

Separation and related financial matters

Fact sheet



Options on separation

1. Try to achieve a reconciliation – we have details of counsellors if you think this could be of assistance.
2. Begin divorce proceedings – there is one ground for divorce in the UK: that the marriage has broken down irretrievably. This must be demonstrated by one of the following facts:
 - 2.1 adultery – this must be admitted or proved
 - 2.2 unreasonable behaviour
(these 2 are the only immediate bases for a petition)
 - 2.3 you have lived apart for 2 years and your spouse consents to a divorce
 - 2.4 desertion by your spouse for a period of 2 years
 - 2.5 you have lived apart for 5 years (without the need for consent).

Divorce gives the court wide powers to adjust financial arrangements between spouses – see below.

3. If you have no basis for divorce immediately on separation but you wish to resolve financial arrangements you can enter into a separation agreement. This is a contract setting out the terms of your separation and how your assets and income are divided. Pensions can only be shared on divorce but an agreement as to how that should take effect at that stage can be included. Such agreements should be followed by the court on a subsequent divorce if the following conditions are met:
 - 3.1 Both parties received independent legal advice
 - 3.2 Full disclosure of both parties' financial circumstances was exchanged
 - 3.3 Neither party was under duress to sign the agreement.
4. If either of you do not want to divorce (for religious or other reasons) you could begin judicial separation proceedings. This is based on the same facts that need to be established in divorce (see paragraph 2 above) but there is no need to show that the marriage has broken down irretrievably. The court has the same powers to adjust finances as in divorce except that pensions cannot be shared. Another fundamental difference is that you stay legally married and therefore may continue to benefit from spouse's benefits or widow's/widower's benefits on the other's death (subject to any individual scheme's provisions relating to separation).

Resolving financial matters (in the context of divorce proceedings)

Disclosure

The first step is for each party to disclose to the other full details of their capital assets, debts, pension provision (including State entitlement) and income from all sources. This is usually done using the court's comprehensive form for financial disclosure (Form E) even in voluntary disclosure before any court application is made. The form is supported by documentary evidence. Only once all the information is available and the total assets available for division is known can a solicitor advise as to a suitable outcome.

Division of resources

The court has a wide discretion and will take into account the following factors when deciding which orders to make (these factors are therefore considered by solicitors when advising in the context of negotiations):

- the welfare of any minor children of the family (this is the first consideration)
- the needs and resources of the parties and their financial obligations
- the income and earning capacity (even if it is not realised) of both parties
- the length of the marriage (including any period the couple lived together before the marriage)
- the parties' ages
- the standard of living the parties had during the marriage
- contributions made by the parties during the marriage
- any health problems or disabilities of either party
- the conduct (behaviour) of either party if it would be unfair to disregard it – in practice this must be extreme conduct to be taken into account in relation to finances
- any benefits that will be lost as a result of the marriage being dissolved, e.g. entitlement to spouse's/widow's benefits under a pension scheme
- all the circumstances of the case, including any pre-nuptial or post-nuptial agreement.

Orders that can be made by the court

The court has wide powers to adjust finances, either after an agreement is reached between the couple or at a contested final hearing. There are 3 elements to any settlement:

1. **Capital** – the court can order: payments of lump sums, transfer/sale of property, assignment of life policies, transfer of shares. Orders can only be applied for once after which capital claims are dismissed. On rare occasions it is appropriate to defer capital claims (for example until the value of a significant asset crystallises).
2. **Pensions** – sharing or attachment orders can be made:
 - pension sharing – one spouse receives a proportion of the other's pension provision and it is transferred to a scheme in his/her own name
 - pension attachment – a spouse receives a proportion of the income and/or benefits from the other's pension scheme. The difference being that the scheme remains in the original spouse's name and the income/benefits are paid in accordance with his/her circumstances. This type of order is rarely used because it is defeated if the pension holder dies, or the recipient remarries.

(Potential interests in the other party's pension provision may sometimes be offset against other assets.)

3. Income – there are two aspects:

3.1 Child support – this is payable by the non-resident parent to the parent with care. The court can only order child support if the parties agree, otherwise an application must be made to the Child Support Agency (“CSA”). It applies to children under 16 or under 20 and in full time secondary education/training. The current CSA formula for calculating child support (which is usually adopted by the court) is:

- 15% net income for 1 child
- 20% net income for 2 children
- 25% net income for 3 or more children. (This formula is due to change in 2011.)

Reductions are applied to take into account overnight contact with the non-resident parent for 52 nights per year or more. If the non-resident parent’s income is greater than £104,000 net per year (the maximum used in the CSA formula) the court has the power to order top up payments. Net income can be reduced for the purpose of calculating child support if the non-resident parent lives with another relevant child. There is a new Child Maintenance and Enforcement Commission (CMEC) which has much greater enforcement powers to collect unpaid child support.

