

---

# Austin Kemp

ANCILLARY RELIEF

---

# Financial arrangements

The court follows the legal principles from legislation and case law in making its decision, although each judge has a discretion to do what they perceive to be appropriate on the evidence in each particular case. This means the precise outcome of financial court proceedings can be quite difficult to predict.

**The court considers all the circumstances of the case, gives first consideration to the welfare of any children of the family under the age of 18 and, in particular, the court has regard to the following matters:**

1. The income, earning capacity, property and other financial resources which each spouse 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 be, in the opinion of the Court, reasonable to expect a person to take steps to acquire.
2. The financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future.
3. The standard of living enjoyed by the family before the breakdown of the marriage.
4. The ages of each spouse and the duration of the marriage.

5. Any physical or mental disability of each spouse.
6. The contributions which each spouse has made or is likely to make in the foreseeable future to the welfare of the family, including any contribution by looking after the home or caring for the family.
7. The conduct of each spouse, if that conduct is such that it would in the opinion of the Court be inequitable to disregard.
8. The value to each spouse of any benefit which one spouse because of the divorce will lose the chance of acquiring (most usually pension provisions).

Other principles have become part of the law through the decisions of senior judges in important cases. The judgment in the case of *White v White* made fairness the overriding objective in financial proceedings judged against what was called the yardstick of equality.

An agreement made before or during the marriage can also have a significant effect on what the court decides.

The weight to be given to the factors, as set out above in points 1 – 8, to be taken into account by the court, will depend on the particular facts and circumstances of each case — thereafter the consideration of need, compensation and sharing would usually guide the search for fairness.

## Needs

The Family Justice Council produced a document entitled “Guidance on Financial Needs on Divorce” in June 2016 designed as a useful tool for the Judiciary in relation to the making of orders to meet financial needs following divorce and the dissolution of Civil Partnerships. They published their second edition in April 2018.

**They state that the Law Commissions objective for financial orders is:**

1. To meet needs to enable a transition to independence to the extent that it is possible in the circumstances.
2. Needs may well, and commonly do, provide a justification for a departure from equal sharing.

## What are Needs

The main needs in most cases are for housing and present and future income. Future income may include a need for income in retirement. The court will assess the level and duration of need as a question of fact and the court will decide whether needs can best be met by capital and income provision.

## Measuring need

### Need is measured by:

1. Assessing available financial resources.
2. Assessing the standard of living during the relationship, generally the longer the relationships duration the more important this factor will be.
3. A party may be expected to suffer some reduction in standard of living having regard to the overall objective of a transition to independence.
4. Both parties will be expected to present detailed budgets to the court to enable the measurement of need.
5. The court will assess the needs of both parties.

## Compensation

### The guidance as to the approach to claims for compensation is as follows:

1. Compensation is a feature of the concept of fairness.
2. In ordinary circumstances a party has no right or expectation of continuing economic parity unless needs or relationship-generated disadvantage so require.
3. Where the matrimonial assets are sufficient for a clean break to be achieved, a party with ordinary career prospects is likely to have been compensated by an equal division of the

assets, and consideration of how that career might have progressed is to be avoided.

4. In cases where a continuing award of periodic payments is necessary and a party has sacrificed their own earning capacity, compensation will rarely be amenable to consideration as a separate element capable of calculation with precision, and
5. Any element of compensation is best dealt with by a generous assessment of continuing needs unrestricted by budgetary considerations.

### In a further case it was said that:

1. Compensation will rarely be successfully invoked.
2. A successful case will be one where (as a near certainty) the claimant gave up a high earning career that would have led to earnings at least equivalent to those of the respondent, and
3. Compensation will be reflected by fixing the periodical payments award at the top end of the discretionary bracket rather than by an additional element.

It remains difficult in practice to pinpoint, quantify, and apply this principle with any precision. In most cases compensation is not likely to be a relevant factor.

## Sharing

It has been held that marriage is a partnership of equals and when the partnership ends each party is entitled to an equal share of the assets unless there is a good reason to the contrary.

