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DEALING WITH FINANCES WHEN A MARRIAGE OR CIVL PARTNERSHIP BREAKS DOWN

INFORMATION PACK

The law in this information pack is only applicable to matrimonial law.

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Introduction

Whilst obtaining a divorce or dissolution of a civil partnership is usually a simple procedure, dealing with the financial matters, for example, **property, pensions, savings, debts** etc, may not be so easy. There are a lot of factors to take into account.

It is often mistakenly believed that obtaining a **Decree Absolute** (or final Order) at the end of a dismisses financial claims between you and your spouse. It does not. The other common mistake is that the assets should automatically be divided on a 50/50 basis. Sometimes this may be the case, but very often, it is not. For example, if one party has a greater need, the children create a financial need, one party has a bigger assets (eg pension) than the other, or for other reasons, then it may not be appropriate to divide the assets in an equal and straightforward way. It should also be remembered that re-marriage can severely affect financial claims and in some cases bar financial claims completely so if you are considering this you must speak to one of our specialist solicitors first.

Often what one party wants can differ from what the other party wants. One party may believe that they have a greater entitlement than the other person is prepared to offer and there is a dispute. How can you resolve this difficult situation?

- **How can this be resolved?**

A financial settlement can be reached in the following ways;

- ✓ **By agreement between the parties/their legal representatives;**
- ✓ **By mediation/Collaborative Law; or**
- ✓ **By Court Order acquired through Court proceedings**

may

BY AGREEMENT BETWEEN YOU BOTH

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You may have tried to negotiate a settlement between you. Of course this would ultimately save costs if you can both do this. You need to ensure this is a fair agreement. The problem is that if the financial settlement is deemed unfair then a Judge may not approve the agreement when it is sent to the court to be stamped. Also, if one party feels that they are pressured into dealing with this matter in a way they did not want then this may invalidate an agreement and should be discussed with us carefully.

If you do manage to reach an agreement between yourselves and wish to follow this through then it is obviously important that this agreement becomes **binding**. **An agreement will only become binding in one of two ways:**

- 1. By Order (court order or sent in by Consent)of the Court, or;**
- 2. An agreement become binding if agreed between Solicitors but this will need to be carefully considered.**

In either case, such an Order/Agreement can be set aside based upon non-disclosure and even a change in circumstance/significant reason maybe taken into account. It is for this reason that full and frank financial disclosure is very important (see below) and must be exchanged and seen by both parties to ensure fairness.

If a financial agreement is to be contained within a Court Order then both parties would sign the agreement and then ultimately the Court has the decision as to whether or not they approve the agreement reached. This is known as a FINANCIAL REMEDY ORDER commonly called a "**Consent Order**".

THE FINANCIAL REMEDY ORDER / CONSENT ORDER

The Order embodies the financial agreement which has been reached between husband and wife and is sealed by the Court to make it a **binding Order**. It is usually signed by both parties and their legal representatives. The Order can include maintenance orders, lump sum payments, transfer of property, dealing with pensions, etc. The Order may also be on a "**Clean Break**" basis.

What is a "Clean Break" ?

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In cases where there are sufficient assets to enable the parties to sever all financial ties with one another, this route is encouraged and is known as a Clean Break. Basically, the object of the Clean Break is to settle once and for all a parties financial responsibility towards each other and to end their financial inter-dependence to enable them to leave their past behind and begin anew.

Yet, in cases where there are **young children**, it maybe difficult to achieve a Clean Break as the residence parent may rely upon the other spouse. There may also be situations where one spouse has become **financially dependant** upon the other during the marriage and therefore a Clean Break is not applicable.

Often parties may not be able to reach an agreement between themselves and at that point they have attended Solicitors to try and resolve the matter. In order to try and reach an agreement, the procedure is relatively straightforward and involves **full and frank financial disclosure** from both parties. This is where both parties indicate there financial situation and assets and provide documentation to show this such as bank statements, pension details etc. Financial settlement can often be reached without the Court's intervention based upon **voluntary disclosure** by each party to the other. Once full disclosure has been obtained then we can . advise you about settlement in this matter in an attempt to try and reach an agreement. The terms of such an agreement can then be obtained within an Order and sent to the Court for them to approve. If you instruct us to file an Order without disclosure (this would be against our advise and we will advice you against the risk of doing this you.

When the Order is sent to the court it has a summary of the finances signed by both of you. This statement is a simple form but it is designed to give a Judge an outline of the parties' finances for a Judge to decide if the agreement proposed is fair and reasonable. If a Judge decides it is not they will not approve the agreement .

