

## MONEY MATTERS ANCILLARY RELIEF

Nearly all of us have friends or family who have been through a divorce or know someone who has. Frequently these friends or family will aim to help you by telling you what you will or will not get by way of a financial settlement following a divorce. Although these friends or family probably mean well it is extremely important to remember that each divorce is different. This overview aims to help you understand ancillary relief and why it is always best to take legal advice rather than listening to well-meaning third parties.

Everything that is said here can equally apply to civil partnerships when they break down and are being dissolved in much the same way as when marriages break down and there is a divorce, judicial separation or a decree of nullity.

**Ancillary Relief is a legal term that describes all the Orders of a financial nature which the Court has the power to make.**

### WHO CAN MAKE AN APPLICATION FOR ANCILLARY RELIEF?

Either party to the proceedings. You can only make an application for ancillary relief against a party or a former party i.e. party means your husband or wife. If parties decide to divorce and not to obtain Court Orders dealing with the financial provisions and where neither party remarries then the financial claims which each of them have against the other are simply left open.

This situation is generally regarded as unsatisfactory as it creates a degree of uncertainty that one party may make a claim against the other at any time in the future. If a party to a divorce remarries without making an application for ancillary relief he or she cannot subsequently issue an application (the remarriage trap) although an application made before remarriage can still be progressed after it.

Generally speaking it will be better to ensure that an application is made and determined and the Court Order dismisses the right either has to make further claims. In divorce proceedings the orders can be made by the Court after Decree Nisi usually to take effect from Decree Absolute.

### WHAT CAN THE COURT ORDER?

The Court can make the following Orders:-

**Periodical Payments.** This is a payment made out of income by one party to provide for the other and frequently is called maintenance. It is payable by reference to a period and very often is a monthly payment. A maintenance Order can be open-ended or it can be limited in duration. If the party receiving the maintenance remarries (or enters into a registered civil partnership for a same sex couple) or dies it automatically ceases.

It is an ongoing continuing obligation and therefore there is not a "clean break" (see later) if maintenance payments are being made under an order. It can be varied (either as to the amount payable or the duration of it) in the future if the financial or other circumstances of one or both parties change significantly. On an application for variation the Court has power to fix a lump sum and order the payer to pay it as capitalised maintenance and terminate the periodical payment order.

# HENLEY LAW

SOLICITORS

**Lump sum.** This is an Order that one party must pay the other a sum of money. It is a payment of a capital nature. It is normally to be a one off payment but the Court can order it to be paid by instalments. The order specifies the amount and when payable and if by instalments or there is default in payment it can specify interest payable. Once fixed the amount is not variable but in some circumstance the time for payment can be.

**Transfer of Property.** It usually is going to mean land and buildings (e.g. the former matrimonial home) but it also includes stocks, shares, bonds, policies and household contents cars boats and possessions. The Court has the power to transfer such an asset from one persons ownership to the other outright or to determine the shares in which they will jointly own it subsequently and transfer a part share accordingly. There is a power to order a sale and divide up the proceeds if the Court thinks it is appropriate.

**Settlement of Property.** This is another way of dealing with property where instead of transferring the legal ownership outright to the other it will provide for the other having the right to enjoy occupation or use of it for a period preserving some right for both to benefit in the ultimate proceeds of the property's realisation at the end of that period.

An example would be the matrimonial home being settled on the wife for her own and the children's occupation until the children cease full time education whereupon it was to be sold and the proceeds shared out in such proportions as the Court specify.

**Pension sharing or attachment** These enable the Court to make provision in relation to pension arrangements that one party has for the benefit of the other. Accumulated pension rights are often very valuable assets. A sharing order is one that shares or splits one party's pension fund so that the recipient of the share then has a pension fund that is personal to him or her.

An attachment order is one directed to the trustees or managers of the pension scheme to implement when the party with the pension retires directing that from the pension in payment some of the lump sum capital and pension income is diverted and paid to the other party. Generally speaking it is better for the recipient if he or she obtains a sharing rather than an attachment order the latter being essentially hybrid lump sum and periodical payments as described above.

## **Can the Court make financial Orders for Children?**

Yes but only in limited circumstances.

If the parties agree in writing it can make a periodical payments order requiring the payment of income by one to either the other or directly to the child until the child is 17 years or ceases full time education (and this includes university education) or training for a trade profession or vocation. It can order school fee payments to be made. It can order periodical payments to be made by parties who live abroad or parties who have been assessed to pay the maximum assessable amount by The Child Support Agency (CSA) and the order is to "top-up" that maximum. Otherwise the Court has no jurisdiction and the CSA has to assess and collect child maintenance.

