

Working out the financial settlement

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How do I find out the law on what should be the financial settlement on divorce?

Not easily and certainly not very reliably.

The answer should be that it is found in the relevant legislation passed by Parliament, the Matrimonial Causes Act 1973. Sections 22 to 24 set out the powers of the court when dealing with financial matters on divorce. Section 25 sets out the matters which the court should take into account in deciding what is the appropriate financial settlement. Section 25 is set out at the end of this note.

Unfortunately it doesn't give much helpful guidance on how to work out what a fair financial settlement should be. It is simply a list of factors to take into account.

So if the law is not in an Act of Parliament, where is it?

For the next 25 years or so after the legislation was passed, the general policy of the courts was to provide for the needs of the applicant, invariably the parent with the primary care of children. In many ways, it worked very well indeed. It was based on the concept of one party, invariably the husband, providing for the other, invariably the wife, also often mother and primary parent post separation. It worked well in circumstances where there was a traditional breadwinner and stay at home wife. It was appropriate in cases where there was just enough assets to go round to provide for needs. Where there was insufficient to provide for the needs of two households, the practical reality was that the husband, also often the father, might be left with less than his own needs.

In so-called big money cases, where there was ample amount of money to provide for needs and reasonable requirements, it had the result that the wife, as claimant, would have her needs met but received a very small percentage of the overall matrimonial assets.

In cases of dual earners and cases where one party had given up her career to look after children, the law providing for needs was often unfair and unjust.

As a consequence, pressure built from the mid-1990s onwards for a fairer financial provision law.

What is the White equality case?

In 2000, the House of Lords, England's highest court, decided a case concerning Mr and Mrs White. The facts are not relevant. What the House of Lords said transformed financial provision on divorce in this country and in many countries abroad. The law lords said that for a generation, there had been gender discrimination in the financial provision law of our country, the needs based approach referred to above. They said it was unfair on women who had chosen to stay at home to look after children and had made sacrifices in their careers. It emphasised that the court had to produce a fair outcome. Fundamentally, they said that in very general terms, an equal division was a fair outcome in many cases.

It was made clear that this was not a presumption, a rule to be applied in all cases. It was a starting point, a guide.

The House of Lords said that the previous needs based law was not appropriate in cases where the assets were sufficient to provide for the needs of both parties. Where the assets were not sufficient, then the needs of the parties was still the predominant factor, especially providing for the accommodation

needs of the children during their minority.

Over the next five years, the concept of equality of division became embedded in the financial settlement culture in England and Wales. Many comfortably well off couples simply divided the assets equally. Many couples regarded it as a fair outcome.

Some sophistications were added. It was made clear that liquid and illiquid assets could not be treated alike, so it was unfair if one party ended up with assets which were liquid and the other party ended up with illiquid assets. Similarly, it was made clear that high risk assets and very safe assets could not be treated alike.

Where there were sufficient assets to provide for needs, practice developed in appropriate cases of taking out of the division any pre-marriage acquired assets and inheritances and gifts.

What happened about income and maintenance?

This was left unresolved by the House of Lords. Generally maintenance continued to be on the basis of needs. However where there was a considerable amount of surplus income, the maintenance would be increased including in circumstances where it was expected that it would be used to create savings to allow a later clean break.

What are clean breaks?

In the early 1980s, it was appreciated that there were significant psychological, relationship and other benefits by introducing a clean break between a couple on divorce regarding financial matters. The change in the law in 1984 required the courts to bring about a clean break in as many cases as possible.

It does this by introducing term maintenance orders. This is a maintenance order which continues for a period of years until time when it is expected that the recipient could have become self sufficient. Often this is linked to a period of retraining or to an age when the children may no longer need a mother at home full-time. The court has power as well to say that when this period of years comes to an end, it is not possible for the maintenance then to be extended.

It has been a distinctive feature of English family law over the past 20 years that many cases with a reasonable level of assets have resulted in clean break orders.