MEDIATION

- **What about using mediation to try and resolve financial issues?**

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We encourage the use of family mediation. Mediation does not necessarily mean working together to save the marriage but may simply be used to help you and your spouse reach an agreement without the use of the Court. We have strong links with Mediation Services in Nottingham and Derby and if it is agreed that Mediation is suitable then we can make a **referral**. However, mediation only works when both you and your spouse are willing to attend and mediate in an effort to try and resolve matters. It is not compulsory although if we need to issue proceedings for finances and there is no exemption from Mediation then you will still need to attend a Mediation Information and Assessment Meeting.

We can advise you whilst you go through a mediation process. It is still important financial disclosure is exchanged and we can look through this to advise you.

COLLABORATIVE LAW

Another form of mediation is collaborative law. **We are one of the few firms in Nottinghamshire and Derbyshire who participate in this scheme.** Again, this can be extremely beneficial to both parties and can help the parties negotiate a settlement and consequently save costs **without the matter proceeding to Court.**

- **How does it work?**

Both you and your partner work with specially trained Collaborative Lawyers. You would each receive **legal advice** and guidance and together with your lawyers, meet to discuss and resolve issues face to face. Obviously this is reliant upon everybody entering into the process in good faith.

Ultimately, if the process works and the parties reach an agreement then everyone signs an agreement. The advantage is that you both set your own agenda in accordance with what matters most to you and your family. For example, you won't be risking key decisions about your future being made by a Judge if this matter went to Court. You are able to move at your own pace to try and resolve matters but of course you will still have a duty to provide full and frank disclosure in respect of all assets so that negotiation can be honest and open.

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As collaborative practitioners, we are professionals providing a creative approach to legal, emotional and practical problems of family breakdown.

It should be noted that if Collaborative Law does not succeed then as Collaborative Lawyers, we cannot continue to act for you in Court proceedings if they are issued.

What is considered to achieve a financial settlement?

The basic principles are contained in the **Matrimonial Causes Act 1973 (a similar list is set out in the Civil Partnership Act)**. This states the factors that are to be taken into account. All circumstances of the case must be taken into account.

Consideration must be given to the **welfare of any child of the family** who has not attained the age of 18. Also the following factors need to be taken into account :

- a. 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;
- b. The **financial needs, obligations** and **responsibilities** which each of the parties to the marriage has or is likely to have in the foreseeable future;
- c. The **standard of living** enjoyed by the family before the breakdown of the marriage;
- d. The **age** of each party to the marriage and the duration of the marriage;
- e. Any **physical or mental disability** of each of the parties to the marriage;
- f. The **contributions** made by each party to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- g. 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;

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- h. The **value** to either of the parties to the marriage of any benefits, (for example, a **pension**), which (by reason of the divorce) that party will lose a chance of acquiring.

What if a settlement cannot be reached / an order cannot be obtained by agreement/mediation?

Unfortunately, not every case will reach an agreement out of Court. Obviously, determining how the financial assets are to be distributed can be a source of conflict, especially in connection with assets that matter most to people, for example their property and pensions. In these cases, **proceedings** will need to be issued (see below).

If financial matters cannot be settled either due to lack of financial disclosure by one party or the inability to reach an agreement between the parties then we would need to issue an application to the Court to resolve the matter.

The Court has to ensure that the following rules are observed;

- ✓ Ensuring that the parties are on an **equal footing**;
- ✓ **Saving expenses** of both the parties;
- ✓ Dealing with cases in ways that are proportionate to the money involved, the importance of the case, the **complexity** of the issues, the **financial position** of each party;
- ✓ Ensuring that the case is dealt with **expeditiously and fairly**;
- ✓ Allotting the Court's resources **appropriately** to the needs of the case.

In other words, the Court's aim is to ensure that the case is managed as effectively as possible whilst at the same time encouraging the parties to settle the case as quickly and efficiently as possible.

Upon making an application for the finances to be dealt with, the Court will set a **timetable** as to when certain documents should be filed at the Court in order to ensure that the case is progressing towards an **early settlement**. Whilst this is ongoing, it is always our intention to try and resolve matters as quickly and early as

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possible whilst at the same time full disclosure of financial matters is necessary for us to advise you and for the Court to make a decision.

- **First Stage – Disclosure**

The parties will be required to complete a **Financial Statement (“Form E”)**, in which they must disclose all of their assets, income and other financial information. The parties are under an ongoing duty of **full and frank financial disclosure** and will be required to state that the contents of the Form E are true to the best of their knowledge and belief. If false information is found to be given that person could be held in contempt of court and any agreement reached on that basis could be set aside.

