

Financial orders upon divorce and dissolution

During or after a divorce or dissolution the court's assistance may be necessary to settle a financial dispute or to approve the terms of an agreement reached between the parties. The making of a financial order is known as 'ancillary relief'. The court can make one or more of the following orders:-

Avoidance of disposition order

This is an injunction preventing a party from disposing of property. An injunction may be granted where the court is satisfied that one party is about to dispose of property with the intention of defeating the claim for ancillary relief, reducing the amount that may otherwise have been ordered or frustrating or impeding the enforcement of any order.

If the disposal is not discovered until after it has taken place the court has the power to grant an injunction setting aside a reviewable disposition. A disposition will be reviewable unless it was made for valuable consideration (other than marriage), to a person who at the time of the disposal acted in good faith and without notice of any intention by the respondent to defeat the claim.

Periodical payments

This is an order requiring one party to make regular payments (usually monthly or weekly) to the other. This is commonly called maintenance. A periodical payments order will not be made if a party is able to maintain an appropriate standard of living without support from the other or the other party is unable to afford to provide any support. A periodical payments order cannot be applied for by a party who has remarried, even if the application is made before remarriage.

Upon making a periodical payments order the court must consider whether the order should be for a limited term only (such term being that which is sufficient to enable the receiving party to adjust without undue hardship to the termination) or for joint lives. A periodical payments order will however automatically end upon the death of either party or upon the remarriage or forming of a civil partnership by the receiving party. The court will also need to consider whether it would be appropriate to prohibit the receiving party from applying for an extension of the term. This is called a section 28(1A) bar.

Unlike many other ancillary relief orders, a periodical payments order can be varied. An application to vary can be made by either the receiving or paying party and therefore can be varied upwards or downwards.

Secured periodical payments

This is an order requiring the paying party to secure the annual amount of the periodical payments against a capital asset, e.g. a bank account. As with a periodical payments order, a secured order will end on the death or remarriage or forming of a civil partnership by the receiving party. It will not however end on the death of the paying party. In practice these orders are rare. To make an order the court will need to be satisfied that the receiving party will need protection against the paying party going bankrupt, disappearing or dying and that there is an asset against which the payments can be secured.

Maintenance pending suit

This is an order for periodical payments to be made to bridge the gap between the issue of the financial application and final determination of the case. It is therefore a temporary level of maintenance. The amount of interim maintenance ordered by the court should not be taken as an indicator of the future obligations. Circumstances may change, for example, the sale of a property which would change the financial needs of one or both parties.

Orders for the benefit of children

The court has the power to make a financial order for the benefit of a child of the family. A child of the family is defined as a child of both parties to a marriage/civil partnerships and any other child (not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation) who has been treated by both parties as a child of their family. This will therefore include stepchildren. The basic principle is that no order will be made in favour of a child who has attained the age of 18. An order can however be made for a child aged over the age of 18 if it appears to the court that the child is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation (whether or not he or she will also be in employment) or if there are special circumstances which justify the making of an order. Although special circumstances are not defined by statute they are likely to cover cases where the child is unable to be self sufficient because of some mental or physical disability.

Periodical payments for children

This is an order requiring one party to make regular payments (usually monthly or weekly) to the other for the benefit of a child of the family. This is commonly called child maintenance. Following the coming into force of the Child Support Agency Act 1991(CSA) the jurisdiction of the court to set the level of child maintenance has in most cases been removed. The Act does, however, allow an application to the court in the following circumstances:-

- i) Topping up order. This can be applied for where a CSA calculation has been applied for and the non-resident's parent's net weekly income exceeds the current CSA maximum net income limit of £2,000 per week and the court considers it appropriate for the non-resident parent to make a payment in addition to the CSA payments.
- ii) Additional educational expenses. This can be applied for if a child is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation. This will most often be used in relation to the payment of school fees.
- iii) Disabled or blind children. This can be applied for where a disability allowance is paid to or in respect of a child, or where no such allowance is paid but the child is disabled and the order is made solely for the purposes of requiring the person making payment to meet some or all of the expenses attributable to the child's disability.
- iv) Consent orders. The court can make an order where there is no CSA maintenance calculation and the parties have entered into a written agreement (the consent order). If maintenance is agreed in a consent order, either party is prohibited from making a CSA application for a period of one year from the date of the order. Although after a period of one year a party is still entitled to apply to the court for a variation either party may give notice that they intend to apply to the CSA for an assessment. This will then bring the existing order to an end.

- v) If there is a court order or pre-April 1993 written agreement an application to the CSA cannot be made and therefore the existing order has to be varied by the court unless it has been discharged.
- vi) The CSA will only have jurisdiction to deal with an application where a child is under 18 and is the natural or adopted child of the parties and all three are habitually resident in the UK. The court will therefore retain jurisdiction to make a maintenance order for stepchildren, children aged over 18 and/or where any one of the parties or the child are not habitually resident in the UK.

