

Factors the court will 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. These are often called the Section 25 factors, which the court will take into account when deciding how to distribute assets upon divorce or dissolution.

The expression 'spouse' in this factsheet will also mean civil partner. The various options apply for couples that are undergoing divorce or dissolution proceedings and therefore where it refers to a marriage it will also apply to a civil partnership.



Fairness

Section 25 has to be read in the context of decisions made by the senior family courts in England and Wales. Since 2000, the overriding criterion in family cases is that of fairness. Fairness comprises three elements: needs, compensation and sharing.

- Needs – in many divorces or separations, needs is the most important factor as there will be no surplus capital or income. Where there are children of the family, their needs will come first.
- Compensation – this will only arise in very few divorces, particularly where one spouse has given up a high earning career to support the other.
- Sharing – where the needs of both parties can be met, the sharing principle will often dictate that the assets are divided equally. Factors to depart from equality may be needs for pre-acquired or inherited assets.

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 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. Moreover if one spouse refuses to seek employment when they have the opportunity to work then this would need to be taken into consideration. The court can attribute an earning capacity to either party of the marriage.

Examples of future financial resources can include a bonus payment or entitlement to a personal injury compensation award.

Section 25 (1)

Section 25 (1) requires the court to have regard to all the circumstances of the case, with the 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 or civil partnership, 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 parties remarrying, forming a civil partnership, cohabitation or the existence of an agreement between the parties.

Section 25 (2)(a)

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

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 Maintenance Service 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).

In limited means divorces, the needs of the parties will be the main factor taking into account under the section 25 checklist.

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Section 25 (2)(c)

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

For many divorcing couples, the standard of living enjoyed before the breakdown of the marriage cannot be maintained post-divorce as two houses cannot live as cheaply as one. The court will however attempt to ensure that the standard of living for one party does not deteriorate to a greater extent than that of the other.

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.

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.

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 parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.

The starting point is that contributions made by the parties during the marriage are viewed as equal. The contribution of the breadwinner should not be treated any differently to the contribution of the home-maker. Contributions made however be taken into account if either party owned assets prior to the marriage or if they inherited assets. Such contributions made justify a departure from equality.

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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.

Successful conduct arguments in divorces are however rare. The courts have made it clear that they will only take into account conduct if it is obvious and significant.

The fact that a divorce has been issued on adultery or unreasonable behaviour will not usually amount to conduct which will affect the financial division. This is the same for a dissolution petition issued on the basis of unreasonable behaviour. The parties’ conduct in relation to the proceedings may also be taken into account, but only in respect of costs orders. If one party has failed to comply with the court timetable, then they may be ordered to pay the other party’s costs.

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.

Please feel free to discuss your own position and concerns. Contact your nearest office on:

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