

Your Guide to Varying or Setting Aside a Financial Order or Undertaking

This guide will provide you with an overview of the law on varying a financial remedy order or undertaking. It will also provide you with an overview of the law on applying to set aside an order.

What orders can be varied?

Orders that can be varied or discharged are defined in section 31 of the Matrimonial Causes Act 1973 (MCA 1973) and include:

- **Maintenance pending suit:** orders providing for an amount of maintenance to be paid, usually monthly until the final divorce order.
- **Periodical payments and secured periodical payments:** Orders for the payment of maintenance, usually monthly for a specified term or on a joint lives basis.
- **Lump sums by instalments:** Any order for the payment of a lump sum by instalments.
- **Provision for children:** An order for periodical payments (child maintenance) or the payment of a lump sum by instalments.
- **Deferred lump sums:** Any deferred lump sum order that includes provision for pension rights and pension compensation rights.
- **Settlement orders:** An order providing for the settlement of a property for the benefit of a spouse or children of the family or varying a settlement for the benefit of a spouse or children of the family. The order to be varied must be made after an order for judicial separation and the application to vary must be made in subsequent proceedings for rescission of that order or for dissolution of the marriage.
- **Sale of property:** An order for the sale of property in an order for:
 - secured periodical payments;
 - payment of a lump sum; or
 - property adjustment.
- **Pension sharing orders:** The application to vary must be made before the order takes effect. A pension sharing order will take effect from the date of the final divorce order, or, if later, 7 days following the period of appeal (time for appeal usually being 21 days).
- **An executory order:** An order that has not been implemented (whether wholly or partly) can be varied. The court's decision whether to set aside or vary an executory order will depend on whether it would be inequitable to hold a party to the original terms of the order where there has been a significant change in circumstances.

What orders cannot be varied?

- An order for a lump sum not payable by instalments;
- Property adjustment orders (except settlement orders as outlined above);
- A pension sharing order after the order has taken effect. A pension sharing order will take effect from the date of the final divorce order, or, if later, 7 days following the period of appeal (time for appeal usually being 21 days).

Liberty to apply

Your order may include a liberty to apply clause which states ‘the parties shall have liberty to apply to the court concerning the implementation and timing of the terms of this order’. This will enable parties to return their case to court if issues arise regarding the timing or implementation of the order. Whilst this clause will allow the court to make directions to assist implementation of the order it does not allow the court to vary an order otherwise prohibited by section 31 of the MCA 1973 and therefore the court cannot vary capital awards and make a new order unless it is still an executory order.

Executory orders

If your order has not been implemented, or only partly implemented it can be varied or set aside or the court can decline to enforce it. In *Thwaite v Thwaite* [1981] 2 FRL 280 the Court of Appeal confirmed that the court can adjust a financial remedy order which remains executory if it would be inequitable to hold the parties to the original order in light of a significant change of circumstances.

There is a differing of judicial opinion on whether the change in circumstance must also amount to a *Barder* event. The case of *Barder v Barder* [1987] 2 FLR 480 established that the court can set aside an order if it is satisfied that a new event has taken place that invalidates the basis on which the order was made and the new event occurs within a relatively short time of the order being made. For *Barder* to apply the new event must also be unforeseen and unforeseeable.

Capitalisation

On varying a periodical payments order, the court has the power to ‘capitalise’ the periodical payment order by making:

- A lump sum order;
- A property adjustment order or
- A pension sharing order.

At the same time as making one of these orders the court can order a clean break.

What factors do the court consider on a variation application?

The court has a broad discretion. The first consideration is the welfare of any minor child (s.31(7) MCA 1973). The court will also need to consider any change in circumstances since the original order as well the parties’ existing financial circumstances. The overriding objective will be fairness.

How do you make a variation application?

The procedure for applying for variation is very similar to the procedure to apply for a financial remedy order. An application to vary will however follow a shortened fast-track procedure. Disclosure is provided in Form E1 (a shortened version of Form E and contains less information about a party’s capital resources). There is no financial dispute resolution hearing (unless a complex case and one is requested).

The obligation to make payments under the existing order continues until ordered otherwise.

The general rule as to costs applies. This means the court will not make an order requiring one party to pay the costs of another unless it considers the conduct of one of the party’s would make it inequitable to disregard it.

For a detailed overview of the procedure to apply for a financial order see [Our Guide to Applying for a Financial Order](#).

Can I vary an undertaking in my financial order?

The court has no power to vary the terms of an undertaking. The court does however have the power to grant or refuse an application to be released from an undertaking and can also consider accepting a further undertaking in different terms.

How do you apply for release from an undertaking?

If the terms of an undertaking mean it is equivalent to a financial order capable of variation the same procedure applies as a variation application. If the court does not have jurisdiction to make an order equivalent to a financial order capable of variation, the application for release should be made using Part 18 of the Family Procedure Rules.

What orders can be set aside?

The grounds for setting aside a financial remedy order are a matter of judicial discretion (paragraph 13.5 of the Family Procedure Rules PD 9A). Grounds for set aside can include:

- Fraud or fraudulent non-disclosure;
- Inadvertent or negligent non-disclosure of material facts;
- Mistake;
- Undue influence or duress;
- Lack of capacity;
- A subsequent event, unforeseeable at the time the order was made which invalidates the basis of the order (the *Barder Principle*).

The case of *Barder v Barder* [1987] 2 FLR 480 sets out the conditions to be satisfied in order to justify an application to set aside:

- that new events (both unforeseen and unforeseeable) have occurred since the making of the order that invalidate the basis, or a fundamental assumption, on which the order was made;
- that the new event has occurred within a relatively short time after the order (this is unlikely to be as much as a year and in most cases will be no more than a few months due to the strong public policy arguments in favour of achieving finality in litigation); the time period will be applied restrictively, although the particular facts of a case may justify a longer period if, for example, a party has been obstructive in the court process;
- that the application should be made reasonably promptly, and
- the application should not prejudice third parties who have acquired property that is the subject matter of the relevant order.

Mostyn J suggested in *BT v CU* [2021] EWFC 87 that there was also a fifth condition, namely, that 'the applicant must demonstrate that no alternative mainstream relief is available to [them] which broadly remedies the unfairness caused by the new event'.

The grounds for setting aside the order must be proved; a mere allegation is not sufficient.

The court has wide discretion on how to determine an application. The court can strike out the application or the court may decide to set aside the whole or part of the order. Once the court has decided to set aside an order it will usually give directions for a full rehearing to determine the original application. If the court is satisfied that it has all the information to do so it may decide to re-determine the original application at the same time as determining the set aside application.

How do you apply to set aside an order?

If an error of the court is alleged, or the order to be set aside includes a pension sharing or pension compensation sharing order, an application for permission to appeal will need to be made. Where no error of the court is alleged, the application to set aside should be made to the Family Court that made the order. The application should be dealt with by the same level of judge that dealt with the original application and if possible, heard by the judge who heard the original application.

The general rule as to costs does not apply. This means the court will usually make an order requiring the respondent to pay the applicant's costs.

Enforcing a financial remedy order or undertaking

For information on how to enforce a financial remedy order or undertaking see [Our Guide to Enforcing Financial Agreements, Orders and Undertakings](#).

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.