

**A GUIDE TO THE TAXATION
OF HUSBANDS AND WIVES
ON MARRIAGE,
AND ON SEPARATION AND DIVORCE
2011/2012**

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He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the resolution/ Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and founder member of its International Committee. He is a member of The President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is an Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia and a member of the Lawyers Christian Fellowship. He is chair of the Family Law Reform Group of the Centre for Social Justice

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below. He is the author of "A Practical Guide to International Family Law", (Jordans July 2008), probably the leading textbook on international family law, of which part of this is an extract.

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The International Family Law Group is a specialist law firm providing services to the international community as well as for purely national clients. iFLG has a special contract with the Legal Services Commission for child abduction work and is regularly instructed by the UK Government (Central Authority). It acts for international families, ex pats and others in respect of financial implications of relationship breakdown including forum shopping and international enforcement of orders. It receives instructions from foreign lawyers and, as accredited specialists, acts for clients of other law firms seeking their specialist experience.

iFLG is situated in Covent Garden near the Law Courts. Its mobile telephone accessible website includes valuable information, podcasts, a government approved child abduction questionnaire and formulae as a starting point for calculating fair financial settlements. It has emergency 24 hour contact arrangements. Contact at www.iflg.uk.com

1 INTRODUCTION

1.1 Taxation of Husbands and Wives

One definition of marriage is the coming together of a man and a woman as “one flesh”. For many years Parliament has recognised this special united relationship of a husband and wife (and the family unit created as a result) by giving it favourable tax treatment. During the marriage, the husband and wife should take maximum advantage of this special treatment to minimise the overall tax payable by them both.

In this Guide I start with a brief summary of the various UK taxes. I then describe how a husband and wife are taxed, and the opportunities available during the marriage to reduce the tax bill of the family. I include the major changes introduced in April 1990 of Independent Taxation. I also mention the taxation of a couple who choose to cohabit rather than marry.

If a husband and wife separate or divorce, they may be able to benefit from certain tax provisions that apply in such circumstances. They can be very valuable indeed and so I describe them in some detail.

In any event, the high rate of divorce in England at present demands that any tax planning measures during marriage should take account of the impact of any divorce and the likely divorce financial settlement.

Particular provisions apply where a tax-payer is either not resident or not domiciled in England and Wales. These detailed provisions are outside the scope of this Guide. It is essential that no admissions are made to the tax authorities about your residence or your domicile until you have first discussed the matter in detail with your advisers. Moreover this Guide does not cover tax payers who may be eligible for reliefs for the elderly, nor cover tax or welfare benefits relevant for those entitled to state benefits. Increasingly some tax reliefs and allowances are linked with the welfare benefits system. This Guide does not deal in detail with such reliefs. For those not on low incomes, these reliefs are still worth claiming.

For ease of reference, I have assumed that it is the husband who is paying the maintenance to his wife, the child lives with the wife, that it is the husband who is the first to leave the matrimonial home, and that it is he who is personally responsible for all its outgoings. In practice this may not be so, but the principles outlined in this Guide will nevertheless apply.

Tax reliefs, allowances and exemptions usually change each tax year. The figures in this Guide apply for the tax year 2011/12 as announced in the Budget on 23 March 2011 and as in the Finance Act 2011. I update the Guide each tax year, so you should make sure you have the latest edition. This Guide is correct as at April 2011 with the changes anticipated following the Budget for the tax year starting 6 April 2011.

This Guide provides general information only. Professional advice should always be taken and I cannot accept any liability for reliance on it. Copyright in this document is with me.

1.2 Summary of taxes

1.2.1 Income Tax

This is the annual taxation of income arising in the tax year (6th April to 5 April). It applies to income and profits from all employment, trade, business (including self-employment), property (for example, rent), investments and interest on loans. From this gross income certain personal allowances and reliefs can be deducted and what remains is the taxable income.

