

Matters to which the court has regard when deciding how to distribute assets upon a divorce or dissolution

Section 25 of the Matrimonial Causes Act 1973 contains the matters to which the court is to have regard when deciding how to distribute assets between parties.

Section 25 (1) requires the court to have regard to all the circumstances of the case, first consideration being given to the welfare of a minor child of the family who has not attained the age of 18. A child of the family is defined as a child of both parties to the marriage and any other child (not being a child placed with those parties as foster parents by the local authority or voluntary organisation) who has been treated by both parties as a child of their family. This will therefore include step-children. Welfare will include the accommodation needs of any children.

The circumstances of the case can include a past, present or future circumstance and could for example include the remarriage or cohabitation of one of the parties or the existence of an agreement between them.

Section 25 (2) requires the court to have regard to the following matters:-

Section 25 2(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, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire.

This requires the court to consider the parties' current income as well as their future earning capacity. A party who chooses not to work when he or she could do so, or chooses not to take advantage of opportunities to earn or to receive funds which are available to him or her will find that the court will draw an adverse inference from their behaviour.

Property includes all real and personal property owned by a party or in which he or she has an interest. No assets (whether business or not) in which a party has an interest should be excluded.

The most common example of a future financial resource is one party being a beneficiary under a Will. The court will however have to have regard to the fact that a testator may change their Will at any time or outlive their beneficiary. The court is not able to compel a potential benefactor to disclose his or her intentions. Another common example of a future financial resource is a personal injury claim. For this to be relevant the court would have to be satisfied of the likelihood of success and the amount of damages likely to be recovered.

Section 25 2(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.

Financial needs will include housing and income needs. Particularly relevant will be the needs of a parent who is caring for the child or children of the family. The court will therefore have to consider whether there should be a transfer of property between the parties or payment of maintenance to meet those needs. The court will also have to consider the financial needs of the paying party and ensure they are left with sufficient income or capital to meet their reasonable needs.

In relation to obligations and responsibilities the court will take into consideration legal obligations which it is impossible to withdraw from. This would therefore include mortgage, loan repayments and Child Support Agency payments. The courts will however usually make a distinction between "hard debts" such as debts to banks and "soft debts" such as money borrowed from relatives.

Section 25 2(c): The standard of living enjoyed by the family before the breakdown of the marriage.

In most cases the court will attempt to ensure that the standard of living for one party does not deteriorate to a greater extent to that of the other.

Section 25 2 (d): The age of each of the party to the marriage and the duration of the marriage.

The age of the parties is relevant to their earning capacity. This will also be relevant to their mortgage raising ability. Different considerations however will apply to a party aged over 50 who has not worked for many years or is in need of care.

The duration of a marriage is really only significant in the case of a short marriage and particularly where there have been no children of the marriage. Generally where there has been a short childless marriage the court will aim to put the parties back in more or less the positions they were in prior to marriage and for the assets accumulated during the course of the marriage to be shared equally.

Although the law makes it clear that the court may only have regard to the period between the marriage and the breakdown when considering the length of the marriage case law has suggested that where parties move seamlessly from cohabitation to marriage it is unrealistic and artificial to treat the periods differently. Equally in this same case it was held that it was unrealistic to treat the period of estrangement “conducted under the umbrella of a divorce petition” as part of the duration of the marriage.

Section 25 2 (e): Any physical or mental disability of either of the parties to the marriage.

This will be relevant to a party’s income and earning capacity.

Section 25 2 (f): The contributions which each of the party’s has made or is likely within the foreseeable to make to the welfare of the family, including any contribution by looking after the home or caring for the family.

This makes it clear that the court should not distinguish between the efforts of the bread- winner and the home maker and child carer.

Contributions of a financial nature will include the earnings of both parties over the course of the marriage and any capital sums provided by them. Capital sums will include the acquisition of a house, inheritances which have benefited the family and the value of a discounted purchase price for a former council house under the Right to Buy Scheme. Financial contributions will be particularly relevant to a short marriage case.

Future contributions will normally be relevant where one party will be the primary carer for the children of the family. The younger the children, the longer the dependency and therefore the greater the significance of this factor.

Section 25 2 (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.

The most common example of conduct is where one party alleges that the behaviour of the other party has significantly reduced the assets.

For non-financial conduct to be taken into account it must be grave. An example has included where a husband had partially disabled the wife by a violent assault and therefore restricted her earning ability. In this case it was held that the conduct was highly relevant.

Conduct of the parties during the proceedings may also be a relevant factor. For example, where a wife had knowingly misrepresented her true financial position and failed in her duty to give full disclosure it was held that it would be inequitable to disregard such behaviour and that the behaviour should be reflected in an order for costs.

The fact that one party has committed adultery or that divorce proceedings have been issued on unreasonable behaviour will not generally affect the division of the assets.

Section 25 2 (h): In the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring.

This factor is most frequently relied upon when the loss of pension benefits on retirement is an issue.

G O R V I N S

FAMILY LAW

For advice on divorce, dissolution or any other family matters contact **Gorvins Solicitors Family Team** at:

4 Davy Avenue
Knowhill, Milton Keynes
MK5 8NL

Tel: +44 (0)1908 354 154
Fax: +44 (0)1908 354 155
E-mail: enquiriesmk@gorvins.com
www.gorvins.com

2-14 Millgate
Stockport, Cheshire
SK1 2NN

Tel: +44 (0)161 930 5151
Fax: +44 (0)161 930 5252
E-mail: enquiries@gorvins.com
www.gorvins.com