assets will have been accrued by them during the course of the marriage and on occasions assets will have come to one party or the other by way of, for example, inheritance, a previous divorce settlement or even after separation but prior to dealing with financial matters between them.

There are, of course, alternatives to proceeding direct to court and we would always encourage separating couples to consider this. To this end it has been a requirement since April 2011 that before applying to the court couples should first explore the possibility of mediation as being an alternative route to settlement by attending a mediation information and assessment meeting (MIAM). Mediation is not, as yet, compulsory as, at present, the system is designed to provide a routine assessment of suitability for mediation in the hope that couple may prefer to follow this route.

However in the event that a couple cannot reach agreement the court can be asked to make an order in terms of the division of their assets between them. The downside is that the court has a wide discretion when it comes to considering what decision it wishes to make and therefore what one party feels that they should be entitled to is not always what they end up with.

When dealing with financial matters between you, whether negotiated or whether contested in court, it is essential that both parties provide the other with full and frank disclosure of their financial circumstances thus ensuring that any agreement between them or settlement made by the court is fair.

Please bear in mind that while on occasion parties can settle matters by way of a 'clean break' which means no on-going maintenance by either party to the other and an acceptance that there should be no further claim by either against the other, this is not always possible. On occasions there are simply insufficient resources available to the parties to make this possible so, for example, maintenance payments may be required from one party to the other and this could be for joint lives or for a fixed term, for example, until such time as one spouse returns to

work when the children are older or when a party remarries.

### Scope of the Court's jurisdiction

The court has wide powers and can order the following:

- a transfer of property from one party to the other, a transfer of a joint property into the sole name of one of the parties or allowing one party to remain in the property with the other party retaining an interest in it not to be realised until a later date, for example, when the youngest child completes full-time education;
- a transfer of a tenancy from one party to the other or a joint tenancy into the sole name of the one of the parties;
- a sale of property owned by one or both of the parties and a related distribution of the proceeds to either one or both of the parties;
- a payment of a lump sum from one party to the other or to a relevant child of the family;
- a future payment of a lump sum or maintenance to one party out of the money which would be due to be received by the other party upon their retirement or, if it should occur, by way of a death in service benefit ('pension attachment');
- a variation of a party's pension provision for the benefit of the other (a 'pension share'). Please note that the value of a pension is able to be 'offset' against the value of other assets which can then be transferred to the party who does not have the benefit of the pension.

### Factors to be taken into consideration when making a decision

In the first instance the court is to give first consideration to the welfare, while a minor, of any children of the family who have not attained 18 years of age. After this the court shall have particular regard to the following matters:

- the income, earning capacity, property and other financial resources which each of the parties to the marriage 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 in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

- the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- the standard of living enjoyed by the family before the breakdown of the marriage;
- the age of each party to the marriage and the duration of the marriage;
- any physical or mental disability of either of the parties to the marriage;
- the contributions which each of the parties has made or is likely to make in the foreseeable future make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

In principle there is no particular reason why one factor should outweigh the importance of the others listed above however that is not to say that in some cases a factor such as the length of the marriage or the age of one of the parties will not take up more of the court's time. In such circumstances it might be that one factor will prove to be more important than the others. When deciding whether and how to exercise its discretion the court has a duty to have regard to all the circumstances of the case and should seek to achieve a situation of fairness between the parties.

### Financial Remedy procedure

The process in regard to Financial Remedy applications is now streamlined into the First Appointment, the Financial Dispute Resolution Hearing and the Final Hearing.

In order to commence proceedings a party must issue an application for a Financial Remedy with the court by way of Form A. As at July 2013 the cost for issuing the application is £255 (this is subject to periodic changes so always worth checking). The application should set out all forms of Financial Remedy that are being sought on behalf of the party making the application.

When the application is issued the court will fix an appointment at court not less than 12 weeks and not more than 16 weeks after the date of the filing of the application. Within 4 days beginning with the date on which the application was filed, a court officer will serve a copy of the application on the respondent to the application and give notice of the date of the first appointment to both the applicant and the respondent.

Not less than 35 days before the first appointment the parties must simultaneously exchange a financial statement known as Form E with the other.

Not less than 14 days before the first appointment each party must file with the court and serve upon the other party:

- a concise statement of the issues between the parties;
- a chronology;
- a questionnaire setting out by reference to the concise statement of issues any further information and documents requested from the other party or a statement that no information and documents are required, and;
- a notice stating whether that party will be in a position at the first appointment to proceed on that occasion to a Financial Dispute Resolution Hearing.

### The First Appointment

The First Appointment must be conducted with the objective of defining the issues and saving costs. At this hearing the court will deal with the following:

- the extent to which the questionnaire from each party shall be answered, which documents are required to be produced and giving directions as to what future documentation may be required;
- give directions as to valuations of all assets owned jointly or by either party and the obtaining of any necessary expert evidence;
- give directions as any other evidence sought which might include a narrative affidavit where specific issues have been raised i.e. a contribution made by one party;
- give directions as to any further chronologies or schedules which might be required;
- give directions to progress the matter to a Financial Dispute Resolution Hearing.

## The Financial Dispute Resolution Hearing (FDR)

This appointment is arranged for the purpose of discussion and to explore the possibility of a negotiated settlement. The role of the Judge falls into two phases the first being an early neutral evaluation and the second being mediation in an attempt to bridge remaining gaps between the parties. A Judge who has been involved in an FDR hearing will not be the Judge who sits at any final hearing and any views expressed as to potential settlement by him or her are not binding on any Judge at a final hearing.

## The Final Hearing

In preparation for the final hearing and not less than 14 days prior to it the applicant must file with the court and serve on the respondent to the application an open statement which sets out details of the orders that they wish the court to make at the hearing. Not more than 7 days after this document is received the respondent must file with the court and serve on the applicant their document in response dealing with the orders that they wish to be made.

The hearing will not be before a Judge who has previously dealt with the Financial Dispute Resolution Hearing because what is said at that earlier stage is privileged and should not be referred to unless both parties consent to this. Both parties should attend for cross-examination by the other party or their representative. At the hearing itself all involved should try to adopt a realistic approach bearing in mind that the Judge will be focussing on how best to distribute the available assets between the parties and how best to achieve a fair outcome.

*Members of the family team of 12 College Place understand the worry that accompanies the breakdown of any relationship and the fears about the consequences that this can have on financial matters for both parties. Matters can become complex and it is sometimes easy to get lost in legalese and feel that you are simply in a process. We can help you through the process, talk through your options for early settlement and get to the issues quickly. Above all we aim to take a sensible and pragmatic approach to your case with a view to saving you unnecessary expense and angst.*