

Your guide to how the courts decide what financial orders to make on divorce, dissolution, judicial separation or nullity

Overview

This guide will provide you with an overview of the law applied by the courts when deciding what financial orders to make. Reference throughout this guide to divorce will equally apply to dissolution, judicial separation or nullity.

The starting point is the financial position of the parties. The court will first calculate the resources available and then look at how to distribute the resources between the parties. In deciding how to distribute the resources the court will apply statute and case law principles.

Statute

Section 25 of the Matrimonial Causes Act 1973 (MCA 1973) contains the statutory factors the court must apply to determine how the income and assets should be distributed on divorce. The court operates a discretionary regime and therefore when considering the Section 25 factors, different judges may adopt different solutions on identical facts, all of which would be within their judicial discretion.

It shall be the duty of the court to have regard to all the circumstances of the case, first consideration being given to the welfare of any minor children of the family (MCA 1973 s25(1)).

Circumstances can be past, present or future. A relevant circumstance of a case could be the remarriage of one of the parties or the existence of an agreement between the parties.

In every case, the first consideration of the court will be the welfare of any minor child of the family who has not attained the age of 18. 'Child of the family' is defined as any child who has been treated by both parties as a child of their family. The welfare of minor children essentially means their housing and day-to-day needs and can often include the costs of private education. Whilst the court's duty is limited to the period ending with the child's 18th birthday this does not prevent the court having regard to the needs of children over this age under one of the other Section 25(2) factors below.

Section 25 checklist

Section 25(2) of the MCA 1973 contains the following checklist of factors. No one factor is more important than the others.

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 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 (s25(2)(a)).

The court will make an order based on what the parties may reasonably be expected to receive if their opportunities are fully exploited. A party who does not take advantage of opportunities to earn or receive funds or chooses not to work when they can do so may find that the court draws adverse inferences against them.

The court will also consider any increase in earning capacity that it might be reasonable for a party to take. For example, there may be no reason why one party cannot increase their hours of work from part time to full time hours.

The first step the court will take when considering the property and financial resources of the parties is to calculate what income and assets are available. Property includes all property owned by either party,

whether they are personal belongings, land, shares, insurance policies or trust and business interests.

If one party has recklessly or irresponsibly wasted or dissipated assets the court is able to use its discretion to 'add back' or notionally attribute such wasted assets to the party responsible for the dissipation of the assets when considering the overall position of the parties.

The court must also consider the income, property or financial resources that a party is likely to have in the foreseeable future. This could include inheritance, funds from the sale of a business or income or property from a trust or third party, or assistance from a new partner. A personal injury claim may also be a financial resource to be taken into consideration.

There is no clear definition of what is meant by 'foreseeable future'. The court will determine the future financial resources available to the parties based on the evidence provided in the case.

The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future (s25(2)(b)).

The court will calculate the reasonable housing and income needs of the parties and any children of the family and make orders necessary to meet those needs. What constitutes obligations and responsibilities is not always clear. Legal obligations assumed by a party from which it would be impossible to withdraw would normally be accepted. For example, mortgage or loan repayments or payment of child maintenance. The court may however distinguish between obligations that were in existence during the marriage and those acquired post separation.

The standard of living enjoyed by the family before the breakdown of the marriage (s25(2)(c)).

In most cases the court will try to ensure that the standard of living for one party does not deteriorate to a greater extent than that of the other. The court is directed to consider the standard of living enjoyed by the family and therefore it is not just the parties' standard of living but also the children's standard of living that must be considered. Separate considerations may arise in cases of a short marriage or where the assets exceed need.

The age of each party to the marriage and the duration of the marriage (s25(2)(d)).

The age of the parties is usually relevant when considering earning capacity. A party aged 55 who has never worked will be considered differently to a party who is aged 25.

The court will also consider the length of the marriage. Where a marriage moves "seamlessly" from cohabitation to marriage the period of cohabitation will usually be included when considering the duration of the marriage. The duration of the marriage is usually only of significance in cases where there is a short marriage.

