

20. ANCILLARY RELIEF – THE LAW

(FINANCIAL APPLICATIONS IN DIVORCE AND JUDICIAL SEPARATION)

In divorce or judicial separation proceedings, both you and your spouse have the right to apply for maintenance, capital, property or future pension entitlement against each other

Claims by or against your Spouse

In deciding what, if any order to make, the Court considers these factors under section 25 of the Matrimonial Causes Act 1973:-

1. The needs of any minor or children.
2. The income and earning capacity of the husband and wife.
3. Property and other resources available to those parties.
4. The needs, obligations and responsibilities of both parties.
5. The pre-separation standard of living of both parties.
6. The age of the parties and the duration of the marriage.
7. The health of both parties.
8. Past, present and future contributions by either party to the welfare of the family.
9. The conduct of both parties (if it is particularly bad and financially relevant).
10. Loss of pension rights and other future benefits to either party.
11. Prospects of remarriage.
12. The likely costs of the case (e.g to be repaid by you to the Legal Services Commission under the Statutory Charge or to be met by you direct).

The Court of Appeal in the case of Charman v Charman [2007] 1 FLR 1246 provides the most helpful guidance as to the approach of the courts when considering the question of financial and property division upon divorce. It built on the high profile House of Lords judgments in the cases of Miller and McFarlane where a three strand approach was set down:

- a) Financial needs
- b) Compensation
- c) Sharing

Charman explains that the starting point is that property should be shared equally unless there is a good reason to depart from equality. To examine this we must deal with a 2 stage process:

- a) what is the matrimonial property, income and other resources? (ie. what is in the pot?)
- b) how should they be distributed in line with the balancing exercise in section 25 of the Matrimonial Causes Act 1973? (ie. how should the pot be divided?)

The court's ultimate duty is to achieve fairness by reference to the 3 strands above.

It is important to note that where the needs of the parties exceed sharing the financial needs will take priority.

If you and your spouse are already in similar financial positions, then you can seek by consent or by order of the Court to have all claims dismissed. What this means in practice, is that you will not be able to make a financial claim for yourself now or in the future against your spouse, and your spouse will similarly not be able to make a claim against you. This would apply both to claims arising from the marriage, or a claim made against your estate on death.

Once a claim has been dismissed, that will be the end of the claim for all times, unless an Order was made on the basis of willful and substantial non disclosure or misinformation.

If you remarry – you are barred from applying for financial provision against this spouse.

If you leave it too long to make the claim – say a number of years – the Court may reduce or refuse your claim, stating that you have encouraged your spouse to believe no claim was forthcoming.

Claims by or for Children

Where there are children of a marriage, an application may be made on their behalf, or by the children themselves once they are eighteen, for financial assistance for as long as they are dependent due to their minority or where they are continuing in full time education.

The maintenance needs of children are most usually dealt with by the Child Support Agency. In fewer cases this will be dealt with by the Court by way of a child maintenance order. This could be the case for example where the child is a step-child or is continuing in education to eighteen or beyond, or where the party or the child is not habitually resident in the UK, or where a child is or has been married, or where school fees are sought, or where the parties are particularly wealthy and/or the child has unusual income needs, or where there is an agreement for child maintenance made under Section 8 (5) of the Child Support Act.

A child maintenance order for the natural children of the parties can be made where the parties agree. In the absence of agreement the court has no power to approve an order of this type and the parties must resort to the Child Support Agency. Any child maintenance provision within a consent court order can be opted out of by either party upon giving notice to the other after a period of 12 months has passed since the making of the consent order.

If your case does not fall within these exclusions, child maintenance will be dealt with by the Child Support Agency in the usual way. The parent not living with the child will have to make periodical payments of maintenance of such amount as determined by the Child Support Agency under the Statutory formula. Please note that the level of child maintenance is non negotiable under the formula. However if you or your spouse is dissatisfied with a CSA Assessment, there is a right to appeal, subject to time limits. An Appeal must be received within 28 days of the decision appealed being notified, ignoring the day notification is given. Notification is treated as made two working days (including Saturday) after posting by the CSA. The Child Support Appeal Tribunal Chair Person may extend the time for appealing so that the appeal can be considered, but only if there are special reasons. There is no appeal against a refusal to extend time. We can advise you on this should the occasion arise.

The level of child support will be reviewed annually.

In relation to a child, the Court, where it has authority to deal with the matter, will have regard to the following:

- a) The financial needs of the child.
- b) The income, earning capacity (if any), property and other financial resources of the child.
- c) Any physical or mental disability of the child.
- d) The manner in which the child is being educated or was expected to be educated.
- e) The Parties' income and/or earning capacity.
- f) The Parties' present or future financial needs and responsibilities.
- g) The Parties' standard of living prior to the marriage breakdown
- h) Any physical or mental disabilities of the Parties.