The tax payable is calculated as a percentage of this taxable income. The lower rate of tax of 10% has been abolished. The basic tax rate for the tax year 2011/2012 is 20%, on the first slice of taxable income (currently up to £35,000) and the higher rate (presently 40%) is charged on any taxable income exceeding this total figure. In addition there is a new rate of 50% on taxable income over £150,000. Income tax is often deducted at source, for example by the employer who then accounts to the Inland Revenue. Trust income and some savings income may be taxed separately.

1.2.2 Capital Gains Tax

Capital Gains Tax is levied on the tax-payer's chargeable gains (after deduction of certain capital losses) accruing since 31 March 1982 on the disposal of assets in a tax year. The tax is charged only on the disposal although this may include gifts and sales at undervalues. The rate of the tax was 18% however this increased from midnight 23rd June 2010 to 28% for those paying income tax at 40% or higher. There is an annual exemption for individuals on the first £10,600 of chargeable gains. The disposal of certain assets are exempt; these assets include cars, chattels of £6,000 or less, one's own home (elected to be the principal private residence when the tax payer owns more than one property), and gifts to charities and to certain national institutions. There are reliefs including Entrepreneurs Relief.

The amount of the gain is calculated by reference to the value of the asset at the time of disposal, less the original acquisition price. This acquisition price will include not only the price at which the asset was purchased, but also certain costs of the purchase.

Furthermore, in recognition that assets may increase purely because of inflation, the original cost price was previously 'increased' by virtue of an indexation allowance. This allowance was based on the increase in the retail price index between the date of purchase of the asset and the date of disposal. It therefore had the effect of reducing the chargeable gain for tax purposes. However this indexation allowance ceased to be available from 6th April 1998. It will be given to that date but then frozen. It is replaced by a more complex tapering relief which reduces the gain depending on how long the asset has been owned. Professional advice must be taken on this issue.

1.2.3 Inheritance Tax

Inheritance tax, introduced on 18 March 1986, is a highly complex and technical tax. Although it deals mainly with the tax payable on the death of an individual, which is outside the scope of this Guide, gifts made within seven years of the date of death are added to the value of the estate at the date of death and taxed accordingly. Gifts made within three years of the date of death are taxed at the full rate but gifts between three and seven years are charged at lower rates and on a reducing scale, if taxable. Gifts made by one individual to another are totally exempt from Inheritance Tax as long as the person making the gift survives seven years.

1.2.4 Stamp Duty

This tax is charged according to the value of certain transactions such as the transfer of property. Payment of the tax is evidenced by the stamping of the document recording or implementing the transaction. Normally, stamp duty is calculated according to a fixed percentage. The stamp duty land tax threshold for houses, land and other real property is 1% at over £125,000, with 3% over £250,000 and 4% over £500,000. From 6 April 2011 it is 5% on value over £1 million. Usually the transaction will have been undertaken by one of your professional advisers, for example your solicitor, who will invariably deal with the stamping of the relevant document and the payment of any stamp duty on your behalf.

1.2.5 Council Tax

This replacement to the poll tax is based on values of property. Where there is only one adult resident, there is a 25% reduction. Second properties with no permanent residents are eligible for a 50% reduction. The tax is based on two residents: there is no higher tax if three or more residents live in the same property.

1.2.6 Value Added Tax

This tax is levied at 17.5% on a number of goods and services passing from one business to another or to a private consumer, so has little direct relevance to the taxation of a families. It increased to 20% on 4 January 2011

1.2.7 Corporation Tax

A tax on the profits of companies, it has no significant bearing on the taxation of husbands and wives and so not dealt with in this Guide.

1.2.8 National Insurance Contributions

These payments are made by employees and employers towards the cost of providing certain state benefits. Except for the situation where one spouse employs the other, this will have no direct bearing on the taxation of husbands and wives.

2 TAXATION OF HUSBANDS AND WIVES DURING MARRIAGE

2.1 Income Tax

2.1.1 Personal Allowances

6 April 1990 saw the introduction of a radical change in the taxation system of husband and wives: Independent Taxation. Until then, husbands and wives were looked upon for tax purposes as one person - and the Revenue saw only the husband! The spouse's incomes and gains were added together and the couple were treated as if the total income was that of the husband; he was responsible for completing the annual tax return and for paying all tax due including that on his wife's income and gains.