3.2 Spousal maintenance – the court has 3 options:

- clean break – if both parties can be financially independent this order will be made so that no maintenance can be claimed by either party from the other in the future.
- substantive maintenance (also called periodical payments) – a monthly sum is paid by one party to the other to boost their income.
- nominal maintenance – no amount is actually paid but the door is left open for substantive maintenance to be applied for if circumstances change in the future.

The duration of substantive or nominal maintenance must be specified as either:

- joint lives – until the first to occur of:
 - the death of either party
 - the recipient’s remarriage
 - further order of the court.
- an extendable term (often linked to the child(ren) reaching a certain age)
- a non-extendable term (achieving a deferred clean break).

Only the court can order a clean break between spouses so that once matters are finalised they can no longer make any claims against each other for any form of financial provision. Claims will remain open until they are dismissed by the court. However, a clean break never covers claims for provision for children which can still be made for child support, lump sums and temporary provision of housing.

Divorce and financial procedure

Divorce on an undefended basis (minimum 5-6 months)		Finances	
Petition	Sets out basis for divorce and begins process – sent to court and served on respondent. Court fee: £340	Voluntary disclosure	Exchange of information to enable solicitors to advise about settlement options
Acknowledgement of service	Respondent confirms: <ul style="list-style-type: none"> • receipt of petition • intention not to defend the divorce • admits adultery (if applicable) • response to any claim for costs. 	Negotiation	If agreement reached – consent order sent to court to approve (once decree nisi pronounced). Court fee: £45
Statement in support of petition	Sworn statement – acts as application for decree nisi.		If no agreement reached or disclosure inadequate – start court proceedings
Certificate of entitlement to decree	Confirms date on which decree nisi will be pronounced (enables respondent to attend to object to costs order claimed by petitioner)	Financial court application	Court sets timetable for provision of relevant information and first hearing. Court fee: £240
Decree nisi	Pronounced in court by district judge. No need to attend (unless objecting to costs order). First stage of divorce – gives court power to make orders in relation to finances.	Formal sworn disclosure	Exchange of Forms E (disclosure forms) and supporting documents
6 weeks	Time period after pronouncement of decree nisi which must elapse before application for decree absolute can be made.	Hearings – where no outcome imposed	First directions appointment (FDA) – sets dates for provision of any outstanding information, experts’ reports required.
			Financial dispute resolution appointment (FDR) – can be combined with FDA, without prejudice hearing to encourage negotiation. District judge hears parties’ positions and gives indication of what court may decide at final hearing.
Decree absolute	Effects: <ul style="list-style-type: none"> • dissolves the marriage – changes status so no longer spouse/widow/widower and lose associated rights (e.g. in relation to pension schemes). Application therefore usually delayed until after financial issues are resolved. • renders void any gift to a former spouse or their appointment as executor/guardian in a will • any divorce costs order becomes payable. Court fee: £45	Final hearing	Evidence heard from both parties, decision imposed by district judge.

Joint assets

There are some issues that should be considered before financial matters are resolved:

1. Property owned in joint names

There are two ways property can be jointly owned:

- joint tenancy – this gives each co-owner a 50% interest in the equity in the property (the value after payment of any mortgage, other charges and sale costs). If one co-owner dies his/her interest passes automatically to the other regardless of any provision in his/her will (this is known as survivorship).
- tenancy in common – co-owners can hold equal or unequal shares in the property (if unequal there may be a declaration of trust confirming how the sale proceeds would be divided). There is no rule of survivorship and on death the co-owner's share would pass in accordance with his/her will and not automatically to the co-owner.

Married couples often own property as joint tenants and on divorce, consideration should be given to whether to sever the joint tenancy. Notice can be given to the co-owner of the severance and then registered at the Land Registry. Severance would mean the property is held as tenants in common in equal shares so the only change would be that on death each co-owner's share would pass in accordance with his/her will.

2. Joint bank accounts/loan facilities

Any bank account or loan facility in joint names means both parties are jointly and severally liable for any overdraft or debt – that potentially means one party to the account could be held responsible for the entire debt, however it was accrued.

On separation it is therefore sensible to close/transfer to sole names any such accounts to prevent the other party incurring significant debts for which the other could be held responsible.

If a joint overdraft is too large to pay off to enable the account to be closed it is possible to freeze an account on application to the bank so that joint instructions would be needed to increase the debt. It can then be taken into account in the overall financial settlement.

Wills

It is important to review whether your will reflects your up to date intentions when you have decided to separate. A will in favour of your spouse or an appointment of your spouse as an executor will continue to be effective after separation and it is only on pronouncement of decree absolute that a gift to a spouse or their appointment as an executor ceases to be effective. Any changes required should therefore be made as soon as possible.

Our Estate Planning & Tax department can help you to review your will.