We then **exchange Form E’s** with the other party or their solicitor and at that point we request **further information** if this is required or missing from their Form E.

- **Second Stage – First Court Attendance known as First Directions Appointment (FDA)**

The first Court attendance following the issuing of an application for is the first appointment when a District Judge will consider the issues between the parties and will direct how the case is to proceed in the most cost effective way. The intention is to promote an **early negotiated settlement**. It is often necessary at this stage to request further financial details for example if your spouse has not supplied all the required information. This hearing may be conducted by telephone , video or in person.

- **Third Stage – Second Court Attendance - Financial Dispute Resolution (FDR)**

If the matter has still not settled or been agreed then the FDR is a hearing where both parties are encouraged to try and negotiate and discuss a potential settlement. The District Judge will play an active role in this hearing by listening to the arguments of each party and will usually express a view that he/she considers to be a fair settlement. If at this point settlement is not reached, the matter will be listed for a final hearing.

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- **Fourth Stage – Final Hearing**

The majority of cases do settle before a final hearing and very few cases get this far. In any event, if they do not settle then a District Judge will make an **Order** based upon all the evidence and submissions put by each party and their legal advice. That decision will be binding.

What types of Order's are available to me?

When trying to work out the appropriate settlement, all the issues indicated under the **Matrimonial Causes Act 1973 (again similar in Civil Partnership proceedings)** have to be taken into account. Assets and income have to be looked at as a whole. Whilst at the same time both capital and maintenance, can be inter-dependant. It is not only property that needs to be dealt with but also other assets such as pensions and indeed the income of both parties also need to be taken into account. The Court has the power to grant financial Orders. The types of Orders that are available are:

- ✓ **Maintenance Orders;**
- ✓ **Property Orders;**
- ✓ **Lump Sum Orders;**
- ✓ **Pension Orders; and**
- ✓ **Emergency Orders**

1. Maintenance

Maintenance, otherwise known periodical payments (maybe for a child , spouse or both) can continue until such a time as dismissed, even after a financial Consent Order has been made. For example, one spouse may have been dependant upon the other spouse during the marriage for quite a long period and it would simply be unjust to have a Clean Break. One spouse may need time to adjust to the change in circumstances. One spouse may not be

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able to rely upon their own income and the Court may justify that periodical payments should be made until a certain time in the future. This may be limited to a certain term of years.

If the parties can not agree the amount and / or time scale the court can make this decision. Please note however the court does not have jurisdiction of Child maintenance.

You may have been reliant upon your spouse during the marriage and they have simply stopped supporting you, the children or paying towards the mortgage.

- **What if my spouse has stopped supporting me, i.e. paying the mortgage?**

It may be necessary for us to make an **interim (temporary) claim for maintenance** against your spouse until a final agreement can be reached. This is known as "**Maintenance Pending Suit**". There may be many reasons why we need to make an interim maintenance application although you should be aware that an application can not be heard or take effect until a divorce petition has been filed with the Court. At that time it may be necessary for us to file the application for Maintenance Pending Suit.

Maintenance pending suit is often not worth pursuing as justifying the maintenance may be difficult to show or enforcing the application may be difficult. It may not exactly be clear or easy to show exactly what your husband/wife earns and therefore any maintenance pending suit may be difficult. It may be more appropriate to see what benefits are available, which we can advise you about.

2. Dealing with Property

The **matrimonial home** is often the most important asset to be dealt with. There may even be other properties owned by the parties. Depending on the circumstances and taking into account the other assets, there needs to be a decision about whether or not a **sale of the property** is appropriate, a

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transfer of the property into one of the parties names (maybe in consideration of a lump sum paid), or **alternatively a deferred charge** in favour of one party on the property to be owned by the other spouse.

Often the parties will try to deal with the property. Unfortunately, the property cannot always be dealt with in isolation. The property has to be taken into account along with all the other assets. Only once full and frank financial disclosure has been obtained and once all the value of the assets can be calculated (this may be a simple process or not) can a decision be made about what should happen to the house.

In many cases it is the case that the property is sold and the money is divided or alternatively one person decides to take over the other person's interest in the property for a lump sum. Sometimes one party may have a large share of the assets and they will retain this on the basis that the other person keeps the property. For example, one party may have a large pension (see below).