With the introduction of Independent Taxation, spouses were treated as separate individuals for tax purposes and, for the first time, married women enjoyed privacy in and responsibility for their own tax affairs. In addition, some married couples were paying more tax because they were married than if they cohabited and this was contrary to public policy. Independent Taxation abolished the former tax advantages of cohabitation and it is now marginally fiscally beneficial to marry.

Each individual is now entitled to a Personal Allowance, £7,475 for the year 2011/2012, to set against their own taxable income. Any unused Personal Allowance of a spouse cannot be transferred to the other.

A married couple also received a Married Couple's Allowance but this was abolished from April 2000 except for the elderly.

From April 2004, there is available Child Tax Credit (CTC), a means-tested allowance that is paid to parents and carers of children or some young people who are still in education. If a person or family have a gross income of less than about £58,000 a year and meet certain other qualifying conditions,

there is eligibility for some award. Some incomes from State and welfare payments are not taken into account. The main carer will have the money paid direct into their bank – a clear attempt to get the money direct to mothers as primary carers. The main carer is usually the person getting Child Benefit. The amount paid depends on the number of children, their age and any disability. From April 2011 CTC was more restricted and those with an income of £40,000 per annum or more will have their eligibility to the basic CTC payment of £545 reduced

Working Tax Credit is a means tested allowance for those in work and on low incomes. Individuals and not just families can benefit. The benefits depend on the person's circumstances, earnings and the hours worked weekly. Child care help is also given, called the Child Care Element and depends on the number of children. WTC is made up of a number of elements, the detail of which is beyond the scope of this Guide

The tax bands and rates are applied to husbands and wives separately as individuals.

Higher Personal and Married Couple's Allowances are available to those over 65 years of age along with other various reliefs and allowances for those over 65, not covered in this Guide.

2.1.2 Joint Declarations of Beneficial Interest

A husband and wife will often have income or gains produced by a jointly owned asset e.g. rental income, share dividends, interest on building society accounts. In such cases, it will be presumed by the Revenue that the income or gains belong to the parties in equal shares and they will be taxed accordingly.

However a couple may jointly elect and declare to the Revenue that they hold the asset in unequal shares e.g. 75%:25%, and so they are taxed on proportionate income or gains (75%:25%). This may produce significant tax savings if one spouse has unused Personal Allowance or if one spouse pays only basic rate tax and the other pays higher rate tax.

Such declarations should be in advance - before a large tax bill is received! They should be "reflected in reality" (the Revenue's terminology). The declaration is not possible if the income entitlement differs from the beneficial interest in the asset. It is only effective from the date of the declaration which must be given to the Inspector of Taxes within 60 days. If the couple own the asset jointly before they marry, the provision will only apply to them from the date of marriage. It ceases if the husband and wife no longer live together or interests in the asset vary.

Although it presents good tax saving opportunities during marriage, I must caution that on any separation and divorce, such declarations as to beneficial interests in assets may be influential in divorce proceedings and might affect the terms of any divorce financial settlement. The high rate of divorce demands that any tax planning measures during marriage should always take account of their impact on any divorce and divorce financial settlement. I refer to this aspect of the declaration in more detail below in 3.2.1

Furthermore, whilst transferring an asset such as a deposit account into joint names to equalise income is another tax saving opportunity available by Independent Taxation and may allow excellent life-time tax saving, it may produce increased liability to Inheritance tax. This is one aspect to consider in deciding whether such a step was advantageous.

2.1.3 Mortgage Interest Relief

Mortgage Interest Relief at source (MIRAS) was available for interest paid on a loan for the purchase of an interest in land, often the principal private residence. It was abolished from April 2000.

2.1.4 Conclusion

I believe that Independent Taxation creates a number of tax saving opportunities. I would be pleased to discuss these opportunities with you.