What were the Miller and McFarland cases in the House of Lords in spring 2006?

Whilst the solicitor's profession had very largely grasped the major changes produced by the White cases and were settling many of its clients' cases, the High Court and the Court of Appeal in a number of cases involving substantial levels of assets had handed down a number of utterly confusing and contradictory judgments. Technically, the legal profession was obliged to follow these judgments. It was like a game of twister! There seemed no rationale, logicity or consistency. It resulted in the settlement rate declining and more cases being litigated. More help was needed from the House of Lords. This occurred in Spring 2006 in two cases which were heard together.

Mr and Mrs Miller had had a very short and childless marriage. He was worth about £12 million at the time they got married and arguably acquired £15 million in various business transactions by the time of the divorce three years later. What should be the outcome? What was the relevant law in cases of short marriages?

Mr and Mrs McFarlane had been married for about 25 years, had three children. He was a senior and

very well paid accountant. She had been a junior solicitor but had given up her career for the children. Should she get merely what she needed or anything more?

The House of Lords took the opportunity to state further the principles of financial provision on divorce.

What is a fair settlement?

The House of Lords said that there were three component factors.

The first is needs. In the majority of cases, there are insufficient available resources to provide for the needs of two new households. In such instances, the settlement must simply do its best to provide for the needs of both parties as well and as flexibly as possible, with particular account given to the needs, including accommodation needs of the children during their minority. Needs is the primary criteria in the majority of divorce settlements.

The second factor is compensation. Where one spouse has taken steps to their disadvantage during the marriage, then they should be compensated. Very little guidance is given on the exact circumstances in which this factor will be relevant and how it is calculated. The most obvious circumstance is where one spouse has given up her career for the children and the household and then on divorce finds that she cannot return to her career or cannot return at the same level of income as if they had not taken a career break. In these circumstances and where resources permit, the court will expect some compensatory payment to be made.

The third factor is sharing. This follows directly from the White decision. The House of Lords made it plain that in modern marriages, couples start with an expectation of sharing the matrimonial resources. It is not so much a question of one party claiming against the other or one party providing for the other's needs. Marriage is a partnership and on its termination the partnership resources should be equally shared.

Financial settlements may be entirely needs based but where resources permit, they will include a sharing of the resources and perhaps some compensation element.

Does the length of the marriage matter?

This depends on the assets being divided up.

The House of Lords said that matrimonial resources created during the marriage, perhaps together with the family home, should be shared equally once needs are provided for. Matrimonial resources include the family home and other pure domestic assets which have arisen during the marriage.

Taken out of account in this sharing are assets in existence before the marriage - in practice before the cohabitation before marriage - also inheritances and gifts. Also taken out of account are business resources which are solely created by one spouse without the direct involvement, contribution and work of the other party. Also taken out of account are post separation resources where they are created by new directions or new ways of working unattributable to what occurred during the marriage. These various resources are often referred to as non matrimonial resources. They are not automatically shared.

In a short marriage, they will be invariably out of account and stay with the party to whom they belong. However the longer the marriage, the more likely it is that these non matrimonial assets will have become mingled with the matrimonial assets. In any event it becomes fairer that they are brought into account in sharing. It is impossible at this stage in the development of the law to be more precise about how and

when and how much they will be brought into the sharing division.

What about pensions?

By a change of the law in the mid-1990s, the court has the power to order that a part of a person's pension shall be transferred to the other party. If they are not of retirement age themselves, the part transferred to them either stays with the pension company or could be transferred to a pension company of their choice. This is known as a pension transfer order.

When referring to equality division, this should be to equality of outcome rather than equality of the value of the asset. This is particularly important on the question of pensions. For each spouse, the pension will provide a different amount on retirement. Assistance is needed from lawyers and sometimes from financial services advisers about the value of the pension which should be transferred.

It is not automatic that a pension-sharing order will be made and sometimes the outcome is that one party keeps their pensions and another party has more of the liquid assets. This is part of the discretion and flexibility of outcome.

