

GUIDE TO FINANCIAL DISPUTES WITHIN DIVORCE PROCEEDINGS (ANCILLARY RELIEF)

1. Terminology

“Ancillary Relief” or “Financial Relief”

The financial claims brought by either the Petitioner or Respondent in divorce proceedings

“Party”

Any of the people involved in Court Proceedings - normally the Petitioner or Respondent or Applicant and Respondent.

“Applicant”

The person who makes an application for financial relief.

“Respondent”

The person who responds to an application for financial relief.

N.B. The Applicant in the financial proceedings can be either the Petitioner or the Respondent in the divorce proceedings and this can often cause confusion.

“Open Correspondence”

Correspondence that can at any time during the proceedings be shown to the Court.

“Without Prejudice Correspondence”

Correspondence that can never be referred to or produced in Court unless the parties have reached an agreement in the correspondence.

“Without Prejudice Save as to Costs Correspondence” (Calderbank Proposals)

Correspondence that can only be produced to the Court at the end of the proceedings when the Court considers liability for each party's legal costs.

Form E Statement:

A sworn document setting out the parties' respective financial circumstances in a prescribed form.

The First Appointment (‘Finance Dispute Resolution Hearing’)

A Court appointment in front of a District Judge to be attended by the parties and their legal advisers, at which the Court will give Directions on the preparation of the case for final hearing and consider whether the matter is suitable for Financial Dispute Resolution (FDR).

Financial Dispute Resolution (FDR):

An appointment in front of a District Judge at which the parties and their legal advisers attempt to reach settlement with the assistance of the Court. The discussions and negotiations are conducted on a without prejudice basis and the final hearing cannot take place before the District Judge who presided at the FDR

Child Support (Child Maintenance):

Periodic (income) payments by one party to the other party for the benefit of a dependent child of the family. The amount is usually determined by the Child Support Agency under the Child Support Act

1991. The Courts become involved in limited cases.

**Spousal Maintenance
(Periodic Payments):**

Periodic (income) payments to be made by one party to the other party during the lifetime of both parties or up until the re-marriage of the payee.

**Maintenance
Pending Suit (MPS):**

An interim Order for periodic (income) payments to be paid during the course of divorce proceedings up until the date of Decree Absolute.

A Clean Break Order:

An Order which terminates the financial obligations of each party towards the other during the course of their respective lifetimes and after death (this means that neither party would be entitled to apply for income or capital out of the deceased party's Estate).

Disclosure/Discovery:

A broad term encompassing the various ways in which one party gives information ("discloses") to the other party relevant factual information. This might be by way of correspondence, or a sworn statement, or the production of relevant documents.

"Assessment of Costs"

A procedure under which the amount of costs payable is assessed by the Court (formerly known as taxation).

"Standard Basis of Assessment"

The Court will:-
(i) only allow costs which are proportionate to the matters in issue;
(ii) resolve any doubt which it may have as to whether other costs were reasonably incurred or were reasonable and proportionate in amount, in favour of the paying party.

"Indemnity Basis"

The Court will resolve any doubt which it may have as to whether the costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

2. The Law

The Court has wide sweeping powers in divorce, nullity and judicial separation proceedings to make a number of financial orders in favour of either party to the proceedings and/or for the benefit of any children of the family. The range of Orders include: lump sum Orders, property adjustment Orders, pension sharing/earmarking Orders (in the case of divorce or nullity proceedings), interim and/or final periodic payments Orders, and maintenance pending suit Orders.

(A) Section 25 of the Matrimonial Causes Act 1973

When deciding what Orders to make, the Court has a very wide discretion. By Section 25 of the Matrimonial Causes Act 1973, all the circumstances of the particular case must be taken into account and first consideration must be given to the welfare of any minor child of the family who has not attained the age of 18. Section 25 directs the Court to 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 any benefits under a pension scheme which a party to the marriage has or is likely to have), 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 (for example a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

(B) Equality (White -v- White)

In October 2000, the House of Lords delivered a very important judgment in a case involving “big money”, called White -v- White. In that judgment, the House of Lords said that:-

- (i) In seeking to achieve a fair outcome, there was no place for discrimination between husband and wife and their respective roles;
- (ii) The Court's aim should be to achieve a fair result and before making a division of assets a judge should check his tentative views against the yardstick of equality. As a general guide, equality should be departed from only if, and to the extent that, there was good reason for doing so
- (iii) Where a wife does not work (or only works part time) and instead looks after the home and children, her contributions must be regarded as equally valid and valuable in the overall family's partnership as those of the husband who makes the main financial contributions (the same principles apply where it is the husband who looks after the home and the wife is the main breadwinner).

There have been a considerable number of decisions of the Court of Appeal since adding more guidance as to how the law should be applied and in 2006 the House of Lords delivered a further important Judgement in the cases of *Miller* and *McFarlane*. Although these cases also involved “big money” there was useful guidance for all cases:-

- (a) The court has to try and arrive at a fair result for the husband and wife and three principles have emerged
- (b) Firstly, the assets of the husband and wife should be divided primarily so as to make provision for their housing and financial needs to take into the account the various criteria.

