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)).

Needs refers to the income and capital needs of the parties. There is no statutory definition, and needs cannot be looked at in isolation. A judge will use their discretion to 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.

Needs: The Law Commission report and Family Justice Council Guidance

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 Law Commission examined the law on financial needs on divorce in its report, *Matrimonial Property, Needs and Agreements (Law Com No 343)* (see *Legal update, Law Commission publishes report on Matrimonial Property, Needs and Agreements*). It described needs as including payments to provide income, whether on a regular basis or capitalised, and the provision of a home, including privately-owned housing where appropriate, and provision for old age.

The Family Justice Council (FJC) has also provided guidance on needs on divorce for the judiciary, see *Family Justice Council: Guidance on financial needs on divorce (April 2018)*. It complements FJC guidance aimed at litigants in person, see *Sorting out finances on divorce (March 2024)*, which was issued in light of the Law Commission's conclusion that without legal advice, the increasing number of litigants in person are unable to work out the appropriate financial outcome on divorce.

Standard of living

The FJC guidance states that:

- In an appropriate case, typically a long marriage where there are sufficient financial resources available, courts have taken the view that the standard of living the parties had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards.

- It is also generally accepted that it is inappropriate for divorce to lead to a sudden and dramatic disparity in the parties' lifestyle.

Other relevant factors

However, standard of living is not an immutable guide and, depending on the facts, other issues to consider when assessing an applicant's needs include:

- The fact that needs must be causally related to the marriage (except in a situation of real hardship).
- The scale and source of the respondent's wealth.

- The length of the marriage.
- The applicant's age and health.

Transition towards financial independence

The Law Commission report found that the absence of a statutory objective to be achieved in making financial orders, led to regional differences in the levels of support awarded in different courts and a lack of transparency. It concluded that the objective of financial orders to meet needs should be to enable a transition to independence, to the extent that this is possible given:

- The choices made within the marriage.
- Length of marriage.
- Marital standard of living.
- Parties' expectation of a home.
- Continued shared responsibilities (importantly, childcare).

However, it acknowledged that a transition to independence may not be possible in a significant number of cases, because of age or other choices made during the marriage.

The FJC guidance endorses the Law Commission's approach. Cases have reflected the emphasis on a transition towards financial independence and the inter-relationship between the level at which future needs are assessed and the period during which those needs should be met:

- In an appropriate case, the court should assess its award on the basis that needs for housing and income will reduce in future.
- Standard of living is not the "lodestar". As time passes, how the parties lived in the marriage becomes increasingly irrelevant.

Case law principles

The principles from the leading cases can be summarised as follows:

- The overriding objective is to achieve a fair outcome;

- Where possible and fair to do so, the court should ensure that the parties' needs are met (the "needs principle").

- There should be compensation to a spouse who has given up valuable opportunities by marrying (the "compensation principle"). 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.

- Matrimonial assets should be shared, usually but not invariably, on an equal basis (the "sharing principle"). Reasons however to depart can be because:
  - needs cannot be met on an equal division;
  - 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.

- There can be no discrimination in favour of the spouse who has been the principal wage-earner at the expense of the spouse who has principally been the home-maker and where relevant the child-carer (the “non-discrimination principle”).

- The sharing principle **applies only to matrimonial propert**y (assets that are earned or gained during the course of, and as a result of the marriage) a**nd does not apply to non-matrimonial property (**assets which each spouse owned in his or her own right prior to marriage, or by inheritance or gift from an external source during the marriage).However, non-matrimonial property can still be subject to the needs and compensation principles.

- What starts as non-matrimonial property may become matrimonial property (referred to as “matrimonialisation”). What is important to consider is how the parties been dealing with the asset and whether this shows that, overtime they have been treating the asset as shared. For example, where a party has demonstrated an intention to use an inheritance for the benefit of the family, by translating into actual use and enjoyment, the parties have elected to treat it as matrimonial property, even if its origin was from outside the marriage.

- What is not determinative in deciding what is and what is not matrimonial property is who has legal title to the property.

- The matrimonial home is normally considered a matrimonial asset even if it was owned by one party prior to the marriage.

- Transfers of capital assets with the intention of saving tax, do not, without some further compelling evidence, establish that the parties are treating the capital asset as shared between them.

- The court must apply the needs principle when determining whether a sharing award is sufficient to meet future needs. If the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the needs principle prevails.

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 claims on estates on death.