Some couples have continued with their joint completion of tax returns. However, many wives wish to take advantage of the privacy and independence that the system offers. I work closely with specialist tax law firms which can help with the preparation and completion of tax returns or simply guide and advise.

2.2 Capital Gains Tax

In a similar way to the old income tax arrangements, the gains of a married couple living together used to be calculated separately but charged to the husband so that both sets of gains were added together to determine the total capital gains tax payable.

Under Independent Taxation, each spouse is now taxed separately. Each spouse has their own annual exempt gains limit (£10,600 for 2011/12). CGT was levied at 18% however increased to 28% for taxpayers on 40% or higher rate from midnight 23rd June 2010. One spouse's annual exemption is not transferable to the other. Similarly one spouse's capital losses cannot be transferred to be set against the gains of the other - this was a change brought in by Independent Taxation.

It is sensible tax planning to ensure that each spouse uses their full annual exemption and that the spouse who pays the lower rate of CGT realises any capital gains. The existing tax legislation helps married couples to achieve this as genuine transfers of assets between a husband and wife while they are living together take place on a no gain/no loss basis. The transferee spouse takes over the asset at the transferor spouse's acquisition cost plus the indexation allowance. So, on the final disposal, the chargeable gain will be based on the entire period of ownership by both the husband and the wife, taking into account the indexation allowance up to April 1998.

Each spouse is responsible for their own annual tax returns including details of chargeable capital gains.

Certain assets are exempt from CGT. One of the most important exemptions is the tax-payer's principal private residence. A tax-payer may have only one such property, but it need not be the property in which he lives for most of the year. It is obviously advantageous to elect the property which will increase the most in value (as distinct from the greater percentage increase). Where a tax-payer owns two properties, the election of a second property as principal private residence must be made within two years of the date of acquisition of the later property. While the husband and wife are living together, they may in general only have one principal private residence.

I can advise on the many steps that are available to maximise the CGT saving opportunities arising from Independent Taxation.

2.3 Inheritance Tax

Transfers between husband and wife during their lifetime and on death are exempt from inheritance tax when they are both domiciled in the UK. Other lifetime gifts are usually treated as 'potentially exempt transfers', which are transfers upon which inheritance tax will be payable only if the transferor dies within seven years of the date of transfer.

2.4 Stamp Duty

There is no stamp duty on lifetime gifts, including gifts between husband and wife. In certain circumstances, duty of £5 may be levied on the document or instrument of transfer.

2.5 Council Tax

Where a family home is in joint names or in the sole name of one person who is married or living with another as man and wife, both parties are equally liable to the local authority for the whole council tax.

2.6 Co-habitants

A man and woman living together in a household, with or without a child of the relationship or of previous relationships, are treated for tax purposes as two single persons. Therefore each cohabitant has their own Personal Allowance and CGT annual exemption.

In the past cohabitants had enjoyed a number of fiscal advantages over a married couple but these were largely abolished as a result of measures introduced in the 1988 Budget. It was then the case that marriage had some tax advantages over cohabitation, with the availability of the Married Couple's Allowance, the opportunity to make declarations of interests in income and gains producing assets, and the ability to transfer assets on a no gain/no loss basis. With the abolition of the MCA, marriage now makes only a marginal impact on fiscal affairs for most couples.

As a consequence of the Civil Partnerships Act 2004, which gives legal rights to same sex couples who register their relationship, similar rights of marrieds, such couples with registered partnerships are treated for tax purposes the same as married couples. This gives a number of benefits, especially with CGT, inheritance tax and pensions, but it does mean they are connected persons and so brought within a large number of anti avoidance measures.

There are many advantages in entering into a Cohabitation Contract at the start of the relationship and making a will to provide for the other. I can draw these up for you and advise you of the matters that it is better to agree at the outset.