- **Is it always appropriate to sell/transfer the property?**

This may not be possible. Often when there are children, the **children's housing needs** need to be taken into account. The children's housing needs are paramount and obviously the main carer for the children will have greater housing needs than the other person. Nevertheless, it still has to be decided whether or not the person who will be looking after the children will purchase the other person's interest in the property or whether that person will have a charge over the property so that they will receive their monies at a later date, for example when the children are no longer dependant. Properties can be dealt with in lots of different ways. It would depend upon both parties' personal circumstances personal circumstances and the other assets involved. Another situation is where the needs of the person in the property may mean that a sale is simply not appropriate. For example, an elderly person who is particularly dependent and of limited means, the non-occupying spouse's housing position would also be relevant.

3. Lump Sum Orders

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The Court can order one party to pay to the other a cash lump sum or lump sums. There are two reasons for making such an Order:

1. The Financial Division of the assets. The Order is frequently used in conjunction with dealing with a matrimonial home/pension. For example, one spouse may have the property transferred into their sole name and pay to the other person a lump sum whilst releasing them from the mortgage.
2. To compensate one spouse for expenses incurred prior to the application as a result of inadequate support from that spouse for them or the children of the family or if one spouse has intentionally disposed of an asset.

The Order will usually clearly set out when and how a lump sum will be paid.

4. Pensions

It is often believed that the matrimonial home is the largest asset although pension are often underestimated. Pensions more often than not can be the most valuable asset in a marriage. Pensions are quite unique in the sense that they can not be cashed in to provide a ready lump sum before a certain age. **Due to the nature of pensions it is not always appropriate that pensions are seen as actual asset, therefore it is not always appropriate that the pensions are dealt with in the same way.**

a. How do I deal with pensions?

Pensions can be dealt with in three different ways:

1. Pensions can be "**off set**" against other assets. For instance, one party may retain a larger share of other assets. For example, one party may retain a larger share of other assets, i.e. the property on the basis that the other spouse retains their pension in tact. This is often the easiest way to deal with pensions but may not be the best way.

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2. You may have a “**Pension Attachment Order**” that allows for all or part of the pension or lump sum paid on retirement of the pensioned person. This is rarely used although is an option available to the parties.
3. **Pension Sharing.** Where a pension is effectively sub-divided so that each party has separate pensions which they can contribute in the future in the normal way. Pensions can also be shared if in payment.

Pensions are complex

The parties will need to obtain a valuation in respect of their pension, which says what the pension fund is worth and your expected pension payments. Sometimes this may not reflect the true valuation of the pension fund because of how the calculations are made, and the actual value may be higher than the value of the pension provided. A pensions’ actuary will be able to provide an expert view of the valuation of the pension fund and expected payments.

A pension actuary would advise of the options of pension sharing as there may be multiple options eg sharing based on capital value or equality of income. An Actuary can be asked other questions eg : if a part of the pension is ignored how would that impact on the calculations, for example pre-marital or post (please note : it may not be appropriate to ignore this and we will discuss this with you). They may be asked to consider an offset eg equity in a property going to one party and reducing a pension share. As pension and cash assets are not the same they would advise an amount to be considered.

An actuary is recommended to ensure pensions are dealt with correctly. There is a cost and time implication but not having this advice is very risky and may result in the wrong decision. The Actuary expert is usually instructed jointly at joint expense. The size of the funds will no doubt influence the decision about instructing an actuary.

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Other Issues to Consider

Children

You may or may not have already decided who will be looking after the children of the family. This is often a decision made by the parties or through mediation. Of course if this cannot be settled amicably then the Court have powers to deal with this matter and we do deal with children issues on a day to day basis. The impact of who the children will live with can be far reaching. As seen above, the final decision on who would stay in the matrimonial home would very much depend on who the children will live with.

State Benefits

The impact of separation can be far reaching including the benefits that are available to the parties. You may find that your eligibility to certain state benefits does change when you become self-reliant. For example, your Universal Credit (tax credits) entitlement may be greater once you are living by yourself. We do provide advice with regard to the types of benefits that are available and the change in circumstances. Whilst we are not specifically welfare benefits advisors, we do try to assist in this area. You may be entitled to a discount of Council Tax.

Rented Property

▪ What if the property is rented?

If the former matrimonial home is a rented property, the Court will also have to consider whether the **tenancy can be transferred** into the sole name of one party. If the tenancy contains a **prohibition** against assignment, the Court cannot order a transfer under this provision unless the Landlord consents.

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Statutory Tenancies, can under the Family Law Act, be transferred into the name of one spouse. Although the Landlord may have to make representations at Court, this can technically be achieved. **Protected, assured and secured** tenancies may also be transferred. Often there is good reason to transfer the tenancy into one name and for one party to remain at the rented property, for example if it is the children's home and that person constitutes their main carer.