However it has also been held that a ‘fringe of cases may lie outside the equal sharing principle’ where ‘a combination of potentially relevant factors (short marriage, no children, dual incomes and separate finances) is sufficient to justify a departure from the equal sharing principle in order to achieve overall fairness’

In *Charman v Charman* the Court of Appeal, further considered the sharing principle and stated that:

*‘... we take the sharing principle to mean that property should be shared in equal proportions unless there is good reason to depart from such proportions...’*

As time progresses, the court considered the sharing principle and needs principle and give guidance on their approach so, for example, in *L v L* the judge made it clear that the sharing principle must first be applied to meet the parties’ needs.

The House of Lords in *Miller; McFarlane* acknowledged that in the majority of cases fairness would be achieved by a division of the matrimonial resources to meet, as far as possible, the accommodation and income needs of the parties and their children. Where there is no surplus after this exercise had been undertaken, fairness has been achieved.

## Equality

**The principle of equality had two limbs:**

1. Equality of outcome. This does not necessarily require an equal sharing of the assets.
2. Each party is entitled to an equal share of the assets unless there are good reasons for one party to receive a greater share.

## Compensation, sharing and equality in practice

**In Charman (No 4) important guidance was set out as to the application of the principles of need, compensation and sharing to financial applications:**

1. MCA 1973, s 25 must always be the basis of any ancillary relief award.
2. Need, compensation and sharing must be considered in light of the resources in the case.
3. The yardstick of equality introduced in White has developed into the equal sharing principle.
4. Fairness must always prevail.

**The High Court in L v L gave the principles further interpretation:**

1. First, the assets and general financial position of the parties must be determined.
2. The assets should then be shared equally unless there are good reasons to depart.

3. Consideration must then be given as to whether this meets the needs of the parties.
4. If not, then a greater share of the resources must be awarded as necessary.
5. If the application of the sharing principle means that needs are exceeded, no adjustment is required.

When approaching settlement in a financial case, it is first necessary to identify the resources available to the parties now and in the future. The parties' income, capital and pension need to be considered.

Unless a party's position is similar to that of the wife in McFarlane, an argument based on compensation is unlikely to succeed. In most cases adequate compensation will have been provided by a share in the assets.

Although the general principles must be considered, MCA 1973, s 25 still remains the start and end point when considering the appropriate outcome in all cases.

In most cases, the Courts no longer have power to make orders for child maintenance; an application to the Child Support Agency has to be made for child maintenance to be assessed.

## Pre-Marriage Cohabitation

The Court can take into account a period of pre-marital cohabitation, that moves seamlessly into marriage, as part of the duration of the marriage.



## Financial disclosure

Both parties have an absolute duty to each other and to the Court to fully disclose their financial position so that a proper financial arrangement can be made. Legal Practitioners will be able to advise you more fully on a financial settlement once financial information has been collated. They will not be able to advise you if a settlement is fair in the absence of full disclosure and you may not receive a fair share of the matrimonial assets.

It is important that you keep all your financial documents, such as bank statements, credit card statements and pay-slips and that you do not destroy them, since you may be required to produce copies of these documents to the Court.

Whilst it is usually possible to obtain copies of these documents, institutions such as Banks charge as much as £5, or more, for a copy of each statement. Clearly, you would be well advised to avoid such expense by keeping the originals of your financial documents from now on.

It is suggested that you keep all financial documents in a safe place, preferably in a ring binder in date order.

Parties should not be discouraged from speaking directly with each other regarding finances, in the hope that this will make it more likely that an agreement can be reached.

However, it is important that they should not specifically say whether any proposals made are

definitely agreed. If proposals are made which they want to accept, then the parties should normally state that they will discuss those proposals with their Solicitor.

Although it is rare for agreements reached direct between both parties to be upheld by the Courts as binding, there is always a danger that this may happen, or that the other person will insist that they will not make any other proposals.

It is essential that the parties give full and frank disclosure of your finances to both their Solicitor and the other party. This is because if there is any failure to disclose, a final order may be challenged by appeal, or indeed may lead to a finding of contempt. It can also substantially increase the costs of the case if the other party has to make repeated requests for information.

## Council tax

If you are now living on your own in your property, you must notify the Local Authority so that you are entitled to a reduction in the amount of Council Tax you have to pay.