- (c) In most cases once you have achieved that, that is the end of the matter as there rarely sufficient resources to provide adequately for the needs of two homes.
- (d) Secondly, in some cases the husband and wife may have organised their affairs so that one of them is severely disadvantaged financially and should receive some sort of compensation for that. An example of this is where you have two potentially high earning spouses and one of them gives up their career to look after a child.
- (e) There is then a third principle of sharing which comes from the concept of the husband and wife committing themselves to sharing their lives and when the partnership ends they are each entitled to an equal share of the assets unless there is a good reason to the contrary. However this does not necessarily dictate a mathematical equal division of the assets for often where there are children one spouse will earn substantially more than the other and that higher earning power is a substantial resource. The ultimate object is to give each of the husband and wife an equal start on the road to independent living.
- (f) There is a distinction between what is referred to as matrimonial property and non-matrimonial property. Matrimonial property is that acquired during the marriage (other than by inheritance or a gift) and will include assets such as the family home. The non-matrimonial property is property that the husband and wife bring with them into the marriage or acquire by inheritance or gift during the marriage.
- (g) In the case of a short marriage then fairness may well require that the matrimonial property should be divided equally but not the non-matrimonial property. As years go by and the marriage is longer then the distinction between matrimonial and non-matrimonial property will diminish.

The full implications of these decisions continue to be debated by the lawyers and judges practising in the Family Division and there is considerable uncertainty as to how income should be dealt with in cases where there is both substantial capital and income but not enough capital to enable both spouses to be fully independent of each other. Each case will continue to be argued on its own facts.

3. The Overriding Objective

The ancillary relief rules are a procedural code with the overriding objective of enabling the Court to deal with cases justly. Dealing with a case justly includes, so far as is practicable:-

- (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; and
 - (iv) to the financial position of each party;
- (d) Ensuring that it is dealt with expeditiously and fairly; and
- (e) Allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

The Court must seek to give effect to the overriding objective when it:-

- (a) Exercises any power given to is by the ancillary relief rules; or
- (b) Interprets any rule.

The parties are required to help the Court to further the overriding objective.

The Court must further the overriding objective by actively managing cases. Active case management includes:-

- (a) Encouraging the parties to co-operate with each other in the conduct of the proceedings;
- (b) Encouraging the parties to settle their disputes through mediation, where appropriate;
- (c) Identifying the issues at an early date;
- (d) Regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question;
- (e) Helping the parties to settle the whole part of the case;
- (f) Fixing timetables or otherwise controlling the progress of the case;
- (g) Making use of technology; and
- (h) Giving directions to ensure that the trial of a case proceeds quickly and efficiently.

4. Pre-application Protocol

The aim of the pre-application protocol is to ensure that pre-application disclosure and negotiation takes place in appropriate cases and that, where it does take place, it is dealt with:-

- (a) Cost effectively;
- (b) In line with the overriding objectives.

A further aim is to ensure that the parties are in a position to settle the case fairly and early without litigation.

Failure to comply with the pre-application protocol may give rise to cost or other consequences.

The parties should:-

- (a) Provide full, frank and clear disclosure of facts, information and documents which are material. This should be done by the exchange of schedules of assets, income, liabilities and other material facts supported by some documents. Excessive documents should not be disclosed and excessive or disproportionate costs should not be incurred.
- (b) Identify the issues and clarify their claims as early as possible.
- (c) Refrain from entering into protracted and unnecessary correspondence and "trial by correspondence".
- (d) Refrain from obtaining expert valuations unless necessary because the parties cannot agree or do not know the value of a significant asset. Keep the costs of the valuation proportionate to the sums in dispute and instruct experts jointly.

The aim of all pre-application steps must be to assist the parties to resolve their differences speedily and fairly or at least narrow the issues and, should that not be possible, assist the Court so to do.

5. Procedure

(i) Notice of Intention to Proceed

The Petition should contain an application for financial relief. Respondents to Petitions have an opportunity to make a claim for financial relief if they defend the divorce proceedings. In order to bring any application for financial relief to the attention of the Court, one party to the divorce proceedings must file a Notice of Intention to either make, or proceed with, an application for ancillary relief. The Notice will be issued by the Court together with A Notice of First Appointment fixed on a date about 12-14 weeks later. These Notices will be served on the Respondent to the application for financial relief

(ii) Discovery

Approximately 7 to 9 weeks after the issue of the Notice of Intention both parties must exchange on the same day their sworn Form E statements and any of the documents listed below which may be of relevance.

- (a) Bank Statements covering the past 12 months for any accounts owned by them and/or owned by them jointly with another person
- (b) Building Society Statements for accounts owned by them and/or by them jointly with another person
- (c) Up to date quotations for the surrender values of any Life Assurance Policies (such as a Life Assurance Policy in connection with a mortgage) owned by them or jointly with another party)
- (d) The last 2 sets of accounts for any business interests held by a party
- (e) An up to date valuation of any pension schemes to which a party belongs, including the State Earnings Related Pension Scheme (SERPS) and any relevant correspondence with the Trustees.
- (f) Last three pay slips and P60 for the most recently completed financial year if in paid employment.
- (g) Accounts for the past two years if self employed.

