



FINANCIAL REMEDY PROCEEDINGS **HANDOUT**

When a marriage or civil partnership breaks down, how the parties will divide and share their property and assets needs to be considered, as well as how they are going to provide for the future maintenance and income needs for both parties and any children.

Whilst some couples may be able to reach settlement themselves, it is important to seek legal advice in relation each party's entitlement.

There are different ways to for parties to try and reach settlement terms, these are:-

1. Mediation

Family mediation is a process in which an independent, professionally trained mediator helps the parties work out the financial arrangements. Mediation is not however compulsory and may not be suitable for all parties. Before financial remedy proceedings can be commenced, the Applicant must complete a Mediation Information Assessment Meeting ("MIAM") (In exceptional circumstances a party may be exempt from this step). If mediation is successful, then a solicitor should be instructed to provide advice on the proposed terms of settlement and draft a Consent Order prepared and filed at Court.

2. Negotiation through solicitors

Each party can instruct a solicitor to advise them on the terms of settlement they should seek. The first step will be for full and frank financial disclosure to be obtained and exchanged with the other party.

Once financial disclosure has been exchanged, negotiations can take place with a view to trying to achieve a fair and reasonable settlement. If terms of settlement are agreed, then a Consent Order should be prepared and filed at Court.

3. Application to the Court for a Financial Remedy Order

If an agreement cannot be reached, then a Court application can be made for a financial remedy Order. The process for which is as follows:-

- We will file your application at Court along with the relevant Court fee.
- The Court issue your application and list the application for a **First Directions Appointment Hearing ("FDA")** usually within 3 to 4 months and will order that both parties file at Court and serve on the other party a Form E with supporting documentation.
- Before the FDA hearing, both parties will file at Court and serve on the other party a concise statement of the issues, chronology and questionnaire/request for any further disclosure sought from the other party.
- The Applicant solicitors will prepare a Court Bundle and Forms ES1 and 2 (which should be approved by all parties) for use by the Judge and parties.

First Directions Appointment Hearing

- This hearing is held in Private; the only persons usually being allowed to be present are the Judge, the parties and their legal representatives.
- The object of this hearing is for the Judge to consider what facts are agreed and not agreed between the parties and to consider what (if any) further evidence or disclosure is required, if required, the Court will Order the parties to provide it.
- The court may Order that expert evidence be obtained (eg. Valuation of property, pension actuary report, accountants report, business valuations etc).
- The Judge will list the next hearing to take place, which is known as a Financial Dispute Resolution hearing ("FDR").
- The First Appointment hearing may have to be adjourned if a party has not complied with the directions of the Court and provided their financial disclosure.

Financial Dispute Resolution Hearing ("FDR")

- Before the FDR hearing the court expects parties to make offers and proposals for settlement, for any recipient of offers and proposals to give them proper consideration.
- In advance of the hearing, the Applicant solicitors will prepare a Court Bundle (which should be approved by all parties) for use by the Judge and parties.
- This hearing is held in Private. The only persons being allowed to be present are the Judge, the parties and their legal representatives.
- The Judge does not make a final decision at the hearing but instead will usually provide the parties with an *indication* of the likely outcome if the matter proceeds to a final hearing. The Judge will encourage the parties to reach settlement.
- If settlement is not reached at this hearing, then the Court will list the hearing for a final hearing.

Final Hearing

- In preparation of the final hearing, the parties must file at Court and serve upon the other party, a detailed statement, their updating financial disclosure and their proposals for settlement.
- The final hearing will not be before the Judge who conducted the FDR hearing.
- At the Final Hearing the Court will have regard to the information provided in the parties statements any expert evidence as well as any other relevant information provided.
- The parties and any experts, may be called to give evidence and cross-examined.
- The length of the final hearing is dependent upon the complexity of the issues and the assets involved and can be any length from 1 day to multiple days.

- At the end of the Hearing the Judge will make a decision and impose this upon both parties.
 - When making the decision, the Judge 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).*
- At each of the above stages, the Judge can make an order requiring one party to pay the costs of the other party, where it considers it appropriate to do so, (ie because of the conduct of a party in relation to the proceedings (whether before or during them)). Therefore, 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.**

THE COURT CAN MAKE THE FOLLOWING ORDERS:-

Spousal Maintenance

That one party pay to the other party maintenance if they need financial support.

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 Maintenance Service ("CMS").

Parents can either agree child maintenance voluntarily or If an agreement cannot be reached, then an application can be made to the CMS.

The CMS website provides further details on making an application and also how to calculate what level of child maintenance that should be paid. There may be an application fee payable to the CMS if application is made through them and a collection fee if maintenance is paid via the CMS.

Application can be made to the Court for “top up” maintenance order where a maintenance calculation has been undertaken by the CMS and the non-resident parents’ gross income exceeds £3000 per week. However, the Court would have to be satisfied that the circumstances of the case make it appropriate for additional child maintenance, to be paid.

School Fees Payment Order

The family court has the power to make an order for a parent to pay or contribute towards the school fees of the child of the family.

The court will consider how the child is currently or was expected to be educated when making the decision. If the child is not being educated privately, it is unlikely that a court will make a school fees order.