Council Tax is based on the assumption that two adults occupy your property.

You must therefore write to your Local Authority and notify them that you are now the only adult in the property and ask for the reduction.

You should also be aware that if you are on a low income and have little in the way of savings, you may be entitled to Council Tax Benefit by way of

help in paying your Council Tax. I suggest you contact your Local Authority to whom you pay Council Tax for further information.

## Joint accounts/household accounts

If you have a joint Bank account with your spouse, you should ensure that the account is made a joint signatory account requiring two signatures for any money to be withdrawn. Otherwise any money in the account can be withdrawn, or an overdraft run up without your knowledge or permission and you will be jointly liable for any overdraft run up, even if you have not spent the money yourself.

In the same way, you should cancel any joint Credit Cards otherwise you will be similarly liable for any expenditure incurred by the joint holder of the Credit Card.

In relation to household accounts, it is always advisable to have these accounts transferred into the name of the spouse who is in occupation of the former matrimonial home.



# Assets

## The matrimonial home

Often, the most substantial capital asset owned by a couple is their house. Regardless of whether the house is owned by one of them or by them jointly, a sale of the property and a division of the sale proceeds may be necessary to meet their needs.

There may be sufficient funds available to buy them each a new home. That is the ideal solution. Where there is not enough money, the priority is to provide a home for the children. The court does however recognise that it may not be fair to deprive the other party of their capital in the long-term and has a wide discretion to make whatever order it thinks fit.

## Business assets

Business assets, whether in the form of shares in a limited company, interest in a partnership or LLP, or those of a sole trader, will be considered part of the relevant assets of the relationship alongside other property or investments. Unlike land/buildings, bank accounts and investments, an interest in a business can be difficult to value.

If capital is required from the business, the aim will be to find out how it can be released without destroying the business, for example by selling off some assets, or using the business assets as security to increase borrowing.

The court will only reluctantly consider forcing a sale of the business if it does not make enough profit to pay reasonable maintenance and there is no other means of raising an appropriate lump sum.

The businessman or woman has particular problems about disclosure. It may be difficult to work out the profits of a business especially if the accounts are not up to date, the business is in a period of change, and the stress of marriage breakdown has affected performance at work.

Detailed valuations are discouraged - they can be expensive and controversial, and a paper figure for the valuation of a business is irrelevant if the business is not to be sold. Some form of agreement about the value is, however, generally necessary if a fair settlement is to be reached. If agreement cannot be reached regarding the value then there may be no other option than to obtain a detailed valuation

An argument may be made as to whether a business interest should be viewed as a matrimonial asset or a non-matrimonial. In such circumstances, business assets generated solely by the efforts of one party (for example, where a business is inherited by a party, the existing value in the business at the time it was inherited, or the value that can be attributed specifically to the contribution of one party) may be classified as non-matrimonial assets. They will not be ring-fenced and excluded from consideration, but will be treated as the creator's unmatched

contribution so as to justify a departure from the application of the yardstick of equality.

## The matrimonial home and severance of tenancy

If the Matrimonial Home is privately owned then, unless it is held in one parties name, it is probably held by the parties as 'joint tenants'. This means that, if one of you dies, the survivor will be entitled to the whole property, even if divorce proceedings have been started or you are divorced, and irrespective of any provision in a Will or if no Will has been made irrespective of the intestacy rules.

It is possible to prevent this occurring by preparing a simple document known as a Notice of Severance that you should sign and which must be sent to your spouse for signature. After the Notice has been sent to your spouse, even if he/she does not sign and return it, the property will then be owned by you both as 'tenants in common'. This means that, in the event of you dying before your spouse, your share in the property will pass according to the terms of your Will or under the rules of intestacy if you have no valid Will.

Therefore, in order to ensure that your spouse does not become entitled to your share in the property in the event of your death it will be necessary for you to prepare a Will and a Notice of Severance. Please let me know if you want me to prepare these documents.



## Council and rented accommodation

If you are living in temporary accommodation provided by the local Council you should contact one of the Housing Officers at the Housing Department of the local Council with a view to trying to speed up your application to be permanently rehoused.