3 TAXATION OF HUSBAND AND WIVES ON SEPARATION AND DIVORCE

3.1 Separation

When a husband and wife decide to separate for a trial period, it is not necessary for a court order to be obtained or for the Inland Revenue to be informed. They should try to agree financial short-term arrangements between themselves, including payment of any outgoings on properties and other joint liabilities, and the financial support of any children. I recommend that you discuss these arrangements with me so that they are put on a relatively formal footing and so that there is no uncertainty about the terms of the agreement.

I recommend that the terms of any financial arrangements for the period of separation are recorded in a Separation Agreement, which will be evidence of the separation for Inland Revenue purposes. If a final financial settlement is reached, this can be recorded in the agreement, each party undertaking not to make further claims on any subsequent divorce. Such undertakings may be upheld by a court. As this is very important in relation to your future rights and claims, I will discuss it with you in detail.

I can draw up a Separation Agreement for you recording any agreed terms.

3.2 Divorce

The English courts have jurisdiction to grant a decree of divorce if there are connections with England and Wales, primarily based on residence. Because admissions of residence and domicile can have serious tax implications, I recommend that this aspect is considered very carefully with your advisers before the petition is filed.

If the family has international connections of any kind whatsoever, it may be absolutely vital to take urgent action to secure the country in which any family law proceedings will take place. Please contact me immediately if this may be an issue.

There is only one ground for a divorce, namely the irretrievable breakdown of the marriage. This may be established only by showing one of the five following facts:

- adultery by the respondent (that is, the spouse receiving the petition) and the petitioner finds it intolerable to live with the respondent
- the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent
- desertion for at least two years by the respondent
- two years' separation and the respondent consents to a decree of divorce
- five years' separation, without the consent of the respondent.

I recommend that you read my "Guide to Divorce Procedure", also found on my website, for more details.

3.3 Financial Orders on Divorce

Space does not permit more than a brief comment on the very wide powers of the divorce court in the redistribution of all the assets of either party to the marriage. The court can make the following orders between the two spouses:

- periodical payments (maintenance) order
- lump sum order
- property adjustment order
- pension attachment orders and pension sharing orders

I recommend that maintenance payments should include not only direct expenses, such as food, clothing, holidays and personal expenditure, but also indirect expenses such as gas, electricity and other housing expenses as well as an allowance for the long-term maintenance and repair of property and depreciation of its contents and of your car. I have prepared a document which lists all items of living expenses, including housing costs and provision for depreciation. I find this is invaluable in working out income requirements. It is very easy to underestimate how much it costs to live! I can consider this document with you as an aid to calculating the appropriate level of maintenance

In deciding the appropriate financial settlement on the breakdown of the marriage, the court has to give first consideration to the welfare of any minor child. It also takes into account the following matters:

- income, earning capacity, property and other financial resources which each of the parties or child has or is likely to have in the foreseeable future, including any earning capacity a party could reasonably acquire
- financial needs, obligations and responsibilities of the parties or child
- the standard of living enjoyed by the family before the breakdown of the marriage
- the age of the parties and the length of the marriage

- any physical and mental disability of the parties or child
- contributions which either party 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
- the conduct of the parties, if that conduct was such that it would in the court's opinion be inequitable to disregard it
- the value of any benefit which, because of the divorce, the party would lose the chance of acquiring
- (in the case of child's maintenance) the manner in which the child was being, and in which the parties expected him or her to be, educated or trained.

In all cases, the court must consider the possibility of a 'clean break' order to terminate the continuing financial obligations (for example, maintenance) of one party to the other. It also has power to limit maintenance payments to the other spouse to a fixed period of time to allow the recipient spouse to retrain, receive further education or gain work experience in order to adjust to the end of the marriage and to become self sufficient. It has specific regard to loss of sharing in the benefits of pensions built up during a marriage.

The court has very considerable discretion and flexibility of approach in deciding on the appropriate terms of a financial settlement. I can discuss this with you in more detail, taking into account your own circumstances.

