

# The matters to be considered by the Court when deciding an Application for financial provision on or following Divorce

## Section 25 of the Matrimonial Causes Act 1973 - A Summary -

The Courts have a number of statutory obligations when considering the appropriate provision which should be made by the parties to a marriage to each other and for their children. These obligations arise under the Matrimonial Causes Act 1973, the amendment to the rules for the conduct of family cases through the Civil Procedure Rules 1998 to the extent that they apply to family matters and the Human Rights Act 1998 which came into force in the majority on 2 October 2000.

### The Impact of Changes to Civil Procedure

This has impacted in a number of ways.

1. Pre-action protocol. On 25 May 2000 the President of the Family Division issued a Practice Direction requiring that the legal profession deal with specific disclosure of relevant issues, documentation and information and attempt to reach agreement on behalf of their clients to settle a case prior to the commencement of court action. Failure to comply with the pre-action protocol risks an order at a later stage that the defaulter pay or contribute towards the other party's legal fees on a backdated basis.
2. Overriding objective. From 5 June 2000 the general overriding objective, which applies to the conduct of civil litigation, also applies to family based litigation. This requires that a case be dealt with by the courts justly so far as is practicable to include
  - a. ensuring that the parties are on an equal footing
  - b. saving expense
  - c. dealing with the case in ways which are proportionate
    - i. to the amount of money involved
    - ii. to the importance of the case
    - iii. to the complexity of the issues
    - iv. to the financial position of each party
  - d. ensuring that it is dealt with expeditiously and fairly
  - e. allotting to it an appropriate share of the court's resources, whilst taking into

account the need to allot resources to other cases.

The parties are also specifically required to help the court to further the overriding objective. The court is required to take control of and actively manage the cases which come to it. This includes encouraging the parties to co-operate with each other in the conduct of the proceedings and to settle their dispute, to identify the relevant and important issues at an early stage and regulate the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question.

3. Costs. The court is currently required to deal with costs on the basis that the successful party should have their costs paid by the unsuccessful party unless there is a good reason in the Judge's opinion not to do so. The measure of success is the comparison between the offers made by the parties during the proceedings with the ultimate outcome. The way in which the case has been conducted is highly relevant as is the compliance or otherwise with orders and time limits. Both parties are required to negotiate. The costs should be proportionate to the amount at stake. The Judge may order one party to pay not only a lump sum but also interest on those monies if considered appropriate. The Judge may also order not only that costs are paid but also that interest upon those costs also is paid. The interest rate may go up to 10% above base rate. The Rules with regard to costs are likely to be changed shortly so that the offers made by the parties to try to settle the Court proceedings will not be relevant. The usual Order will become "No Order as to Costs", ie. that each party pays his or her own legal costs and disbursements.

The impact of this is that the lawyer cannot risk on behalf of the client attempting to pursue points, which under the existing statute and caselaw are not relevant to the decision to be made by the court. Parties cannot expect to go on "fishing expeditions" to discover what they can from every

document that can be found nor can they unilaterally decide to abandon the orders of the court or seek alternate expert advice because they don't like that which they have received. No longer may one "just leave it to the court to decide". The parties must make plans for the future and decisions for which they accept responsibility and upon which they act. When information is needed it must be supplied promptly as time limits really are "limits" with penalties.

### Human Rights Act 1998

This legislation has obvious reference to family matters. The following articles appear to be those most likely to be cited:

Article 2	the right to life
Article 3	prohibition of torture, inhuman or degrading treatment (which has been said to include corporal punishment)
Article 5	right to liberty and security of person
Article 6	determination of civil rights and obligations by fair and public hearing within a reasonable time
Article 8	respect for private and family life
Article 9	freedom of thought and conscience and religion
Article 12	right to marry
Article 14	prohibition of discrimination

To implement this the courts are obliged to consider and take into account the Human Rights aspect of every case even when the points are not specifically raised by the parties. Although not specifically included in the UK legislation Article 13 also states a right to an effective remedy which the government explains is dealt with by enactment of the statute itself.

All legislation now has to be read and given effect in a way which is compatible with these rights to the extent that it is possible to do so. But the Court of Appeal has already decided that legal advisers will be penalised if they raise what the court considers to be a spurious human rights point. This will be relevant for the preparation of family cases but it is likely that only in those cases where human rights are exceptionally clearly an issue will this be raised.

These matters are relatively new and to some large extent untried. The rest of this sheet deals with concepts with which family lawyers have been dealing for years and which are well explored.