# HENLEY LAW

SOLICITORS

## HOW DOES THE COURT DECIDE WHAT ORDER TO MAKE?

It is important to understand that each case will turn on its own facts. This is because it is the duty of the Court to have regard to all the circumstances of the case. It must make such order or orders in combination that produce a fair outcome for both parties.

A first consideration of the Court is the welfare of any children under the age of 18 and the impact any order or orders will have upon it. This includes stepchildren who have lived with the parties in the same household as well as the natural children of both the parties. The Court must try to arrange things that if possible a clean break can be achieved either immediately or within a time that can be determined.

A clean break means the termination of any further financial obligation from one to the other. It will be only be appropriate where each party can adjust to self sufficiency without undue hardship. Sometimes the effect of implementing the orders the Court makes and an individual's own circumstances will mean that it will be easy to achieve a clean break (for example where each party is young healthy and working and they have no relevant children) whereas there will be times where it cannot be done (for example where there is a wife with young children who needs continuing maintenance for herself as she cannot work and the rest of what is ordered does not give her such an amount of capital as to produce a sufficient investment income to make her self sufficient).

### **The Court has in particular to have regard to the following matters:-**

The income, earning capacity, property and other financial resources which each party has or is likely to have in the foreseeable future including, in the case of earning capacity, any increase in that capacity in which it would be, in the opinion of the Court, reasonable to expect a person to take steps to acquire.

- 1. The standard of living enjoyed by the family before the breakdown of the marriage.  
The ages of each party and the duration of the marriage.**
- 2. Any physical or mental disability of each party.**
- 3. The contributions which each 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.**
- 4. The financial needs, obligations and responsibilities, which each party has or is likely to have in the foreseeable future.**

The conduct of each party, if that conduct is such that it would in the opinion of the Court be inequitable to disregard. The value to each party of any benefit which one party because of the divorce will lose the chance of acquiring (most usually pension provisions).

In each case the Court has discretion to decide what will be a fair outcome. In making the decision it must not discriminate unfairly particularly by reason of gender.

Before finally deciding the Court should form a tentative view of what might be fair and then cross check this against what an equal division of the assets would be. There is no presumption that an equal division is going to be the right outcome (people who say to you it's always 50/50 are wrong) but equality should only be departed from if a good reason for doing so has been identified when the Court has gone through the exercise of considering the facts and circumstances unique to the parties and the welfare of any children. More often than not meeting the needs each party and the children have is the most important factor in the decision.

# HENLEY LAW

SOLICITORS

## HOW DOES THE COURT KNOW WHO HAS WHAT?

Both parties are under an obligation to make full and frank disclosure of all their individual financial circumstances so that both parties and the Court have a full and complete picture of the financial position. The information must be given accurately and completely and failure to give full disclosure may result in the Court exercising its powers to make costs Orders against the person who does not disclose the information.

If one party lies or seeks to mislead the Court can take that conduct into account as conduct that it would be inequitable to disregard in deciding the outcome. The Court can also make Orders for the production of documents and can order valuation by experts where there is a dispute about the true value of an asset. Your solicitor will ask you to provide full details of your financial position from the outset and will explain exactly what is required. Failure to provide proper disclosure at the right time invariably leads to delay and is the biggest cause of increased legal costs for both parties to an ancillary relief application.

## HOW LONG?

The time the whole procedure takes from start to finish if you have to go through all the stages can vary considerably depending on the issues and problems arising in each case. Usually it is not going to take less than 6 months with between 9 and 12 months as the average. You can reach agreement and have a consent order made at any stage as long as there is a decree nisi. There are rights of appeal from decisions made by the Court but it is not easy or cheap to appeal. There is no right of appeal against a consent order as such but they can be overturned in some circumstances such as undue influence being exerted by one party over the other, fraud or material non disclosure. Either appealing or applying to set aside an order is something that requires very careful thought and judgment and should be avoided other than in the last resort.

## DO I HAVE TO GO TO COURT?

You can have a divorce or a judicial separation without resolving the financial issues at all (exceptionally rarely will it be sensible to do this) or by making an agreement voluntarily and implementing it without any court order (generally unwise because as mentioned earlier it leaves the possibility of further claims open and being pursued later). Most applications do not proceed through all the stages.

Usually the parties are able to come to agreement with regard to financial issues. Sometimes these agreements can be reached as a result of negotiation. If you and your other party come to an agreement then one party's solicitors will draft a "Consent Order" which sets out the terms of the orders you want that is then approved by the other party and then sent to the Court for the Judge to consider.

Orders made by consent after negotiation should only be appropriate where there has been full reciprocal disclosure. If there is material non-disclosure or inaccurate information has been relied upon that later comes to light then in some circumstances these orders can be set aside and parties can start again afresh. But there is no guarantee that they will be.