Can the court take the other party's behaviour and conduct into account?

Almost certainly not. The court will only take it into account if it is very exceptional, in strict terms if it is inequitable to disregard it. There are certain categories of conduct where it is taken into account but this is very serious behaviour indeed. Moreover the courts at several stages in the financial resolution process do their best to discourage the raising of conduct.

I believe I have made a very exceptional contribution to this marriage and I ought to have more than half.

This is a similar category to conduct, above. The court will only take exceptional contribution into account as a reason to depart from equality when the contribution is really very exceptional indeed. So far the only circumstances permitted by the court is when one party has accumulated a very colossal amount of wealth. It may be more guidance will be given from the courts in this area.

What happens about child support?

England still has a Child Support Agency, but only just! It has been a resounding failure over the past 15 years. It is in the process of being scrapped and replaced by a new agency. Hopefully the new agency will not try to take on too many cases and will concentrate on those cases where help is urgently needed.

In the meantime, the Agency is still in existence and the child support formula is still very relevant. In general terms it provides that the non resident parent should pay 15% of their income for one child, 20% due to children and 25% for three or more children. The income and capital resources of the parent with whom the children are residing is ignored, which of course is ludicrous and unrealistic. The child support is reduced pro rata by the time, measured in nights rather than days, spent by the child with the father. This has the unhappy outcome that it produces more contact disputes as some fathers seek more contact simply as a way of reducing the child support, and some mothers deny contact to increase the child support! There are a number of other unattractive features about the child support calculation.

If an order is made by the court for child maintenance, it has to be by consent and in any event after a year either party can apply to the agency and the new assessment takes precedence over the court order.

How can my spouse and I work this out for ourselves.

To a significant extent, provided each of you have first obtained legal advice and there is satisfactory disclosure, then the two of you can reach a settlement. As long as it is broadly fair, and your lawyers confirm it is within the broad range of what a court will consider fair, then the court will make it into a final consent order.

We encourage our clients to discuss settlements direct with their spouse or partner when they feel happy to do so. We do not recommend it if it might result in violence, threats, arguments or might detract from co-parenting.

Often it is better for lawyers to negotiate and settle on behalf of their clients.
Isn't there a formula to help us now?

Not officially. Lawyers love words and wordy explanations. However I have distilled what I believe is the current law on capital and spousal maintenance into two formulae, found at my web site. These are not always the final fair outcomes but they help a number of people along the road to finding out a fair outcome. An explanatory article can be found on my web site. The outcome of these formulae may in some cases be close to what would otherwise be a fair settlement and may save time and costs in reaching it.

What is the effect of a pre-marriage agreements?

These are very popular on the continent and in some parts of America. In many countries around the world, pre-marriage agreements are binding on the divorce court. Accordingly, they need very significant care and legal advice and foresight before entering into one if it may be binding.

In England, they are specifically not binding. The English family law court cannot be bound by any agreements or arrangements reached by the parties direct. The courts consider themselves obliged by statute to consider any arrangements to make sure they are fair and just and in the best interests of children. For a number of years, the English courts have routinely ignored pre-marriage agreements including those entered into abroad by couples now living and working here.

However over the past few years, there have been increasing signs that the English family courts will give some weight to Pre-marriage agreements. There are preconditions to the courts giving them any weight. Each party needs to have had specialist legal advice. There needs to have been disclosure of financial and other circumstances. Neither party should have been acting under duress, mistake, fraud.

The courts are more likely to hold a person to pre-marriage agreements in relation to agreements of where the proceedings will take place and issues of capital distribution. They are more likely to make different orders on questions of income support, maintenance, especially if subsequently children are born to the couple.

Even though they may not be binding, it is our experience that they can be very helpful in negotiating a settlement. The sheer act of discussing with a fiancé about these matters before marriage can help talk through any differences the couple may have about financial expectations for the marriage.