Additionally, an application can be made for a lump sum or sums on behalf of any child who has any unusual and worthy one-off capital need, in order to meet some or all of that financial need. This, for example, could include the cost of a course of private medical treatment.

Variation

Where there is a Maintenance Order either for the spouse or for the child, application can be made to the Court to vary it upwards or downwards, or even to discharge the same if appropriate, at any time during the currency of the order, if there is a change in circumstances of any of the parties involved to justify such a variation.

Upon variation, the Court has power to remit any arrears which have accrued. This is not guaranteed. The Court has the power to substitute a lump sum or property adjustment order when it discharges a periodical payments order. This in effect allows the Court to capitalize maintenance. The Court may also order that no further applications may be made for periodical payments, secured periodical payments or an extension of any term granted by the Court.

Claim

This leaves you with the choice -

- a) Making a claim against your spouse (or waiting for your spouse to make a claim against you) **or**
- b) Having the court dismiss your claims against each other **or**
- c) If you believe that your respective positions are more or less equal, and are likely to stay this way, simply leaving matters as they are.

If you do intend to pursue a financial settlement, we can advise you on what your possible options are. We can then try and achieve the fairest possible settlement for you by negotiation or Mediation, failing which your only option would be to take Court proceedings.

In deciding how to pursue a financial settlement, where you have the benefit of CLS Funding, do not forget the operation of the Statutory Charge. We direct you to the leaflet "Paying for your Legal Aid" should this be relevant to you.

At that stage we shall advise you how long the case is likely to take, and indicate, where possible, the likely outcome of case.

If in the meantime you are not receiving financial support from your spouse, and it appears likely that you should be entitled to such support, you can discuss with us the possibility of making an application for an Interim Maintenance Order.

If you do make a claim against your spouse, this might be for income (maintenance) capital or a home (lump sum and/or property adjustment). Please note that the Court has power to make orders over most assets of value, including pensions and insurance policies. All valuable assets including the home will be valued as part of the process. Failure to make full disclosure may put a party at risk on costs. Should we not be satisfied that the other spouse has fully disclosed all relevant information, we are entitled to seek that further information by questionnaire.

Once we are both satisfied that the financial evidence is complete, then you will be able to make or receive offers of settlement, or should negotiation fail seek a fair Order from the Court.

At the relevant time, should you so require, we can consider with you what the effects of a Financial Order would be, by which we mean the Welfare Benefits and tax consequences, and the amount of costs, to be deducted under the Statutory Charge where you have the benefit of CLS Funding. We will insist any detailed tax implications are dealt with by an expert such as an accountant as we do not have the expertise to do so.

Protecting your Position

Whilst you are considering your position, you may need to take urgent action if you are given good reason to suspect that your spouse is deliberately dissipating, hiding or transferring assets to avoid giving you your fair share in financial proceedings in due course. If you can satisfy the Court that your spouse is doing this or is imminently to do this, we can attempt to obtain an order (Injunction) to prevent this if you find out in time, or to set aside the transaction if you find out too late.

Please also be aware that you may need to sever or limit any joint financial liabilities or accounts, until matters can be settled or resolved by the Court. This may mean you have to take action in regard to joint Bank Accounts or Credit Cards, or the supply of utilities. You may also wish to consider making a new Will.

If you are in rented accommodation, please note that either tenant may give valid notice to the landlord to end the tenancy. Be aware therefore of the dangers of voluntarily vacating rented accommodation. Advise the landlord of your intent to remain, if this is your wish. Also ensure that any rent is being paid. Rent arrears may also jeopardise your ability to continue in that accommodation.

If you are living in temporary accommodation, kindly let us know if we might contact the Local Authority in an attempt to expedite a housing application or contact local Housing Associations on your behalf?

Until you make a financial claim, you may need to consider the possibility and availability of a welfare benefit claim.

- a) If you are working fewer than 16 hours per week it may be possible to claim Income Support and/or help with your housing costs (including Council Tax reductions).
- b) If you are in paid work of 16 hours or more per week and have at least one child under the age of 16 (or under 19 and in full time education) there is a possibility of claiming Working Tax Credit.

c) If you are already in receipt of means tested benefits and without sufficient resources to meet the immediate short term needs of yourself and your family, it may be possible to apply for a crisis and/or budgeting loan.

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Disclaimer: The material contained in this fact sheet is for general guidance only. It is specific to the law of England and Wales, and represents a brief outline of the law current as at the date of the fact sheet. It is not intended to constitute, or to be a substitute for, legal advice specific to your case. Dunn and Baker will be responsible only for advice specifically given to you.