There is every good reason for making financial agreements voluntarily but clients who tell us that their party offers a settlement but will not give financial disclosure should generally refuse the offer. It almost certainly will not be a fair offer if the complete picture was known. Disclosure need not be an expensive process. Getting good legal advice is essential. In some circumstances consent orders made without it or worse still after bad legal advice can also be set aside.

# HENLEY LAW

SOLICITORS

## MEDIATION

An alternative to Court proceedings or negotiations between solicitors in trying to reach agreement is the process of mediation. This involves an impartial trained third person assisting those involved in family breakdowns to communicate better with one another and to help them reach their own informed decisions about some or all of the issues relating to or arising from the separation or divorce. This includes financial matters. One advantage of reaching a consensus through mediation is that it is almost always considerably cheaper because hopefully it will not involve contested proceedings in the Court. There are a number of different organisations locally which carry out mediation and if you would like further details please contact us and we will be happy to provide you with information.

## HOW MUCH DOES IT COST?

This varies widely. The average for an application to the Court for ancillary relief costs in the region of £2,000 – ????? Depending how far you have to go through the stages of the process to get an outcome. It can be more expensive in some cases. It will very rarely be less than £2,000 to sort out financial issues and implement what you have agreed especially where a house sale or transfer is involved.

Solicitors charge on an hourly basis so your costs will be lower the less time we have to spend working for you. We want you to get a good outcome incurring the least amount of expense possible in the circumstances. At all stages you will be expected to factor in to the equation the legal costs involved when making decisions about terms of settlement offered and whether they should be accepted. We will help and guide you. Even if you receive Public Funding then you should be aware of your legal costs because you will have to pay back your costs to the Legal Services Commission if you recover or preserve property as a result of the work we do for you.

## MAINTENANCE - HOW MUCH IS FAIR?

This will depend on how much each needs to make ends meet.

If there is a shortfall, how much can your spouse afford, after meeting his/her own needs. It is a balancing exercise. There is no magic formula.

It is usually resolved by going through in detail the outgoings of each household; it is then a question of trimming items of expenditure to a lower figure or excluding those which may not be absolutely necessary, in an effort to get the quart out of the pint pot.

If one of the parties is only working on a part time basis or is not working at all, it may be necessary to look at his/her earning capacity - to see if more income can be earned. Often it will be a case of balancing that against the cost and practicalities of looking after children, particularly during the school holidays.

Maintenance can always be varied upwards or downwards, if circumstances change - for the person paying it or the person receiving it.

For example, if the maintenance payer loses his/her job, then it is likely that an application will be made for the maintenance to be reduced very substantially, perhaps to a nominal level.

Maintenance comes to an end automatically if the person receiving it remarries. It does not come to an end automatically if the person receiving maintenance starts to live with somebody else.

For the majority of families going through divorce, the financial equation has to be a finely judged balance between the needs of the separating spouses, and matching those needs from the overall financial resources.

# HENLEY LAW

SOLICITORS

## WILL I GET PUBLIC FUNDING (FORMERLY LEGAL AID)?

**1. Your financial position (income and savings) and:**

**2. Whether you have a strong enough case to justify Public Funding.**

In most cases the Legal Services Commission will want to see that you have attempted mediation prior to applying for a Public Funding Certificate to be represented on an application for ancillary relief. Initially public funding (subject to income and savings) would be available to enable you to take up the mediation option.

There are exceptions to this for example if you are in fear of violence or significant harm from your party or if he or she lives further than 2 hours away. If mediation is tried and is unsuccessful then the next stage would be to apply for a Funding Certificate. We can tell you whether or not you will qualify financially.

## WHAT HAPPENS IF THERE IS AN EMERGENCY IN RELATION TO MONEY?

You may need to go to Court urgently if for example you suspect the other party is about to spend large sums of money to defeat a claim for ancillary relief. The Court has various powers to make injunction orders that freeze assets or, if the assets have already been disposed of to set aside that disposition.

If you are suspicious that the other party is dissipating funds then you should contact us as soon as possible as time is the essence with regard to these injunction proceedings.

In addition, the Court has the power to make interim Orders for maintenance if the other party is not reasonably supporting you during the ongoing proceedings.

## WHERE DO I GO FROM HERE?

Again we stress every case is different. Talk to us and we will advise you about the most appropriate way to proceed.

### Disclaimer of Liability

These pages are for information purposes only. Nothing contained in these pages constitutes legal advice. You are advised that a lawyer should be personally consulted on any specific legal matter or problem. Henley Law accepts no liability whatsoever in contract, tort or otherwise for any loss or damage caused or arising directly or indirectly in connection with any use or reliance on the contents of this handout except to the extent that such liability cannot be excluded by law.