Lump sum

This is an order that one party pay to the other a sum of money. The order may provide for an immediate payment, a payment by instalments or a deferred payment. The court may also direct the payment of interest. This can be added in case of late payment or to 'compensate' the receiving party for having to wait for payment by instalments or at a deferred date. An order for an immediate lump sum cannot be varied. An order for a lump sum by instalments or a deferred lump sum can be.

There is at present no provision for an interim lump sum order. The court does however have limited power to provide for payment of sums of money on an interim basis for immediate needs. Therefore where a party has a pressing need to make a payment, for example for school fees, car repairs etc and this need cannot be met out of income, an order can be made.

Capitalising maintenance

This is a lump sum order instead of regular periodical payments

Transfer of property (property adjustment order)

This is an order that one party transfers to the other or to a child of the family some property. In most cases this will be real property such as land or a dwelling house. However, personal property such as shares or personal possessions can also be the subject of a transfer of property order. There is no provision for an interim order and a transfer of property order cannot be varied. Below are examples of types of transfer orders.

Outright transfer

When a property to be transferred is mortgaged the order will have to provide for either the simultaneous redemption of the mortgage (by a separate order for a lump sum) or for the transfer to be subject to the existing mortgage. Where a transfer is made subject to the existing mortgage the person transferring their interest will still remain liable under the terms of the mortgage. Transfers subject to mortgage are fairly common as one party is often not able to afford to take over the existing mortgage in their sole name. If this is the case the order should include an undertaking (promise to the court which can be enforced) by the person to whom the property is transferred to perform the mortgage obligations and to indemnify the transferring party against future payments.

Transfer subject to charge

This is an order providing for the transfer of a property subject to a charge in favour of the transferring party for payment of a lump sum. The lump sum can be expressed as a fixed amount or as is more common on the basis of a percentage of the gross or net proceeds of sale. Payment is triggered at either a fixed date or upon the occurrence of a certain event. The trigger event is usually the first to occur of the transferring party's death, remarriage, cohabitation or the youngest child of the family attaining the age of 18 or finishing full time secondary education. If there are dependant children, a proviso may be included that any enforcement on the ground of the transferring party's remarriage or cohabitation can only take place with the permission of the court.

Mesher order

This is an order postponing the sale of the property until certain trigger events. Unlike the above order there is no transfer to one party. The property will continue to be held in the joint names of both parties. This is not a popular order, as parties remain joined together in property ownership and in a state of future uncertainty.

Martin order

This is again an order postponing the sale of the property but also provides for the property to be settled on the occupying party for life, until remarriage, cohabitation or voluntary removal. This order is appropriate where the circumstances of the case require one party to be entitled to occupy a property for as long as he or she wishes but it is not intended to deprive the other party of his or her capital entitlement for ever and even in the event of the other party's death.

Transfer of tenancy

This is an order transferring the tenancy into one party's name. Most of the tenancies which will be the subject of an application will be local authority or social housing tenancies. This is because most tenancies in the private sector are shorthold tenancies which are likely to contain prohibitions against a transfer or to be of so short a period as to not be worth transferring.

Order for sale

Where the court makes an order for a secured periodical payments order, a lump sum or a property adjustment order the court may make a further order for the sale of property. The power of sale is 'ancillary' to the principal capital order and is only exercisable if such an order has been made.

Settlement of property orders and variation (property adjustment orders)

The court is able to vary or discharge settlements. The court must first be satisfied that there is an ante-nuptial or post-nuptial settlement. 'Settlement' is interpreted loosely and may be contained in a pre-nuptial agreement, separation agreement, a will or codicil or any other document. Secondly, the settlement must provide for the financial benefit of one of the spouses and with reference to the married state. A gift between spouses or by a third party will not create a settlement.

Pension orders

The court is able to make one or more of the following orders:

- Pension sharing
- Pension attachment
- Offsetting (lump sum payment instead of pension)
- Deferred lump sum (lump sum payment from commutation)

For a full explanation of each of these orders please refer to the fact file on pensions.

Clean break

When making an order for ancillary relief the court must also consider whether to make a clean break order. This is an order terminating financial claims between parties and therefore prohibits a future application for one or more of the above orders. If the court makes a periodical payments order the court must consider whether to order a clean break at the end of the term. The court will generally make a delayed clean break order if it is satisfied that the receiving party is or will be self-sufficient at the end of the term. Under the Inheritance (Provision for Family and Dependents) Act 1975 a former spouse is able to apply for financial relief from the estate of the deceased person. A clean break on death dismisses the ability to make such an application.

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