3.4 Income Tax

As mentioned previously, a husband and wife are treated by the Inland Revenue as living together unless they are separated by virtue of a court order or by a deed of separation or they are separated in such circumstances that the separation is likely to be permanent. The first two criteria are clear enough, but in the case of the third it is often very difficult to decide the date on which any separation was 'likely to be permanent'. It may sometimes depend on a decision taken by one spouse without notification to the other. It is known that the Inland Revenue will usually accept a separation as permanent when spouses have lived apart for over a year, but a shorter period of separation may suffice. The matter has to be decided on the facts of each case. It is often very difficult to show that a husband and wife, while still living together in the same house, are in fact separated. In these circumstances, it will be necessary to demonstrate that the husband and wife are living totally separate and independent lives.

English tax law often treats a "permanent separation" as more important than a final decree of divorce. So, for most income tax and capital gains tax purposes, it is the date of permanent separation that matters rather than the date of the decree absolute. I recommend that both spouses consider the tax consequences of separation with their advisers and preferably with each before the Inland Revenue are notified of the date of separation. For instance, the date on which one spouse leaves the other may not necessarily be the actual date of a permanent separation for tax purposes. Another date may be more advantageous.

Fundamentally, along with the abolition of the Married Couple's' Allowance from 6 April 2000, there was also abolished Maintenance Relief for maintenance, whether under old rules i.e. maintenance obligations existing before March 1988 or new rules i.e. those created since March 1988. The result is that there is now no longer in English law any tax relief on maintenance paid to a former spouse or child on separation or divorce. If it is relevant as to past payments I can explain more fully how the tax reliefs previously worked.

As during marriage, so in and after the tax year in which separation takes place, both husband and wife are taxed as single persons and receive only their Personal Allowances.

A significant change brought about by Independent Taxation is that on separation, a husband will have no liability for his wife's non-PAYE income and gains and so will not have to seek an indemnity from her

for this.

I referred above (2.1.2) to the tax saving opportunities available by Independent Taxation to allow spouses to declare that they own a jointly held asset in unequal shares and thereby take maximum advantage of one spouse paying a lower rate of tax than the other. This works very well during the marriage but I am concerned that such declarations may backfire at the time of any divorce financial settlement. Although the Divorce Court has complete discretion and power to transfer and redistribute interests in assets, the starting power for consideration of the appropriate financial settlements is sometimes “who already owns what”. Accordingly if during the marriage, the spouses have declared that a jointly-held asset is owned beneficially 80:20 rather than 50:50, it may be difficult for the spouse with the 20% interest to say that in reality the asset was still equally owned by the two of them. The declaration might therefore affect the terms of any divorce financial settlement. In many cases, strict legal ownership issues may be irrelevant as the court can redistribute assets to provide for a fair outcome.

Special arrangements apply to maintenance paid under a foreign court order or agreement, or by or to an overseas resident pursuant to an English Court order or agreement. This is outside the scope of this Guide but I would be pleased to advise on its implications.

3.5 Capital Gains Tax

As with income tax, it is the date of permanent separation which is important, although certain of the benefits continue throughout the tax year of separation.

In the tax year of separation, the husband and the wife will continue to enjoy their individual annual CGT exemption (£10,600 for 2011/12) and be responsible for their own tax returns for chargeable gains.

As a husband and wife can continue to make chargeable transfers between themselves on a no gain/no loss basis during the tax year of separation, there are advantages in any final financial settlement which involves the transfer of assets being concluded in the tax year of separation, if this should prove possible and in their overall best interests. As before, this is a further reason why it is important that you should discuss the date of final permanent separation with your advisers. The recipient of the transfer of the asset will, of course, be responsible for the chargeable gains during the entire period of ownership when he or she comes to dispose of the asset. Nevertheless, this can be an important benefit.

After the end of the tax year of separation but before the decree absolute of divorce, it may be difficult to avoid a chargeable gain arising on a transfer of assets between husband and wife which will be deemed to be at market value.

The mere fact that a transfer of assets is pursuant to a divorce court order does not, of itself, protect it from CGT. There are however certain ways to avoid payment of CGT on inter-spouse transfers after the tax year of separation and I will discuss these with you should they be applicable and available.