Any physical or mental disability of either of the parties to the marriage (s25(2)(e)).

The court will have regard to any physical or mental disability of either party and how this impacts on their current or future earning capacity.

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 (s25(2)(f)).

Contributions can be financial and non-financial. The court will make no distinction between the homemaker and bread winner and the contribution one party has made to the care of the children. The court must also consider future contributions. This is normally relevant when one party is to care for the children of the family.

Contributions of a financial nature can include the existence of non-matrimonial property (assets acquired prior

to the marriage or post separation or received through inheritance or lifetime gifts), through a 'special contribution' (exceptional effort on the part of one party to the generation of assets) and through pre-marriage endeavour that results in later commercial success. It will, however, only be in very exceptional circumstances that contributions made by one party during the marriage will be regarded as exceptional and taken into account.

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 (s25(2)(g)).

It is rare for conduct to be a significant factor in a case. For there to be relevant financial conduct it will need to be demonstrated that the behaviour of one party has had a clear effect on the resources of the parties. Relevant non-financial conduct could be the giving of false statements and non-disclosure of assets during proceedings or criminal convictions.

The value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring (s25(2)(h)).

The court is required to consider the loss of any benefit a party may lose because of the divorce. This is most frequently raised in relation to the loss of pension benefits.

Applications for orders for children

When determining applications for orders in relation to a child of the family Section 25(3) requires the court to have regard to the following matters:

- The financial needs of the child;
- The income, earning capacity (if any), property and other financial resources of the child;
- Any physical or mental disability of the child;
- The manner in which he was being and in which the parties to the marriage expected him to be educated or trained; and
- The considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (e) of Section 25(2) above.

Applications for orders for step children

When determining applications for orders against a party to a marriage in favour of a child of the family who is not the child of that party Section 25(4) requires the court to also have regard:

- To whether that party assumed any responsibility for the child's maintenance, and, if so, the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
- To whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own; and
- To the liability of any other person to maintain the child.

Case law principles

Although Section 25 prescribes the matters to which the court must have regard, it does not provide any formula or starting point for determining what proportion of the assets or income the parties should each receive. Whilst the law is clear that each case must be decided on its own merits against the Section 25 factors and that no one factor is more important, over the years case law has provided guidance on how to achieve a fair result. The principles from the leading cases can be summarised as follows:

- The overriding objective is fairness;
- The court must act in a just and non-discriminatory way. There can be no discrimination between economic and non-economic roles and therefore no bias in favour of the breadwinner as against the homemaker

and child carer;

- The principles of need, compensation and sharing should be considered in every case;
- Meeting the needs of the parties will require assets to be divided to meet their housing and other financial needs;
- Compensation is aimed at redressing any significant prospective disparity between the parties arising from the way they conducted their marriage or financial disadvantage arising out of entry into or exit from the marriage. For example, sacrificing or not pursuing a career;
- The matrimonial home is normally considered a matrimonial asset even if it was owned by one party prior to the marriage;
- The sharing principle should apply to all property unless there is good reason to depart from an equal division. Reasons to depart can be because:
 - needs cannot be met on an equal division;
 - the contributions of the parties. This can include the existence of non-matrimonial property (assets acquired prior to the marriage or post separation or received through inheritance or lifetime gifts), through a 'special contribution' (exceptional effort on the part of one party to the generation of assets) and through pre-marriage endeavour that results in later commercial success;
 - the existence of a pre or post-nuptial agreement;
 - the length of the marriage; and
 - the conduct of the parties.

Clean break

Under Section 25A MCA 1973 the court is required to consider whether the case is suitable for a clean break. This means that after implementation of their order the parties have no further financial obligations towards each other and cannot make future claims against one another. There are three elements to a clean break, these being capital, income and on death.

This guide is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more information about the issues referred to in this guide, please seek formal advice.