

## **ANCILLARY RELIEF HANDOUT**

As a consequence of the breakdown of the marriage, finances also need to be addressed, which is ultimately dividing the assets of the marriage. Financial claims can arise in relation to capital assets, income and pension.

It is important to seek legal advice in relation to resolving the finances within divorce proceedings. The finances can either be resolved amicably between you, with the assistance of an independent third party at Mediation or with the assistance of solicitors. If an agreement cannot be reached using these methods, then Court proceedings will have to be issued to seek a resolution.

What factors do the Court take into account when dividing the matrimonial assets?

The Court will consider all the circumstances of the case giving first consideration to the welfare of any children of the family under the age of 18. It will then consider the following:-

1. The income earning capacity, property and other financial resources which each spouse 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 person to take steps to acquire.
2. Financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future.
3. The standard of living enjoyed by the family before the breakdown of the marriage.
4. The ages of each spouse and the duration of the marriage.
5. Any physical or mental disability of each spouse.
6. Contributions which each spouse has made or is likely to make in the foreseeable future to the welfare of the family including any contribution by looking after the home or caring for the family.
7. The conduct of each spouse if that conduct is that it would in the opinion of the Court be in actable to disregard.
8. The value to each spouse of any benefit which one spouse because of the divorce will lose the chance of acquiring (generally pension provisions).

In order to consider the matter, both you and your spouse have a duty to each other and to the Court to make full and frank disclosure of all material facts, documents and other relevant information. This duty is an ongoing obligation and includes a duty to disclose any material changes after initial disclosure has been given. If you are not sure if a document should be disclosed then you should let us have it.

What Orders can the Court make in relation to the finances?

### **Spousal Maintenance**

You may be entitled to claim maintenance from your spouse if you need financial support, subject to his ability to apply. You can apply before divorce proceedings are issued as well as during and after. If you are both still living in the former matrimonial home but living as separate households within that home you will be able to make a claim.

The longer the marriage and the greater difference in the financial positions between you and your husband then the greater the maintenance obligation will be, particularly if there are children which you are looking after. Spousal

maintenance is unlikely to be payable in very short childless marriages. However the likely success of such an application will always be subject to the claiming party's need and the paying party's ability to pay.

If you and your spouse cannot reach an agreement regarding spousal maintenance the Court can make an Order.

The fact that your spouse may be paying child maintenance does not take away your right to maintenance for yourself. However, sometimes there may not be enough money after child maintenance has been paid to enable spousal maintenance also to be paid.

If you are claiming Benefits you are advised to inform the Benefits Agency of any maintenance received by you and normally this sum will be deducted from benefits. You should in any event consider obtaining Welfare Benefits advice from the CAB. In certain circumstances, indirect payments may not affect your benefits entitlement. We will advise you should this arise.

### **Child Maintenance**

There is a duty for the non-resident parent to pay child maintenance to the resident parent and whoever is in receipt of Child Benefit can make a claim for child maintenance via the Child Support Agency (CSA) or Child Maintenance Enforcement Commission (CMEC).

You can either agree child maintenance voluntarily with your spouse, however if an agreement cannot be reached then an Application has to be made to the CSA. You can consult the Child Support website for further details on submitting an Application and also to calculate what level of child maintenance should be paid.

In the absence of agreement the Court does not have jurisdiction save in certain exceptional circumstances. If an agreement can be reached then it can be embodied in a Consent Order.

If a step-parent has treated a child as the child of the family during the marriage, then he or she may also be liable to pay child maintenance. In this situation an Application cannot be made to the Child Support Agency, such Application would have to be made through the Court. However, the first port of call for any maintenance would be to the natural father.

### **Former Matrimonial Home**

If the matrimonial home is rented in joint names then neither party can be forced to leave without agreement or Court Order. Both of you have the right to occupy. The Court can make Orders to transfer the property, although such an Order cannot be made until Decree Nisi has been pronounced. The Court can also make an Order that somebody leaves the property if they have been violent or very threatening but there are other factors which the Court would have to take into account, including needs and financial resources. We can discuss this in more detail if appropriate.

If the property is rented in one person's name, then the other person will only have the right to occupy the property until Decree Absolute has been pronounced. If there is an issue then a Court Order would have to be obtained if they refused to leave. The Court would still have power to decide the issues of the tenancy and can transfer a sole tenancy into the sole name of the other.

If the Court has to adjudicate on who should have the tenancy it will take into account all relevant factors including residence, care of children, financial positions etc.

If the former matrimonial home is owned in joint names, neither party can be forced to leave with no agreement or a Court Order. Both parties have the right to occupy. Again the Court can make Orders transferring the property although such an Order cannot be made until after Decree Nisi has been pronounced. The Court can sometimes make an Order that someone leave the property if they have been violent or threatening. There are other factors that they will take into account including needs and resources and we can discuss this in more detail as appropriate.

Even if the property is owned in one name the other will have a right of occupation until the divorce is completed. Even then the Court would have to make an Order that the other party leave the property if they refused.

The Court still has the power to decide who should remain in the property and can transfer a home from one person's sole name to the other.

If the property is in the sole name of the other spouse then as discussed we would advise you to register your rights of occupation this would prevent the property being sold or remortgaged without your knowledge and consent.

As well as making an outright transfer of the property into the other person's name, the Court has power to set what share each person shall receive and when they can receive payment. For example the Court has power to order an immediate sale and distribution of the net proceeds in specified shares for each. The Court may also delay the sale until the happening of certain events including when the children have finished fulltime education or the party has remarried.