There are implications which arise should you decide to move out of your rented accommodation. If you do move out there is a risk that you may lose your right to live at the property and, in addition, you may prejudice any application to be rehoused by a local Council.

By moving out there is a danger that you will lose important rights which protect tenants of Council-owned properties and your tenancy could be cancelled. In addition, the Council could decide that you have made yourself 'intentionally homeless' which would mean that you would not have an automatic right to be rehoused by a Local Authority. The law defines someone as being intentionally homeless if they deliberately do or fail to do anything which results in them ceasing to occupy the accommodation which is available and which it is reasonable for them to continue to occupy.

In broad terms, this means that where the Council tenancy is in joint names and the Court would be likely to transfer it into the sole name of one of the parties to the marriage, then that person is

normally expected to apply to the Court for the tenancy to be transferred into his/her sole name. This may not apply where that person has been a victim of violence.

## Pensions

The court can make a number of orders in relation to pensions as follows:-

### Pension sharing

This Order means that the Court can order the Trustees to the Pension Scheme to take some of your spouse's pension rights away from him/her and transfer them over to you. You would then obtain your own pension rights and these would be separate from your spouses'. A Pension sharing Order in your favour would mean that you would have a pension of your own. It then does not matter if your spouse dies and is not reliant upon him/her retiring. If you re-marry after divorce then it will not affect a Pension sharing Order. Further, you can choose who you would want to receive the benefits of your new Pension rights in case you die before retirement before receiving the pension. Further if you re-marry your new spouse may receive a widow's benefit on your death. After the Court Order, neither party would be able to return to Court to change any amount of the pension share. However, when the Court makes a Pension sharing Order, you will not receive the money immediately. This will be transferred into a pension of your own choosing and you will receive the money when you come to retire.

### Earmarking order

This type of Order is almost never used. The Court can order the Pension Scheme to pay part of your spouse's pension direct to yourself. However, the pension would remain in his/her name. You would then remain dependent upon him/her. You would have to wait for him/her to retire before you would receive your money. The Earmarking Order would cease upon either your death or his/her death and would cease if you re-marry after the divorce. Generally it is normally better to agree to a Pension Sharing Order. Full details regarding his/her pension should be obtained before you formally accept any offer made.

### Offsetting

When offsetting a pension, the Court looks at the parties finances. It can compensate a party for the loss of pensions rights – for example, one spouse might retain the matrimonial home and the other spouse may retain his/her pension. However, offsetting will depend on what other assets both parties



## Other assets

All assets owned by the husband and wife, from cars to life assurance policies and from holiday homes to building society accounts, are relevant to the financial settlement. The court will readily consider the transfer or sale of free assets such as quoted shares or second homes.

Some assets are more difficult to realise than others, for example, assets held as security for the deposits of Lloyd's members. Similarly, it can be difficult to enforce the sale or transfer of overseas assets, but a lump sum can be ordered which means that overseas assets have to be sold in order to pay it.

## Non-matrimonial or non-civil partnership assets

There is no statutory definition of a non-matrimonial asset, but the distinction between such assets and those that form part of the marital acquest has been considered at length in case law. The court will have regard to an argument that property is non-matrimonial in nature as part of its consideration of the provisions of section 25 of the Matrimonial Causes Act 1973 or Schedule 5, Part 5 to the Civil Partnership Act 2004 (in particular as to the assets of the parties, the contributions of the parties and 'all the circumstances of the case').

Whether or not an asset forms part of the marital acquest will also impact on the application of the general principles applied by the court.

An argument may be made that inherited property is non-matrimonial, but such assets will not be excluded from the court's view entirely, ie they will not be 'ring-fenced'. The assets may be looked on as an unmatched contribution by the beneficiary of the inheritance. The court will then decide whether the inheritance should be shared and in what proportions.

In all cases, though, the principle to be applied is that the sharing principle applies with limited or no force to non-matrimonial property. Thus, if there is, or was, at the start of the marriage significant non-matrimonial property, that fact requires reflection in the outcome of the application of the sharing principle.

It is therefore important that an assessment is carried out, at an early stage, of the extent and nature of the evidence that will be necessary in a particular case in which the existence of non-matrimonial property is being asserted.