### Section 25 of the Matrimonial Causes Act 1973

The section noted above specifies the following as criteria which must be taken into account for the determination of financial provision between spouses and former spouses following or upon divorce :-

- (a) the first consideration is the welfare whilst a minor of any child of the family then the Court moves on to consider;
- (b) 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 the case of any 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;

- (c) the financial needs, obligations and responsibilities which each of the parties to the marriage has, or is likely to have in the foreseeable future;
- (d) the standard of living enjoyed by the family prior to the breakdown of the marriage;
- (e) the age of each party to the marriage and the duration of the marriage;
- (f) any physical or mental disability of either of the parties to the marriage;
- (g) 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;
- (h) 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;
- (i) in the case of proceedings for divorce the value to each of the parties to the marriage of any benefit (for example, a pension) which by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring.

The Court also has a duty to consider whether it is appropriate to achieve a clean break between the parties as soon after the Decree Absolute as is considered to be "just and reasonable". This would include limiting the term over which maintenance payments will be made to a period considered to be sufficient to enable the recipient of maintenance to adjust to lack of maintenance without undue hardship.

The Court also has the power to dismiss the right to apply for maintenance altogether and to require that no further Application be made for maintenance. Re-marriage on the part of the recipient automatically ends maintenance payments. But it should be noted that if one of the divorced couple remarries before issuing an application for financial provision with the divorce court they lose the right to do so. The list of financial prayers in the divorce petition is sufficient application for the right to be preserved

### Additional points

- (i) Pensions: Generally - the Court also has a duty to consider the benefits under a Pension Scheme which one party will have and that the other, as a result of the Decree, would lose their chance of acquiring;
- (ii) It takes some while for pension companies and the Pensions' Agency to produce the information required by regulation, so this information gathering process has to be got under way early;

(iii) Pensions : Lump Sums - The Court has the power to order one party to the marriage to pay a lump sum to the other and this may include the payment of an instalment at the time of retirement. This may be paid from whatever resources are then available, including if necessary a lump sum available from a pension scheme on retirement. The Court has specific power to order that a certain sum or percentage of a lump sum available under a pension scheme, and any lump sum payable from that pension scheme in respect of the pension member's death, be earmarked or attached to be paid directly to the pension member's spouse. The Court thus may require Trustees or Managers to the Pension Scheme to exercise their discretion in favour of a particular person for a particular part or the whole of that lump sum, when it becomes due. If that automatically reduces the pension income, then the Trustees or Managers of the Scheme are authorised to permit this by the effect of the Order and Statute combined.

For cases where the Petition for divorce is issued after 1 December 2000 the Court will have the power to order that a proportion of the pension fund from which one spouse or former spouse is entitled to benefits on retirement or death may be separated out and held for the benefit of the spouse or former spouse i.e. the pension of one spouse may be shared by the other. The recipient may retain it in the same overall pension fund or may ask that it be transferred to another pension fund and be invested for pension provision in their name. The tax effect is as if it remained the property of the original pension member. But the fund passed to their former spouse will survive the death of the original pension member. See below.

(iv) Pensions : The Income - for cases where the divorce petition was issued after 1st April 1997 the Court has the power to make a similar Order to Pension Trustees or Managers requiring that the whole or part of the income payments be made directly to a non-pension owning spouse. This includes a retirement annuity contract or an annuity or insurance policy purchased to have the same effect. Unlike orders earmarking or attaching a share of the pension lump sum, this income order may be varied and expires automatically upon the proposed recipient's re-marriage.

Should the pension member die before retirement their pension income from their own pension provision will usually die with them. If there has been no pension sharing order the only financial provision then available for their former spouse will be  
\*any share of Death in Service benefits (if any) allocated to him/her if the death takes place whilst in service

\*or a share of any guaranteed pension paid as a lump sum if the death is after retirement,  
\*or income from a joint lives annuity purchased by the deceased prior to death naming the former spouse as the second life for which the annuity is provided  
\*or a share of the deceased's general estate if provided for him/her by the will or intestacy of the deceased or the court upon application under the Inheritance (Provision for Family and Dependents) Act 1975 should this not have been excluded by court order and sometimes as enhanced by the repayment of pension contributions, or the proceeds of specific insurance.

#### **New Matters to be Introduced in 2000**

From December 2000 new legislation is in place concerning the possible sharing of pension funds. For all cases where the Petition has been issued after the implementation date of 1 December 2000, the District Judge will have the power to Order that one person's pension fund be shared between him/her and his/her spouse. Whilst the pension member has a reduced fund, in order to calculate the limit of contributions which can be made to the fund the part which has been hived off is still treated as part of his or her existing fund. Pension companies will be obliged to keep very detailed records to ensure that limits are not exceeded.

Once a pension sharing Order has been made, the recipient of the Order may leave their fund either where it is, amalgamate it with an existing fund in the same scheme or transfer it to a new scheme entirely, but it has to remain in a pension fund, i.e. cannot be used as available capital for spending.

This information sheet has been prepared to highlight some key issues relating to financial provision on or following divorce. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at July 2004 and may be affected by subsequent changes in the law.

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