

## Settling financial issues following divorce or dissolution of civil partnership



Sorting out the finances is often one of the main concerns for separating couples. Thoughts as to what should happen to the family home, how other assets should be divided and whether maintenance should be paid, by one spouse to the other as well as to the children, can be overwhelming.

Most separating couples are able to reach agreement regarding the division of assets and finances, whether that is by just talking together or with assistance from a third party such as a mediator or within the collaborative practice (see our leaflet “Alternatives to Court”). But what happens if they can’t?

### Will I have to go to court?

If mediation and all other forms of resolving dispute fail you may have to consider making an application to the court for a Financial Remedy Order.

### Who can apply to court?

Either spouse or civil partner can make an application to court to resolve financial disputes arising from divorce or civil partnership dissolution. The person making the application is the applicant and the other person is the respondent.

### What happens when the application is received by the court?

When either of you makes the application to court, the court automatically generates certain standard directions to help to progress your case. These are:

- the date and time for the first court appointment (sometimes referred to as an FDA or first appointment)
- that five weeks before that appointment you must each file at court and exchange a completed financial disclosure form (Form E) giving full details of your financial circumstances, and
- that two weeks before that appointment, you must each file with the court and exchange:
  - a short statement about what the disputed financial issues between you are
  - a chronology of the important events in the marriage or civil partnership
  - a questionnaire if you have any queries on the other person’s financial disclosure, and
  - a form saying whether you will be using the first court hearing to deal with procedural issues or that the hearing might be able to assist you with negotiations aiming for settlement and so need a longer hearing.

### What happens at the first court appointment?

The first appointment is usually listed for 30 minutes of the district judge’s time, unless both people feel they have sufficient information to negotiate, when it can become a longer hearing where the judge gets involved in helping you settle the case (see below, about the FDR).



If this is not possible, at the first appointment the court will consider what more information is necessary to decide what should happen: the judge will order questionnaires (questions to clarify the financial information of the other) to be answered by a certain date, consider what other expert evidence (e.g. on the value of property, or regarding pension details etc) should be obtained and by when, and then it will fix the date of the next court appointment.

The idea is that before the next court appointment each of you and the court will have enough information available about the financial picture to enable you to negotiate constructively about your financial matters.

Immediately before every court appointment, each person must file at court and exchange a statement of their legal costs.

### **What happens at the FDR?**

The FDR (financial dispute resolution) hearing is usually the second court appointment. It can sometimes take place as the first appointment, if each of you has all the information you need early on. If this is possible it can save you money in legal fees.

The FDR is a 'without prejudice' hearing, which means each of you is able to make proposals for settlement that cannot be referred to openly in court afterwards. The judge will try to assist you to come to a settlement and may give an indication of what they think could be an appropriate solution. If you reach an agreement the court can potentially make an order that day to formalise your agreement and end the court proceedings.

If you cannot reach an agreement on the day the judge will give any further directions about what is needed to get the case ready for the court to make a decision, which may include asking each of you to prepare a detailed statement, and will fix a date for the final hearing (or 'trial'). This judge cannot be the judge at the final hearing because they have knowledge of the 'without prejudice' discussions.

### **What happens at the final hearing?**

If it is not possible for the two of you to agree, the court will make orders at the final hearing about how your property, assets and income should be shared. You should bear in mind that very few people's cases get to final hearing stage—most people agree ('settle') before then.

At a final hearing, the applicant presents their case first, then the respondent says what they want to happen. Each of you, and any experts you have asked for an opinion, will have to give evidence and be cross-examined by the other (or their legal representative if they have one). After hearing all the evidence and submissions from each of your legal teams, the judge will make an order about what should happen.

There is limited scope to have your costs paid by the other person in financial proceedings. The general rule is that each person pays their own legal fees.

### **How does the court decide what is right?**

The court follows the legal principles from legislation and case law in making its decision, although each judge has discretion to do what they perceive to be appropriate on the evidence in each particular case. This means the precise outcome of financial court proceedings can be quite difficult to predict.



The statutory principles are set out in section 25 of the Matrimonial Causes Act 1973 and Schedule 5 to the Civil Partnership Act 2004. The court's first consideration is the welfare of any children involved. Alongside that, when determining an appropriate division of resources, the court considers:

- each person's income, earning capacity, property and other financial resources, available now or in the foreseeable future, including earning capacity
- each person's financial needs, obligations and responsibilities relevant now or in the foreseeable future
- the standard of living enjoyed by the family before the breakdown of the marriage
- each person's age and the length of the marriage
- any physical or mental disability
- contributions made or likely in the foreseeable future to make to the welfare of the family, including any non-economic contribution
- 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 (although it is rare for conduct to be taken into account and the reason for the marriage or civil partnership breakdown is very unlikely to be a conduct issue for the purposes of a financial application), and
- the value of each of the parties to the marriage of any benefit which that party will lose the chance of acquiring

Other principles have become part of the law through the decisions of senior judges in important cases. These dictate that the court must be fair, considering each party's needs, any compensation payable to one party for e.g. loss of career opportunity through marriage, and the sharing of any wealth above that which fulfils each party's reasonable needs.

When dividing assets, the court will measure the end result against a benchmark 50/50 asset split to assess whether anything other than that is justified. It would be usual to expect that there would not be a 50/50 asset split where one person's (or the children's) needs require a higher proportion of the capital assets, eg for housing, or sometimes where one person came into the marriage with significantly greater assets than the other. A 50/50 split is actually quite unusual.

An agreement made before or during the marriage can also have a significant effect on what the court decides.

## What can the court do?

The tools that the court uses to divide up financial affairs apply to all property in which either or both of you have an interest (which may also, in certain circumstances, include assets in companies or trusts):



- it can order a sale of a property, a transfer to one person (or to a child) or put it into a trust
- it can order a lump sum (whole or in instalments) or a series of lump sums, e.g. to pay off a mortgage
- it can order one party to pay maintenance to the other either for the rest of their joint lives/until the recipient remarries or enters into a subsequent civil partnership, or for a fixed period (a non-extendable or extendable term), e.g. until retirement;
- it can order money for educational expenses etc., but not usually for general child maintenance, except at higher income levels, and
- it can order that a pension be shared, or attached—sharing is where funds are transferred or split between the parties; attachment is like maintenance direct from a pension, but can also be a lump sum.

## How can we help you?

We will advise you on the best way to proceed, whether you can start proceedings and when and if those proceeding should be issued. We will help you in drafting all the relevant documents and advise on a strategy and likely outcomes. We will also bring in other experts if and when required to ensure you have the best advice and knowledge going forward.