

The court's approach in distributing income & capital assets

Family

Fairness

The obligation of the Judge is to make an Order that is as fair as it can be to both parties having regard to the particular circumstances of their case. His or her first consideration will be any infant children.

Section 25 Factors

Whether the application is for maintenance or capital, the Judge will have to analyse 'the Section 25 Factors' insofar as they apply to your case. They are known as the Section 25 Factors because they are set out in Section 25 of the Matrimonial Causes Act 1973.

First consideration has to be given to the interests of any children under 18, but the Judge also has to consider:

- the income, earning capacity, property and other financial resources which each party has, or is likely to have, in the future including any increase in earning capacity which could be reasonably expected
- the financial needs, obligations and responsibilities that both parties have, or are likely to have, in the future
- the standard of living enjoyed by the family before the breakdown of the marriage
- the age of both parties, the length of the marriage and any physical or mental disabilities that either party has
- the contributions that each party has made or is likely to make towards the welfare of the family
- conduct where it would be unfair to ignore it
- the value to each party of any benefit, for example a pension, which the partner might lose following divorce.

In the case of children, the court has to consider:

- the first four factors above
- the financial needs of the children
- the income, earning capacity, property and other financial resources of the child
- any relevant disabilities
- the way in which the children were being educated and the manner in which the parties expected the children to be educated
- if another party has assumed responsibility for the children's maintenance, the amount of payments being made, and the length of time over which the payment was made. Also, if applicable, whether the party making these payments did so knowing that the children were not theirs.

Clean Break

The Judge also has to consider whether or not to impose a clean break. This will end one party's financial obligations towards the other. It can be done immediately or over a defined period. The Judge has to be satisfied that the recipient can adjust to the new circumstances without suffering undue hardship, even though some hardship might be suffered as a result of the change. Increasingly the courts are doing what they can to ensure that parties become self-sufficient where that can be achieved.

Income Distribution

Spousal maintenance

A maintenance Order can only be made from income (which includes income from capital) and the court will require full income details for both individuals. That is so that it can assess whether or not any payment should be made.

The approach of the court will be to try and ensure that basic needs are met so that, so far as is possible, both parties will be able to manage in the future.

It is very unlikely that the total maintenance payment (for wife and children) is going to be over 50% of a husband's net income because it is recognised that there needs to be an incentive to carry on working.

The approach is not formulaic. The court focuses on need and increasingly there is a move to encourage self sufficiency and thus limit the period during which the payments have to be made. In any event the amount is variable if there has been a change in circumstances and if a wife remarries she automatically forfeits her right to any further income.

Child maintenance

The position is different in relation to the children. Unless there is an agreement about what should be paid for the children the Child Maintenance Service (CMS) will have to make an assessment by reference to a mathematical formula. The court can only make an Order if there is an agreement while the children remain of secondary age (see Child Maintenance Payments factsheet).

Remember also that even if a court Order is made by agreement after 12 months either party can apply to the CMS for an assessment. Once that assessment is issued the Order will cease.

Capital Distribution

Both parties will have to supply details of all their assets and debts verifying them with appropriate documentary evidence. Thereafter an asset schedule can be prepared specifying the value of the assets available for distribution between the parties.

Once that has been done the court has to identify the value of the capital assets available for distribution. It is important to ensure that the figures are accurate and that in appropriate cases reliable valuations are obtained. It is also important to allow for any costs of sale in the case of a property and Capital Gains Tax that might accrue when it is sold.

Thereafter the court has to apply the Section 25 Factors to the case. It has to consider the needs of the individuals, the sharing principle and whether compensation for any financial disadvantage applies (rarely these days).

The assumption will be that matrimonial assets are shared equally between the parties on the basis that they were assets accrued during the marriage. However it does not always follow that assets are shared equally, particularly where the value available for distribution is modest and one party is at an economic disadvantage eg. they cannot work or can only work on a part time basis and the children are living with them. In those circumstances the principle of need will take priority and the court will do what it can to achieve a fair outcome having regard to the circumstances of the individual case.

Sometimes there is an argument about the nature of the assets but usually only in the high value cases. This is because not all assets are categorised as matrimonial assets eg. inheritances and if there is enough money available to achieve a fair solution without touching those assets they will not be invaded. That is usually only going to be relevant to high value cases.

Every case depends upon its own circumstances. A variety of Orders may be made to include:

- the sale of the matrimonial home
- an Order allowing one party to remain living at the property indefinitely
- an Order transferring the property into the sole name of one party
- an Order permitting one party to remain at the matrimonial home until the children are no longer dependent when the house would then be sold and the proceeds divided
- an Order requiring one party to make a lump sum payment to the other to help them re-house.

The court has to do its best to reach a fair solution. Remember that there can be no certainty of outcome and it is important to bear this in mind when you are negotiating because the costs of the process can be substantial.

If you have any questions concerning divorce, financial settlements or Section 25 factors, please contact our Family team.