## Personal injury awards

The court's approach to personal injury damages in financial remedy proceedings is very similar to its approach to non-matrimonial property in general. As with non-matrimonial property, personal injury damages will not be ring-fenced and the courts will have recourse to them as necessary to meet needs.

Needs, however, will not be the court's only focus. It is likely that in cases that are not needs based, the extent of the departure from equality

will depend on the usual considerations relevant to non-matrimonial property, such as the length of the marriage and the degree of mingling with other assets.

How the court will give effect to this departure from equality will depend on judicial preference and the particular facts of the case. The size of the total assets available relative to the parties' needs is relevant.

There are certain considerations that will be unique to personal injury damages alone.

There is a very limited exception to the principle that personal injury damages will not be ring-fenced. It has been expressed that *'there may be instances where the sum [of damages] awarded was small and was specifically for pain and suffering in which case it would be unsuitable to order any of it to be paid to the other spouse'*.

The non-injured spouse may want to argue, quite separately of the issue of the parties' needs, that elements of the injured spouse's award ought properly to be shared between the parties. For example, part of the injured spouse's award may have been for loss of future earnings. The non-injured spouse may, in the absence of any injury having occurred, have a claim to at least some of the other spouse's earnings on principles of compensation and sharing. Arguably, the non-injured spouse should thus also have a claim to this element of the injured spouse's award. At the very least, such an argument may be a reason for the court to adopt the discretionary percentage approach in dividing the parties' assets.



# Post separation assets

## General approach

**A bonus earned post-separation was classed as non-matrimonial and on that basis excluded from the matrimonial pot. Guidance has been given which adopts a more formulaic approach to post separation assets:**

1. An asset acquired post-separation may be treated as non-matrimonial property if it can be said that that asset was created or acquired by that party by virtue of their own personal industry and not by the use of an asset created during the marriage.
2. Where the asset is a bonus or other earned income it should not be classed as non-matrimonial unless it relates to a period at least 12 months after separation.
3. In deciding whether such assets should be shared the court should have regard to:
  - a) Whether the applicant has proceeded diligently with their claim.
  - b) Whether the person was treated fairly by the person who has the benefit of the post-separation accrual during the period of separation, and
  - c) Whether there is the prospect of further significant gains or earnings in the future and whether the applicant will be sharing in such future income or gains.

However the above approaches have not always been followed by courts.

## Trusts and inheritances

The court cannot make orders against trustees. It will, however, look at the reality of the situation where the husband or wife is a beneficiary under a trust. Increasingly, trustees are being joined as third parties to financial proceedings involving beneficiaries so that the court can ascertain their views on how trust monies might be utilised directly or indirectly to assist a financial settlement. For example, if trustees have been paying income to the beneficiary wife and providing capital on request, the court may make an order requiring her to sell her other free assets to meet her husband's claims.

Expectations of inheritance may be taken into consideration but are not usually significant. The courts recognise that wills can be changed. Where potential inheritances involve foreign assets, the position may be different. In some foreign countries, rights of succession are determined by law. In such cases a divorce court may be more tempted to take that property into account.

## Tax

At the time of separation and on divorce, careful consideration must be given to the tax implications.

Where assets are sold or property transferred between husband and wife, consideration must be given to the tax implications. It is important that advice is taken as early as possible during the tax year in which separation (not divorce) takes place.

# The process in detail

If it is not possible to reach an agreement you can apply to the court for an order. It is now a requirement that before you make an application for financial relief you must attend a family mediation information and assessment meeting (MIAM). A MIAM is a short meeting that provides information about mediation as a way of resolving disputes. A MIAM is conducted by a trained mediator who will assess whether mediation is appropriate in the circumstances. If both parties are agreeable then you can attend a MIAM together; if, however, that is not suitable then separate meetings will be held. The intention is to see whether your dispute could be resolved in mediation rather than by using the courts.

In some circumstances one of the exemptions to attending a MIAM may apply. These include cases where an application must be made urgently, where there are child protection concerns or where there are issues of domestic violence. Depending on the situation, there may be an exception to the requirement to attend a MIAM.