The Family (Matrimonial) Home (*Owned Property*)

The Court can make Order;-

- transferring the property to one party or;
- order the sale of the property and the distribution of the net proceeds in specified shares or;
- delay the sale until an event, (ie when the children have finished fulltime education or turn 18, until the remarriage or cohabitation of a party, until the death of a party, or until a specified date).

If the property is in the sole name of one party, the non-legal owner should register Matrimonial Homes Rights against the property to protect their right of occupation and to seek to prevent the property being sold or remortgaged without their knowledge and consent.

The Family (Matrimonial) Home (*Rented Property*)

The Court can Order the transfer the tenancy of the property into one party’s sole name.

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. However, a Court can Order that person be allowed to remain living at the property OR order a person to leave the property if a dispute arose.

Lump Sum Orders

The court can Order a party makes a single payment of a lump sum of money to the other (this payment can be instead of or in addition to Spousal Maintenance).

Therefore, savings of the parties will also be dealt with. Each party should consider whether it’s appropriate to freeze any joint bank accounts or joint credit cards, if is considered that there is a risk that assets may be disposed of by the other party.

Debts and Loans

The Court cannot alter the responsibility for a debt or transfer a debt from one party to the other party's sole name. The Court can however Order one party receives a greater share of the assets, to redress this imbalance.

Pensions

A pension may be a significant asset when considering the appropriate financial settlement. The Court also has the power to make a Pension Attachment Order, a Pension-Sharing Order or Pension Earmarking. The Court can also consider whether to off set pensions against other assets.

- Pension offsetting

The Court can Order a capital payment is made by one party to the other, from a source other than a pension, (i.e. the family home or capital savings). This is only possible where there is spare capital available after the re-housing of the parties has been met.

- Pension Sharing Order

This means that one party's existing pension fund is split, not necessarily equally and passed over to the other person so that they receive a pension in their own right.

Pension Actuarial advice may be required to assist with the calculation to work out the percentage of pension which needs to be shared.

- Pension Attachment Order

Formally known as "earmarking". This is a type of maintenance which requires one party's pension scheme to pay a percentage of their monthly pension income and / or cash lump sum to the other party.

There are several disadvantages to these Orders which include, if the person benefiting from the Attachment Order remarries then the payments will cease, if the person whose pension it is, dies before drawing the pension, the other party's entitlement to the income would be lost. There can be no clean break. Pension earmarking is therefore risky.

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.

Clean Break Order

Preventing either party making a financial claim against the other in the future either in their lifetime or against their estate on death.

OTHER IMPORTANT INFORMATION

Freezing Orders

If a party feels there is a real provable risk that the other party intends to dispose of assets before or during the determination of the outcome of the financial remedy proceedings, the Court can grant a freezing Order, to prevent the other party disposing of or dealing with assets until the conclusion of the financial remedy proceedings.

Remarriage Trap

The Court can make the orders referred to above under the Matrimonial Causes Act 1973. However, it is important that parties are aware of the “remarriage trap. Put simply, if you divorce and then remarry **without** firstly having made a claim for a financial remedy order, either within the divorce application or by issuing an application for a financial order at Court, then you will be unable to pursue an application for a spousal maintenance order, lump sum order or property adjustment order.

Matrimonial Home Rights

When the family home (matrimonial) home is owned by one spouse or civil partner and it is the family home, then you may wish to register your homes rights notice at the Land Registry to protect your interest in the home and your right to live in that property. If the non-owning spouse /civil partner lives at the property, the non-owning / civil partner, has a right not to be evicted by the owner spouse/civil partner, without an order of the court or if they are not in occupation they may be able, with leave of the court, to enter and occupy the home. Registering homes right notice at the Land Registry can give you the following protection: -

A right not to be evicted or excluded from the property (except by a Court Order)

A right to be informed of any mortgage possession proceedings and with the court's permission, take part in the proceedings.

The right for your mortgage or rent payments to be treated as coming from the owner.

If your family home is not owned by you, please advise us immediately so that we may consider and advise you on registering your homes rights.

Severance of Tenancy

In many cases the family (matrimonial) home (or other jointly owned property) is purchased in the joint names of a married couple and held as joint tenants. The effect of this is that the property is owned 100% by you and 100% by your spouse/civil partner. We can alter this by severing the tenancy so that you hold the same as tenants in common in equal shares, the effect being that if you (or indeed your spouse) were to die then your share would pass pursuant to the terms of your Will as opposed to passing to your spouse automatically. If you wish to sever the joint tenancy, please advise us.

Making of a Will

It is important for couples who are separating to consider making a (new) Will. If you already have a Will, then this will remain valid until the time you are divorced. Once Final Order of divorce has been granted the Will is still valid but any reference to your former spouse/civil partner will be disregarded and unenforceable.

If you do not have a Will, and you were to die before a Final Order of divorce is granted, then potentially under the Intestacy Rules, your spouse/civil partner could inherit the majority (or even all) of your Estate. If you were to die after Final Order of divorce is granted, then your estate would pass under the intestacy rules.

Our Wills/Probate department can advise and assist you with making a (New) Will.

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