Pre-marriage agreements are definitely not for everyone. Quite a few couples still consider them unromantic. However they are increasing in number. Where a couple are likely to live abroad during the marriage in a country where they are binding, we always recommend a couple to consider entering into one, often in conjunction with advice from lawyers in the country where they will be living. We find

that many who are getting married a second time are interested in pre-marriage agreements. We find that many elderly people, marrying later in life with children and grandchildren, enter into Pre-marriage agreements to make sure that as far as possible the assets that they have acquired during their life go to their children and grandchildren.

We recommend couples to consider a pre-marriage agreements even if subsequently they decide not to go ahead with one.

Will the financial outcome be the same if the divorce proceedings are abroad?

Definitely not!

The financial outcome abroad can be very different indeed. Whilst England is becoming much closer to the continental community of property system, there are still considerable differences. Urgent and advice should be taken if there is a connection with another country. Please see our information sheet on forum cases.

PRINCIPLES OF MATRIMONIAL PROVISION

When deciding what should be the appropriate financial order on divorce, the Court has a duty to consider certain factors. It is always helpful to review them in every case. Judges often go through them in turn in their judgements.

Section 25 - Matrimonial Causes Act, 1973: Matters to which court is to have regard in deciding how to exercise its [financial provision] powers

1. It shall be the duty of the court in deciding whether to exercise its [financial provision] powers ... and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor or any child of the family who has not attained the age of eighteen.
2. As regards the exercise of the powers of the court ... in relation to a party to the marriage, the court shall in particular have regard to the following matters -
 - a) 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;
 - b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - d) the age of each party to the marriage and the duration of the marriage;
 - e) any physical or mental disability of either of the parties to the marriage;
 - f) the contributions which each of the parties has made or is likely in the foreseeable

future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

- g) 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;
- h) 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.

3. As regards the exercise of the powers of the Court ... in relation to a child of the family, the Court shall in particular have regard to the following matters:

- 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 he was being and in which the parties to the marriage expected him to be educated or trained;
- e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (e) of para 2 above.

4. As regards the exercise of the powers of the Court against a party to a marriage in favour of a child of the family who is not the child of that party, the Court shall also have regard –

- a) to whether that party assumed any responsibility for the child's maintenance, and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
- b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
- c) to the liability of any other person to maintain the child.

Section 25A 'Exercise of Court's powers in favour of party to marriage on Decree of divorce or nullity of marriage.' [Clean break provisions]

1. Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its [financial provision] powers ... in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
2. Where the Court decides in such a case to make a periodical payments order or secured periodical payments order in favour of a party to the marriage, the Court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the Court be sufficient to enable the party in

whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

3. Where on or after the grant of a decree of divorce or nullity of marriage an application is made by a party to the marriage for a periodical payments or secured periodical payments order in his or her favour, then, if the Court considers that no continuing obligation should be imposed on either party to make or secure periodical payments in favour of the other, the Court may dismiss the application with a direction that the applicant shall not be entitled to make any future application in relation to that marriage for an order under section 23(1)(a) or (b) above.

Sections 24B and 25B-D make special provision in the case of pension orders. Section 24B deals with pension sharing orders which became available to couples divorcing after 1st December 2000. Pension sharing means that either spouse can now apply for and receive a share in the other spouse's pension. This will provide them with their own pension fund. The pension share can be anywhere from 1-100% of the pension fund. A pension cannot be shared more than once for any one marriage.

Section 25B-D deals with pension attachment. This provides that the Court can order the following:

1. The pension trustees pay all or part of the spouse's pension to the other spouse. This only takes effect when the spouse whose pension it is can draw it. If that spouse dies before then, the recipient spouse will receive nothing. Therefore such an order is only suitable for spouses near retirement age.
2. That the spouse with the pension converts their pension benefits into a lump sum. This only becomes effective once the spouse with the pension can draw it.
3. An order that where a pension scheme provides benefits if a member dies before retirement, then all or part of the death benefits are paid to the ex-spouse.

It is not possible to have a pension sharing and a pension attachment order for the same pension.

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