If mediation is successful then the solicitor will draft an agreed financial order and submit this to court for approval.

## Overview of the procedure

### Who can apply to court?

Either spouse or civil partner can make an application to court to resolve financial disputes arising from divorce or civil partnership dissolution. The person making the application is the applicant and the other person is the respondent.

What happens when the application is received by the court?

**When either of you makes the application to court (called ‘filing Form A’), the court automatically generates certain standard directions for helping to progress your case. These are:**

1. The date and time for the first court appointment (sometimes referred to as an FDA or first appointment).
2. That five weeks before that appointment you must each file at court and exchange a completed financial disclosure form (Form E) giving full details of your financial circumstances, and
3. That two weeks before that appointment, you must each file with the court and exchange:
  - a) a short statement about what the disputed financial issues between you are
  - b) a chronology of the important events in the marriage or civil partnership
  - c) a questionnaire if you have any queries

on the other person’s financial disclosure, and

- d) a form saying whether you will be using the first court hearing for directions only or you will be able to negotiate constructively, so that the court is able to allocate the right amount of time.

## What happens at the first court appointment?

The first appointment is usually listed for 30 minutes of the district judge’s time, unless both people feel they have sufficient information to negotiate, when it can become a longer hearing where the judge gets involved in helping you settle the case.

If this is not possible, at the first appointment the court will consider what more information is necessary to decide what should happen: the judge will order questionnaires to be answered by a certain date, consider what other expert evidence (eg on the value of property, or regarding pension details etc) should be obtained and by when, and then it will fix the date of the next court appointment.

The idea is that before the next court appointment each of you and the court will have enough information available about the financial picture to enable you to negotiate constructively about your financial matters.

Immediately before every court appointment, each person must file at court and exchange a statement of their legal costs.

## What happens at the FDR?

The FDR (financial dispute resolution) hearing is usually the second court appointment. It can sometimes take place as the first appointment, if each of you has all the information you need early on. If this is possible it can save you money in legal fees.

The FDR is a ‘without prejudice’ hearing, which means each of you is able to make proposals for settlement that cannot be referred to openly in court afterwards. The judge will try to assist you to come to a settlement and may give an indication of what they think could be an appropriate solution. If you reach an agreement the court can potentially make an order that day to formalise your agreement and end the court proceedings.

If you cannot reach an agreement on the day the judge will give any further directions about what is needed to get the case ready for the court to make a decision, which may include asking each of you to prepare a detailed statement, and will fix a date for the final hearing (or ‘trial’).



## What happens at the final hearing?

If it is not possible for the two of you to agree, the court will make orders at the final hearing about how your property, assets and income should be shared. You should bear in mind that very few people's cases get to final hearing stage—most people agree ('settle') before then.

At a final hearing, the applicant presents their case first, then the respondent says what they want to happen. Each of you, and any experts you have asked for an opinion, will have to give evidence and be cross-examined by the other (or their legal representative if they have one). After hearing all the evidence and submissions from each of your legal teams, the judge will make an order about what should happen.

There is limited scope to have your costs paid by the other person in financial proceedings. The general rule is that each person pays their own legal fees.

## What can the court do?

**The tools that the court uses to divide up financial affairs apply to all property in which either or both of you have an interest (which may also, in certain circumstances, include assets in companies or trusts):**

1. It can order a sale of a property, a transfer to one person (or to a child) or put it into a trust.

2. It can order a lump sum (whole or in instalments) or a series of lump sums, eg to pay off a mortgage.
3. It can order one party to pay maintenance to the other either for the rest of their joint lives until the recipient remarries or enters into a subsequent civil partnership, or for a fixed period (a non-extendable or extendable term), eg until retirement; it can order money for educational expenses etc, but not usually for general child maintenance, except at higher income levels, and
4. It can order that a pension be shared, or attached—sharing is where funds are transferred or split between the parties; attachment is like maintenance direct from a pension, but can also be a lump sum.

## Costs

### Costs generally

The importance of costs in financial proceedings cannot be over-emphasised. It is essential that the question of costs is kept in sight and in proportion to the overall assets in dispute. In addition, adherence to the overriding objective and active case management by the courts under the new ancillary relief procedure should help to ensure that costs are kept in proportion to the overall assets.

