



Factors the court take into account when deciding how to distribute assets on a divorce or dissolution

Overview

When deciding how to distribute a couple's assets and income the court has to apply a checklist of factors set by statute. The relevant statute is section 25 of the Matrimonial Causes Act 1973. These factors will need to be applied in every case, regardless of whether you are engaged in court proceedings or negotiating your own settlement.

Section 25 (1)

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.

The circumstances of the case can include a past, present or future circumstance. A relevant circumstance could be one of the party's remarriage or cohabitation or the existence of an agreement between them.

Section 25 (2)

Section 25 (2) contains the following checklist of factors:

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 a party's current as well as their future income and earning capacity to be considered. For example if one party is near to retirement then the change in their income as a result, would need to be taken into consideration. So to, would one spouse's refusal to seek employment when they have the opportunity to work.

Examples of future financial resources can include provision under a will or entitlement to a personal injury compensation award.

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 the housing and income needs of the parties and their children. In relation to obligations and responsibilities the court will take into consideration any legal obligations which it is impossible to withdraw from. This will therefore include mortgages, loan repayments and Child Support Agency payments. The courts will usually make a distinction between "hard debts" (these being sums owed to banks etc) and "soft debts" (these being sums owed to relatives or friends).

Section 25 2(c)

The standard of living enjoyed by the family before the breakdown of the marriage.

Wherever possible the court will attempt to give the party's the same standard of living enjoyed before the marriage breakdown and will also attempt to ensure that the standard of living for one party does not deteriorate to a greater extent to that of the other.

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Section 25 2(d)

The age of each of the parties to the marriage and the duration of the marriage.

The age of the parties is relevant to their earning capacity and will also impact on their mortgage raising ability.

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Generally where there has been a long marriage it is appropriate to achieve an equal division of the assets, whereas if there has been a short childless marriage it is usually appropriate to put the party's back in the positions they were in prior to marriage and only the assets acquired during their marriage to be shared equally. Although 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.

"The fact that a divorce has been issued on adultery or unreasonable behaviour will not generally amount to conduct which will affect the financial division".



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 future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.

Contributions can include property acquired prior to marriage or by way of inheritance as well as contributions by way of income and earnings. This section also makes it clear that there should not be a distinction between the roles of home maker and bread winner.

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.

This is usually taken into account where one party has significantly reduced the value of the assets. For example if one party had greatly diminished the value of the assets by gambling this is conduct which would be likely to be taken into account. For non-financial conduct to be taken into account it must be grave.

The fact that a divorce has been issued on adultery or unreasonable behaviour will not generally amount to conduct which will affect the financial division. The parties conduct in relation to the proceedings may also be taken into account. If one party has not complied with the court timetable or complied with their duty of disclosure the court may take this into account when making their final order or order that that party to pay some or all of the legal costs of the other party.

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.



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