The mortgage on the matrimonial home may have been supported by an endowment policy and the policy is then treated as a separate asset in which you may have a share. Obviously if the endowment policy does not support the mortgage it is still an asset. There may also be other policies in which you have a share. The surrender values of any policies should be obtained. These policies will be taken into account when dealing with the financial settlement and can be assigned with or without payment from one party to another surrendered or sold.

If the property is held in joint names as joint tenants, it is possible to sever the joint tenancy. Where a property is held as joint tenants, if you die the property automatically passes to the other party. Once the tenancy has been severed the property would not automatically pass to the other party on your death. Instead you would leave a Will indicating to whom you wished your share to pass. This works in reverse in that if you severed the joint tenancy and the other party died first, the property would not automatically pass to you but would pass according to their Will if they had made one.

### **Personal Belongings and Household Contents**

It is generally better if parties can agree amongst themselves how the household contents and other items are to be divided. If agreement cannot be reached the Court can make an Order although it prefers not to do so unless the items are of high value.

The Court will take into account the purpose for which the item was bought and also who purchased it.

Any savings accounts in joint names will also be dealt with. You should consider advising the bank that freezing any joint accounts or joint credit cards in order to prevent the other party running up a large debt for which you would be jointly and severally liable.

If it is considered that there is a provable risk that assets may be disposed of by the other spouse to defeat your claim you can apply to the Court for an Injunction to prevent this. However, we would normally ask the party to agree voluntarily not to dispose of such items before proceeding to issue.

### **Debts and Loans**

Any debts, loans, bank accounts, credit cards which are in joint names remain joint liability until agreement or Court Order. As far as the company involved is concerned you both remain jointly and severally liable for the entire repayment period and the Court cannot alter the terms of the original agreement.

If you leave home you are still technically liable for at least half of any joint mortgage repayments. If you have reached an agreement with the other party before you left that they will make all mortgage repayments, this is not binding on the bank or building society until you are formally released from the mortgage.

### **Pension**

The Court also has the power to deal with pensions and can make a Pension Attaching Order in respect of the pension or a Pension-Sharing Order. It may also be possible to receive a greater share of the current assets in lieu of any pension.

In dealing with the above matters the Court takes into account the statutory criteria laid down in Matrimonial Causes Act 1973 listed above.

Until the financial claims have been dealt with they remain open and your and your partner's right to claim can only be brought to an end in two ways. The first and most usual way is by way of a Court Order and if both of you do not wish to proceed with any financial claim, then providing the Court agrees that such an Order is appropriate an Order can be made dismissing the financial claims.

The second way in which the right can be brought to an end is where a divorce is obtained and the party then remarries. If that person has not already applied to the Court for an Order before they remarry then they are caught in the remarriage trap. The effect of this trap is that they have lost the right to make financial claims against the former spouse. If the former matrimonial home had not been dealt with then the Court could not deal with it under the Matrimonial Causes Act but would have to deal with it under the stricter rules of property rights and does not have such a wide discretion.

Should you decide not to obtain Court Orders dealing with financial claims and in the event that the remarriage trap does not apply, then both your claims are left open. This situation can be unsatisfactory as it leaves open the possibility of one spouse making a claim against the other at any time. If you felt that the other spouse's financial position was likely to improve substantially it may be in your interest to delay a final financial settlement. When either spouse wants to claim against the other it is usually better for an Application to be made by consent for the respective claims of each spouse to be dismissed.

## **Procedure**

Ancillary Relief Proceedings are commenced by preparing the appropriate documentation and filing them at Court with the correct fee.

The Court will issue the Application and list the matter for what is called the First Appointment.

When the Court issues the Application it will also make an Order detailing what preparation needs to be done to prepare the matter for the First Appointment. This includes preparing a sworn statement of your financial circumstances. The Respondent will also have to prepare one and these are exchanged and filed at Court.

When the other party's Form E is received we will be able to consider what information and documents are required from the other party to clarify anything arising from the Form E and to ensure that we have full disclosure of all income and assets.

If any information is missing, this can be requested at the First Hearing.

It is important that both parties attend the First Appointment. If the matter is not agreed then it is listed for what is called an FDR. The purpose of this Appointment is for the parties to attempt to negotiate with a view to settling the matter. If an agreement cannot be reached, then the matter will be listed for a Final Hearing.

At the Final Hearing the Court will have regard to the information provided in the sworn statements and to any other information provided. Both parties may well be called to give evidence and the other party will have the opportunity of cross-examining you.

At the end of the Hearing the Judge will make a decision taking into account the factors listed above and the evidence given.

Even after Court Proceedings have been commenced, it is important that every effort is made to reach an agreement to avoid the Final Hearing and the costs involved.

## **Ancillary Relief Costs**

In relation to ancillary matters, it is extremely difficult to estimate the likely costs to be incurred. Much depends upon the co-operation of the parties and the complexity of the issues to be addressed.

A fairly straightforward case involving the transfer of the former matrimonial home into one party's name where the case settles by way of consent can reasonably be expected to incur legal costs of up to £2000 plus VAT.

Cases involving more complex issues that are disputed but still settled by way of consent could reasonably be expected to incur legal costs of up to £4000 plus VAT.

Where a case becomes more protracted and involves the issuing of proceedings but where the case still settles by way of consent in the end, legal costs to be incurred can reasonably be expected to be up to £5000/£6000 plus VAT.

Where however the case involves the issuing of proceedings which become fully contested costs can reasonably be incurred between a bracket of £6000 up to £10,000 for complicated property cases.

We confirm the above are merely guidelines and cannot under any circumstances be seen as quotations.

**Susan Howarth & Co Solicitors Ltd – January 2014**