3.5.1 The Matrimonial Home

Because gains on a principal private residence are exempt, any transfer of the former matrimonial home will not attract CGT provided the owner or owners (in other words whether it was in sole name or held jointly) lived there throughout the period of ownership. However the Inland Revenue will ignore any absence by the transferor spouse during the previous thirty-six months before the transfer or sale.

In addition the transferor spouse will be deemed to be in continuous residence after any departure, provided that the property remains the principal private residence of the transferee spouse, that the transferor does not elect another property as his principal private residence and that the property or interest in the property is then transferred to the transferee spouse. (A sale will not provide this CGT exemption). These are quite considerable and advantageous concessions for both the transferor and

the transferee spouse. However, it is dependent on the transferor not electing another property for his principal private residence. Since it is possible that he will have left the former matrimonial home many months or years before the eventual sale or transfer to his spouse or former spouse, it is quite likely that he will have purchased another property. Before he elects this new property as his principal private residence, he should consider the implications with his advisers, particularly taking account of the tax consequences on any matrimonial settlement.

One of three situations usually arise in respect of the former matrimonial home in the final financial settlement on separation and/or divorce:

- The property is sold and the proceeds divided. If it is sold within thirty-six months of one of them leaving, no CGT will be payable on the sale proceeds. Thereafter the departing spouse may have to pay CGT on some of his or her gains.
- The property is transferred from joint names into the sole name of the remaining spouse, or there is an outright transfer from one spouse to the remaining spouse. If the transferor spouse has not elected another property for his or her principal private residence there will be no liability to CGT on the transfer to the remaining spouse. If the transferor spouse has elected another property as his principal private residence he is likely to be liable to CGT on some of his gain at the date of transfer. The remaining spouse will not be liable for any CGT at the date of transfer to her.
- The property is held in joint names or in the sole name of the remaining spouse, but it is agreed that it will not be sold until the happening of certain events. This often includes the death or remarriage of the remaining spouse or the youngest child concluding full-time education. At this point, the non-occupying spouse receives on sale either a share of the net proceeds or repayment of a charge granted to him on the property to secure his interest in the net proceeds. The sale of the property will result in a chargeable transfer. As far as the remaining spouse is concerned, it will probably be her principal private residence, and so her gain will be exempt from payment of CGT. But if the sale is at least thirty-six months after separation the non-occupying spouse will usually be liable for CGT on the share of proceeds or the repayment of the charge if it is for a proportion of the value of the property. (It can sometimes be argued by specialist tax lawyers that the court order created a settlement so the gain would be exempt. Advice should be taken.) In practice, the non-occupying spouse has frequently purchased an alternative property in which to live and for which he has made an election as his principal private residence; he will therefore be liable for CGT. Such orders allowing the wife to continue to live in the former matrimonial home until a later sale are increasingly popular. (They are known as Meshers orders after the first case in which such orders were made.) They sometimes result in considerable hardship to the wife who is unable to afford to purchase similar or reasonable accommodation from her share of the proceeds so care is needed before adopting this form of settlement.

3.5.2 Other Assets

These include:

- Contents of the matrimonial home and of any other properties owned by the husband and wife. These items unfortunately usually decrease in value, so a gain rarely arises! If each chattel is valued at less than £6,000, any gain is exempt.
- Cash, cars and surrender value of life policies are exempt from CGT.
- Stocks, shares, valuable silver, paintings, jewellery, antique furniture etc. are subject to CGT.

- Second properties. It may be that a second property has gone up more in value than a main residence. As an election for a property as the principal private residence can be made within two years of the date of purchase of the later property, it may be worth electing the second property as the principal private residence, because this will result in a saving of CGT. There may also be considerable advantages in the spouse who leaves the former matrimonial home on separation going to live in the second property. Appropriate transfers of both properties in the tax year in which the husband and wife separate, together with an election by each of them that the property that they are occupying is their principal private residence, should ensure that gains on both properties are exempt. Unless this can be arranged, the husband or the wife or both will be liable to CGT on the proceeds of sale of the second property.