## Offers to settle

Offers to settle are an important part of financial relief cases. The Rules provide that either party may at any time make a written offer to settle which is 'without prejudice except as to costs'.

## Negotiations

One of the key features of the financial relief procedure is the promotion and facilitation of settlements. Most cases do, in fact, settle by agreement, often during informal discussions following the FDR. However, negotiations are an ongoing process and may well commence at a very early stage. This is generally to be encouraged as it will probably be quicker and will cost the parties less, so leaving more of the assets available to be divided between them. Further, it may help to lessen any ill-feeling caused by the breakdown of the marriage and, therefore, aid the parties' future relations, in particular with the children. In addition, the respondent is more likely to comply with an order which he has agreed to, thus avoiding the need for enforcement proceedings.

However, the client must beware of settling at any price. Any agreement represents a compromise, but the solicitor must ensure that negotiations are carried out with full knowledge of all material facts. Both parties are under a duty of full and frank disclosure. If a settlement is reached, heads of agreement should be drawn up and signed by the parties and their legal representatives to evidence the necessary consensus.

## Consent orders

**Once the parties have reached agreement, the applicant's solicitor should draw up a draft consent order and send it to the respondent's solicitor. To enable the court to investigate the parties' means, a statement of information must also be completed. This statement must include:**

- (a) The duration of the marriage, the age of each party and the ages of any minor children of the family;
- (b) An estimate of the approximate value of the capital resources and net income of each party and of any minor child of the family;
- (c) What arrangements are intended for the accommodation of the parties and any minor child of the family;
- (d) Whether either party has remarried, or has any present intention to remarry or to cohabit with another person;
- (e) Where the order includes a transfer of property, whether any lender has been served with notice of application and whether it has objected to the transfer;
- (f) Where the order includes a term which imposes any requirement on the person responsible for a pension arrangement, whether he has been served with the notice of application and whether he has objected to the order;
- (g) Any other specially significant matters.

Often the applicant's solicitor will insert the applicant's details in the statement and then send it to the respondent's solicitor with the draft order. The respondent's solicitor will then complete the statement with the respondent's details, indorse his consent on the order and return both to the applicant's solicitor. However, the statement of information does not have to be on one document, so each party can complete its own.

The applicant's solicitor should then file the draft order plus two copies together with the statement of information. He must also file Form A if agreement was reached at such an early stage that this has not yet been done. The district judge will then peruse the filed documents and, if satisfied, can make an order in the agreed terms. In the rare event that he is not satisfied, he can order the parties to attend a hearing.

If agreement is reached at a hearing, the district judge can dispense with the need for filing a statement of information. The consent order is then drafted immediately by both parties' solicitors, and approved and made by the district judge.

## The clean break

A clean break is a settlement where it is ordered that neither the husband nor the wife will claim maintenance or capital from the other in the future.

The courts encourage both parties to be financially independent after divorce and to earn whatever they can. Each party's age, health, family commitments and the availability of appropriate employment will all be taken into account.

Please note that there is no time limit on bringing a financial claim after Decree Absolute. Further, it is not the case that if Decree Absolute is granted and no financial order has been made, then this brings financial issues from the marriage to an end. Therefore, unless dealt with by the Court, financial claims may be brought at any stage in the future albeit those claims may be prejudiced by delay and re-marriage. In most cases re-marriage will prevent a future financial claim being brought by the Respondent.

If you do not intend to make a financial claim against your spouse then it is therefore important that you consider entering into a clean break order. The object of the clean break is to settle once and for all the parties' financial responsibility towards each other and to end their financial interdependence to enable them to leave their past behind them and begin anew. The advantages of such an approach have long been recognised.

*This is not intended to be a definitive guide on the issue of financial relief but instead is intended to be a guide to the factors that the court will take into account. Issues change, almost on a daily basis, with judgements handed down by the court giving further interpretation on various factors such as needs, marital/non-marital property etc.*

Austin Kemp | By Your Side

Austin Kemp Solicitors Limited are authorised and regulated by the  
Solicitors Regulation Authority - SRA number: 513203.