

# FINANCIAL IMPLICATIONS ON SEPARATION IN SCOTLAND



## Financial Provision on Divorce/Dissolution

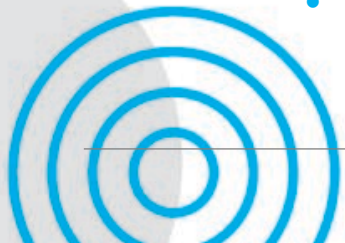
What do we mean when we talk about financial provision?

There are very detailed rules, contained in the Family Law (Scotland) Act 1985, which are designed to ensure fair sharing of the assets (or debts) which have been built up during marriage and which are still in existence at the point of separation.

Where parties separate, if there are assets, it is often necessary for an agreement to be entered into in relation to their finances. If no agreement is reached, then the court has powers to make orders.

What orders can the court make?

- Capital Sum Payment
- Transfer of an asset
- Sale of a Property
- Pension Share
- Aliment/Periodical Allowance  
*to name a few...*



## What does the law say about division of assets and liabilities?

The law in Scotland provides that all matrimonial assets and liabilities (matrimonial property) ought to be divided fairly. Fairly usually means equally, unless special circumstances apply that would justify a departure from equal sharing.

### Matrimonial Property

Matrimonial property is all assets (and debts) acquired between the date of marriage, and date of separation, except assets received during the marriage by way of gift or inheritance from a third party. That means that, at first blush, assets acquired prior to the marriage or received by way of gift or inheritance from third parties during the marriage will not be matrimonial property. However this is subject to the following caveats:-

- i. A property, or plinishings for a property, bought pre-marriage, in contemplation that it will be a family home, will be matrimonial property; and
- ii. Pre-marital assets and those gifted or inherited from third parties will only be automatically excluded if they remain in the same form as when received.



## Unequal division

In accordance with the law, there are various factors that we take into account when considering whether fair sharing in a particular case should mean equal sharing. The most common of those are:

- i. Source of Funds;
- ii. Whether a party has suffered an economic disadvantage for the benefit of the other party or any child; or gained an economic advantage as a result of the other party's contribution and whether and to what extent economic advantages or disadvantages sustained by either person have been balanced by the economic advantages or disadvantages sustained by the other person; and
- iii. The ongoing economic burden of caring for a child of the marriage.

If a court were to determine the issue, these factors are discretionary and even if a court accepts that a valid argument exists, it doesn't follow that the matrimonial property will then be divided unequally. So, in advising our clients on the merits of these arguments, we apply our knowledge of recent case law, but each case will always turn on the particular facts.



## Aliment

Following separation, where there is not yet an agreement, we often also need to consider the issue of whether any maintenance (known in Scotland as aliment) is appropriate. There is a duty on the party who has the wherewithal to do so, to financially support (to a reasonable degree) the other party who is financially dependent.

In the event of a disagreement, the court can determine the issue of aliment on an interim basis, pending overall resolution. The court would consider the need of the recipient party, the resources of the parties, the earning capacity of the parties, and all the general circumstances of the case.

## After divorce? Periodical allowance.

The criteria for assessing whether spousal maintenance is appropriate after a financial settlement has been reached, or after divorce, differs. Where possible, Scots law prefers a clean break with no further spousal maintenance being paid after divorce. But, where a party was financially dependant upon the other, that party could receive maintenance (known after divorce as periodical allowance) for up to three years from separation or divorce to assist them to adjust to their new circumstances, or for longer but only in very limited circumstances.



## What then?

In order to advise, we require to know the value of all assets as at the date of separation. We then compile a schedule of matrimonial property, which details all assets and debts in both sole names and joint names. In contemplation of that, and any special circumstances arguments, we would be able to advise you on what we consider to be a likely range of outcomes.

## Then... resolution

- By agreement between you and your partner directly;
- By agreement as a result of solicitor negotiations or alternative dispute resolution; failing which
- Court action.

Some people decide that they wish to resolve matters on a broad brush approach, and reach an agreement directly on a basis which they consider to be fair, without seeing full vouching of the assets. There is no reason this cannot be done, but you only get one “bite at the cherry”.

Once an agreement is reached, [it is imperative that this it is recorded in a Separation Agreement.](#)



## Questions

- I received an inheritance, but I used it to pay for things for our family, including a family holiday. Can I ask for that back?
- What is the position in relation to Cohabitants?
- My partner has a family business. When he has received large dividends, he has paid them into an account in his own name, and he says that it wouldn't be fair for that money to be divided between us?
- My husband spent money on things during our marriage that I had no idea about. I think it was quite a lot of money. It doesn't seem fair that no account is taken on that?
- My husband has been abusive towards me during the marriage. What impact does that have?
- I have only been married for 10 years, but I have had my pension for 25 years. I stopped paying into that pension a year after we got married. I have been told by a friend that pensions are included in marital assets, and it doesn't seem fair that he should get one half of my pension?
- A lot of this seems very uncertain – is there anything that can be done to provide more certainty?



## To get in touch

If you have any questions or would like our help please get in touch

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