

**GRYLLS & PAIGE**

**—————Solicitors—————**

**FINANCIAL PROVISION ON DIVORCE**

## **ANCILLARY RELIEF**

### **What is Ancillary Relief?**

Ancillary relief is the financial part of a divorce – it is ‘ancillary’ to the divorce.

It is the part of the divorce that often causes the most stress, because it is the part whose outcome cannot be predicted with any great degree of certainty.

When deciding how to divide assets upon divorce, the Court takes various matters into account. The court considers *all* the circumstances of the case, and gives first consideration to the welfare of any children of the family under the age of 18. In particular, the court has regard to the following matters:

- (a) The income, earning capacity, property and other financial resources which each spouse 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 be, in the opinion of the court, reasonable to expect a person to take steps to acquire.
- (b) The financial needs, obligations and responsibilities which each spouse 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 ages of each spouse and the duration of the marriage.
- (e) Any physical or mental disability of each spouse.
- (f) The contributions which each spouse has made or is likely to make in the foreseeable future to the welfare of the family, including any contribution by looking after the home or caring for the family.
- (g) The conduct of each spouse, if that conduct is such that it would, in the opinion of the Court, be inequitable to disregard.
- (h) The value to each spouse of any benefit which one spouse because of the divorce will lose the chance of acquiring (most usually pension provision).

The aim of the court is to achieve fairness. The starting point in all cases is that the assets should be divided equally. It is for the parties to use the above factors to justify why there should be some other way of dividing the matrimonial assets. However, often a key and decisive factor is the reasonable needs (especially housing needs) of the parties, which often overrides any possibility of an equal division of assets.

In most cases, the courts no longer have power to make orders for child maintenance except by agreement; an application to the Child Support Agency has to be made for child maintenance to be assessed.

### **Financial Disclosure**

Both parties have an absolute duty to each other and to the court to disclose fully and frankly their financial position (and any significant changes during the case) so that a proper

financial arrangement can be made. That is an ongoing duty which continues until an order is approved or made by the court. There can be serious consequences if the Court discovers that one party has sought to deceive or misrepresent their true financial position.

### **The Former Matrimonial Home**

There are two ways of owning the house:

1. as **'joint tenants'** - This means that in law you both own the whole house. The law does not see that you own it in different shares. The effect is that if one of the owners dies, the survivor will be automatically entitled to the whole property (even if divorce proceedings have been started or you are divorced, and irrespective of any provision in a Will or, if no Will has been made, irrespective of the intestacy rules).

You cannot make a Will leaving your share of the property to anybody else unless you have first 'severed the joint tenancy' and changed the way the property is owned to the second type:

2. as **'tenants in common'** - this means that each owner owns their own specific share of the property. If there is an agreement that they will own it in shares other than equal, then there must be a deed to evidence this. If there is no such written evidence then there is an assumption that they own it in equal shares. The effect is that upon death, each owner can leave their share to whomever they wish by virtue of their Will. If they have no Will then it would pass by intestacy rules.

The procedure for severing a joint tenancy is very simple and is done by preparing a simple document known as a Notice of Severance which is signed and which must be sent to the other owner for signature. After the notice has been sent, even if he or she does not sign and return it, the property will then be owned as 'tenants in common'.

### **Should I sever the Joint Tenancy?**

#### **Advantage of severing the joint tenancy**

Severing the joint tenancy only has any real significance if one or the other of the parties dies before the property is either sold or ownership transferred to one or the other of the parties within the divorce proceedings.

#### **Disadvantages of severing the joint tenancy**

The disadvantages of severing the joint tenancy is that the other owner could leave his/her half share of the property to whoever he/she wishes, that is to say not to leave it to you. This means that if he/she dies, you would continue to own your half of the property but some other person would own the other half.

## Pensions

Where a party has a pension the Court will require them to provide the CETV (Cash Equivalent Transfer Value). This gives an indication of how much the pension is worth to that individual taking into account all the benefits etc it has.

There are various ways of dealing with pensions:

The first is known as '**off-setting**'. This means that the court looks at the transfer value of the pensions and decides that the person without significant pensions should receive an equivalent payment in capital from some other source (e.g. an additional share of the house). This is only possible where there is spare capital available after re-housing both parties.

The second option open to the court is a **pension sharing order**. This means that an existing pension fund is divided, not necessarily 50–50, and passed over to the other person which, in practice, in most cases, will then have to be invested in a new pension. Where this option is exercised the pension does not end if the original pension holder dies because the recipient now has an entirely separate pension of his/her own.

The third option, not often used, is **pension attachment**, formerly known as 'earmarking'. The court has the power to order that a proportion of a pension, once received, both as to the annual income and the lump sum, should be paid to the other spouse. The court has the power to order that a proportion of any death in service benefit should be paid to the other spouse as well. Should this option be exercised then the pension would cease upon the death of the original pension holder.

The problem with pension attachment orders is that they are complicated to draft and if the person receiving the attachment order remarries then no continuing annual payment will be made. If someone changes job then that will mean that an order regarding a death in service benefit will be of no effect.

This is a highly complicated area of the law and almost every case is different.

### **I think my spouse is getting rid of assets – what can I do?**

If one party has disposed of assets with a view to frustrating the other parties' claims for a financial settlement, or he/she is about to do so, then it is important to know that the court has wide powers to deal with such situations.

Under section 37 of the Matrimonial Causes Act 1973, the court can *restrain* (ie stop) someone from carrying out a transaction, or from transferring assets out of the country or to someone else. In addition, the court can set aside (ie unscramble) certain transactions which have already been carried out where they were completed with the intention of defeating a claim for financial settlement arising from a marriage.

The court can exercise these powers whilst a financial application is proceeding or, indeed, in some cases after a financial provision order has been made.

However, the court cannot order a transaction to be set aside if someone bought the asset from a party in good faith without knowing that the motive behind the sale was to reduce the assets and frustrate the other parties' claim.

For obvious reasons if a party has a fear that the other party has acted in this way or that there is a risk that she/he will do so, they must instruct their solicitor immediately to try and reduce any further risk.

### **The Timetable for ancillary relief**

Once the Court is involved in the proceedings a timetable of events is 'triggered'. They are summarised as follows:

1. Financial Questionnaires (on Form E) must be filed with the Court and exchanged with the other party.
2. Questionnaires may be prepared to ask additional questions that have not been answered in the Form E
3. Questionnaires are replied to
4. Statement of issues is prepared – this gives each party the opportunity to summarise very briefly what they see the main issues in dispute to be. In other words to summarise what they are asking the Court to decide on.
5. Chronology is prepared – this gives a clear overview of all the significant events
6. First Directions Appointment (the FDA) – this comes almost 3 months after the case is started and is the first time the parties actually get to Court. If the parties or the Court believe further information is required it will be directed to be obtained at this hearing.
7. Financial Dispute Resolution – where all the information is available and both parties agree, this could be done at the FDA. It is a chance for the parties to appear before the Judge and set out their cases and for the Judge to give his opinion on a good way to settle the case. The purpose is to help the parties negotiate a settlement and avoid the further delay and costs of going to trial.
8. Final Hearing- if all other attempts at negotiation fail a final hearing will be listed where the Court will make the final decision.

It is worth bearing in mind that settlement is always an option – right up until the day of the final hearing.