The Form E statement is a very detailed document which provides for the disclosure by both parties of all of their assets, debts, pensions, Life Assurance Policies, income from whatever source and future financial needs. It takes a great deal of time and patience to prepare and work should commence on it well in advance of the date set by the Court for mutual exchange.

It is very important to understand the obligation imposed upon you (and your spouse) to make full and frank disclosure of all material facts, documents and other information relevant to the issues. This is an ongoing obligation and includes the duty to disclose any material changes after the initial disclosure by way of Form E statements has been given. Any failure to comply with this obligation is likely to give rise to significant costs penalties being made against the person who has failed to give proper disclosure.

(iii) Preparation for The First Appointment

14 days before the First Appointment each party must file and serve the following documents:

- (a) A concise statement of issues in the case, chronology and questionnaire referring to the concise statement of issues together with a schedule of documents to be disclosed by the other party.
- (b) Notice stating whether that party will be in a position to use all or part of the First Appointment as an FDR.
- (c) Confirmation of the fact that relevant third parties have been served with Notice of the proceedings. A relevant party might be a Trustee of a pension scheme or a mortgagee (these are just two examples).

(iv) The First Appointment

Both parties must attend the First Appointment with their legal advisors.

The First Appointment must be conducted with the objective of defining the issues and saving costs. Both parties must bring costs estimates to the First Appointment.

If the First Appointment is to be treated as an FDR, it will be the earlier part. If a settlement is reached as a result of negotiations during the FDR part of the First Appointment, the Court will make a record of the settlement and that record will be incorporated into an Court Order made with the consent of the parties (a Consent Order). Any such Order will bring the matter to a close.

If agreement has not been reached but is close, the Court may list the matter for another FDR. If the likelihood of an agreement being reached is remote, the Court will list the matter for a final hearing. In any event, the second part of the First Appointment will be used for the Court to give Directions on all or some of the following matters:-

- (a) The extent to which any questions seeking information must be answered and what documents requested must be produced.
- (b) The valuation of assets, including where appropriate the joint instruction of joint experts.
- (c) Any further evidential matters.
- (d) Whether there should be a further Directions appointment.
- (e) Whether, having regard to all the circumstances (including the extent to which each party has complied with this part and in particular the requirement to send documents with the Form E) to make an Order about the costs of the hearing.

(v) The FDR

The FDR appointment must be treated as a meeting held for the purposes of discussion and negotiation. It must be attended by both parties, their solicitors and, if instructed, their Counsel. It is conducted on a "without prejudice" basis. This means that the District Judge who presides over a FDR which does not result in a settlement will not know anything about what took place and what was said at the FDR.

Different Courts adopt different approaches to the conduct of an FDR. The parties are normally encouraged to attend Court at least one hour before the time of the hearing in order to negotiate direct between themselves before going into Court. Any skeleton arguments that have been prepared will be exchanged and an attempt to narrow the issues will be made.

In court, the matter will normally be "opened" by the legal advisor for the person who is most likely to be the recipient of an award (usually the wife). The opening will include relevant historical and financial matters as well as submissions as to the Orders sought by that party. The opposing party's legal advisor will then put forward the opposing party's case. Neither party will be asked to give evidence on oath and there is likely to be a great deal of discussion between the District Judge and the parties' respective legal advisors. If an agreement is reached, it will be incorporated into a Consent Order. If there is no agreement, the Court will give further Directions.

At the FDR, both parties must file up to date costs estimates.

(vi) The Filing of Offers

Both parties are under a positive duty to negotiate.

Not later than 7 days before an FDR (including an FDR at the First Appointment) the Applicant must file with the Court details of all offers and proposals and responses to them, including without prejudice offers.

6. Costs

The rules controlling the power of courts to make orders that one party pays the other's legal costs in relation to applications for ancillary relief have dramatically changed for applications that were started after 3rd April 2006

The starting point is that each party will pay their own legal costs but the court retains the power to order one party to pay the other's costs where it is appropriate to do so as a result of the conduct of a party in relation to the proceedings and the following are matters that must be considered by the court:

- Failure to comply with the rules as to conduct of the proceedings
- Any open offer made to settle the proceedings
- The reasonableness of raising or pursuing or contesting any issue or allegation
- The manner in which an issue or allegation was pursued or responded to
- Any other aspect of a party's behaviour
- The financial effect on the parties of a costs order

In ancillary relief proceedings:-

- It is incumbent upon the parties to negotiate if possible.
- A failure to negotiate and a failure to make full and frank disclosure of your financial circumstances throughout the duration of the case, including the disclosure of any changes that may from time to time take place may result in costs penalties.
- The failure to follow the rules and to behave reasonably in the way in which you conduct the proceedings may result in costs penalties.

Please see our Party and Party Costs Guide for further information in the event that a costs Order is made

The purpose of this guide is to give an overview of the financial applications that can be made following a divorce, nullity or judicial separation and is not intended to replace expert advice on your own position. You should not rely on what is said in this fact sheet alone. If you would like advice as to your individual position we would be happy to accept instructions to advise you.