3.5.3 Conclusion

From 6 April 1990, husbands and wives have each been taxed independently. Separation now has less effect on the taxation of their capital gains.

However, considerable care should be taken over the timing of steps taken in relation to CGT. In particular, the date of permanent separation is very important. Furthermore, I recommend that whatever the other personal and financial differences between the husband and wife after separation, they and their advisers should ensure that no steps are taken, such as election of another property as a principal private residence, which might be financially disadvantageous to either or both spouses in any final settlement, without first consulting the other spouse and his or her advisers.

3.6 Inheritance Tax

Unlike income tax and capital gains tax, the impact of inheritance tax is from the date of decree absolute of divorce and not from the date of permanent separation. Until decree absolute, transfers between husband and wife are exempt from inheritance tax except that if the transferor spouse is domiciled inside the United Kingdom and the transferee spouse is domiciled outside the United Kingdom, this exemption is limited but specific advice should be taken on spousal transfers between spouses who may be non domiciled or non resident.

Property adjustment orders in divorce proceedings for the transfer of real and personal property can be made effective only from the decree absolute. However, the Inland Revenue accept that transfers of money, property or other assets after decree absolute but pursuant to court orders made in divorce proceedings are specifically exempt from inheritance tax, as long as there is no intention to confer any gratuitous benefit on the transferee - which is unlikely in divorce proceedings!

Maintenance to a former spouse and a relevant child of the family is also exempt from inheritance tax.

But transfers of property to children, other than for their maintenance, education or training, are unlikely to be exempt, so I recommend that you discuss this with me if you contemplate such a step in the divorce action.

3.7 Stamp Duty

Although a transfer of property on separation or divorce might strictly be a 'sale' of an interest in property based on its market value and therefore attract stamp duty, relief is granted to transfers pursuant to an order in divorce or judicial separation proceedings or pursuant to an agreement in contemplation of or connection with divorce, nullity or judicial separation proceedings. In such circumstances only £5 duty is payable on the document. However, a mere agreement to separate is not sufficient.

3.8 Council Tax

During marriage, a spouse is responsible for any non-payment of the other spouse's overall council tax on their family home and/or jointly held property.

If, after separation, the property is in joint names, each continues responsible for the whole council tax unless one elects another property as his sole or main residence whereupon the other would be solely liable. The 25% discount would apply if there was only one adult resident. Liability for the council tax should be part of the terms of any separation.

Where the home is in the sole name of the departing spouse, liability continues on that spouse unless/ until he elects another property as his sole or main residence whereupon the remaining spouse would be solely liable as non owner resident. Further, until the election, the departing spouse may be solely liable as the local authority are in practice unlikely to look for payment from the remaining separated spouse who has no interest in the property. Liability through marriage (rather through joint ownership) ends on separation so local authorities should be informed.

4 CONCLUSION

It is very easy to pay too much tax! I hope that this Guide has shown some of the relatively easy and straight forward ways to reduce the tax that you and/or your spouse may be paying.

I can advise you on the best way to arrange your affairs to minimise the tax you are paying and on any other aspect of your tax affairs

If your marriage is in difficulties and/or a separation seems likely or you would just like to discuss your personal finances in the context of your marriage, I can advise on the best steps to take as well as the most tax-efficient way of reaching any settlement with your spouse. I encourage a conciliatory and constructive approach to the resolving of any disputes or difficulties involving families. I pay particular regard to the interests of children in any arrangements.

If you do not have a solicitor dealing with your personal or financial affairs, but would like to discuss with me any aspect of this Guide or your general tax affairs, please contact me. I work closely with tax and trust lawyers.

This Guide is intended solely as a summary. Summarising is inevitably inconsistent with total accuracy; no responsibility can therefore be accepted for the completeness or accuracy of the contents or for any observations or views expressed. For further information on Family Law or Family Law Taxation in England and Wales, please contact me.