EMERGENCY PROCEDURES

Sometimes there is a fear that one party may seek to avoid their responsibilities by **disposing of property** or attempting to deal with the property or other assets in a way that would be detrimental to the other party. They may do this to try and avoid a claim by their spouse.

- **What if the property is in joint names?**

If the property is in joint names then neither party can deal with it by themselves. Any sale or mortgage will require the consent and signature by both parties. In certain circumstances where there is a fear that one party will improperly sign on behalf of both parties. In this circumstance restrictions on the property may be considered.

- **What if the property is in one party's sole name?**

It is often the case that the property is held in one spouse's name and not the other. Nevertheless, even though the property may be held in one parties name, the other party may register their rights to protect their share. By virtue of the fact that they are married, they automatically have **homes rights**. This is a very simple procedure that we can register with the **Land Registry** on your behalf. If you are already divorced then we can advice you of other ways of obtaining a registerable interest. Please note that a Homes Rights Notice can be removed by the owner if there is a Decree Absolute / Final Order

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- **Preventing Disposal of an Asset by your spouse**

Sometimes a spouse tries to dispose of an asset to avoid a claim by the other spouse. It is possible to obtain an **injunction** to stop this. An injunction is granted if the Court are satisfied that the other party is about to make a disposal of property/assets with the intention of defeating the claim by the other.

Example 1

Mr X owns the matrimonial home. Mrs X has since left the matrimonial home and has discovered that Mr X intends to transfer the property into his new girlfriend's name. Mrs X can apply for an injunction to prevent Mr X from transferring the property.

Example 2

Mrs X learns that her husband is about to transfer the savings account of £10,000.00 into the name of his new girlfriend. Mrs X can again apply for an **injunction** to **freeze the savings account** so that it can be dealt with later.

- **What if the transfer of assets has already taken place?**

Sometimes the transfer has already taken place. Again an **injunction** can be obtained to set aside the disposition.

Making Offers

Can I make an offer at any time?

It is always possible to make an offer of settlement to your spouse at any time. We would however only advise you to do so once we have **full and frank financial**

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disclosure and are fully aware of all the assets and the **implications** in such settlement.

Nevertheless, it is our intention to try and encourage and assist you to settle this matter as quickly as possible. The courts also have a duty to do the same. We would discuss with you whether or not you wish to make an open offer or without prejudice.

In proceedings , as and when full and frank financial disclosure you would be expected to set out your position and if you do not do so then you may be penalised as to costs.

What if I do not intend to have a divorce/legal separation but want to separate and deal with the finances?

If spouses separate, they can as an alternative to divorce enter into an agreement to deal with the financial matters. This is known as a **“Separation Agreement”**.

- **Separation Agreement**

A Separation Agreement tends to be based upon contract principles and is usually an intention that you with both create a **legal document**. The general contents of a Separation Agreement include the following:-

1. An agreement to separate.
2. Details of any periodical payments.
3. Details of agreements in relation to property, either now or in the future.
4. Details of arrangements for the children.

Advantages of Separation Agreement

- ✓ Sets out the agreement between the parties.
- ✓ Can be entered into fairly quickly.

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- ✓ Outlines intentions of both parties

Disadvantages of Separation Agreement

- ✓ May not be enforceable. There could be a number of reasons for this. If there is an intervening event or any particular reason why the Separation Agreement should not be taken into account then a Judge may not rely upon that agreement. By comparison with a Court Order, a Separation Agreement is much more difficult to enforce and is much weaker. A Court Order for a Clean Break would prevent either parties from applying to the Court at a later date. A separation Agreement is not a document sent to a court to be made binding.
- ✓ A Separation Agreement can never been guaranteed as a final solution.

However a Separation Agreement is certainly persuasive and the Court have to consider how the agreement has come into force, how much importance the parties attach to the agreement and how have the parties acted upon the agreement themselves. Also, if there is any real reason why the Separation Agreement cannot be taken into account.

Pre-Marital Agreements/Pre-Nuptials

We deal with pre-marital agreements. A pre-marital agreement is an agreement before marriage dealing with what will happen on divorce. Unfortunately the law in this area is complex. There may be no statute law that expressly states that pre-marital agreements are binding but recent case law has upheld and supported pre-nuptial agreements. There are reforms and proposals to change the law in this area although there have been recent cases that have strengthened the position of pre-marital agreements. Nevertheless, you will need to speak to the Solicitor at the time to enquire as to the current position with the law.

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