

RACHEL JAYSAN

Family Law. Together

Financial Considerations  
upon Divorce

Telephone 020 8958 2073

Email [rachel@racheljaysan.co.uk](mailto:rachel@racheljaysan.co.uk)

Website [www.racheljaysan.co.uk](http://www.racheljaysan.co.uk)

### Financial Considerations upon Divorce

The court has wide powers to make orders in relation to the division of assets including ordering a party to:

- Pay spousal maintenance to the other party for as long as the court decides is necessary.
- Pay a lump sum or sums to the other party.
- Make or arrange periodical payments for the benefit of any children
- Pay a lump sum or sum for the benefit of any children.
- Transfer specified property to the other party.
- Make a settlement of specified property (set up a trust for the benefit of the other party and/ or a child of the family).
- Vary any nuptial settlement or trust made for the benefit of one of the parties.
- Sell specified property and distribute the proceeds.
- Share a pension fund.

There is a wealth of case law regarding financial orders made on divorce. However, the court must have regard to all the circumstances of the case and must give first consideration to the welfare of any children under the age of 18 years. The factors that the court must take into consideration when deciding what orders to make (set out in the checklist at section 25 of the MCA 1973 as follows:

- The financial resources which each party has, or is likely to have, in the foreseeable future.
- The financial needs of each party now and in the foreseeable future.
- The standard of living enjoyed by the family before the breakdown of the marriage/civil partnership.
- The age of the parties and the duration of the marriage/civil partnership.
- Any physical or mental disability of either party.
- The contributions made by each party to the welfare of the family, including any contribution by looking after the home or caring for the family, and any contributions which either is likely to make in the foreseeable future.
- The conduct of each of the parties, if that conduct is such that it would be unjust to disregard it (it is very rare for the court to take conduct into consideration unless there has been serious financial and/or litigation misconduct).
- The value to each of the parties of any benefit that, by reason of the divorce, either party will lose the chance of acquiring.

In a divorce case, the court has a duty to consider whether a clean break can be achieved so that there are no ongoing financial ties between the parties.

### Current Position

While the court has wide discretion as to the division of assets under section 25 of the MCA 1973, in *White [2000] 2 FLR 981* the House of Lords established two key principles:

- There should be no discrimination in favour of a money-earner against a home-maker. Their contribution to the marriage, and to the family asset, should be seen as having equal value.
- The court established the principle of sharing assets where resources exceed needs.

In the subsequent cases of *Miller/McFarlane [2006] UKHL 24*, the House of Lords confirmed the two main principles set out in *White* but went much further in exploring the issues facing the courts when making financial orders on divorce. Three key principles were established:

- The needs (generously interpreted) generated during the relationship between the parties will be met.
- Compensation for any financial disadvantage generated by the relationship (although in practice this concept is rarely applied)
- That marriage is a partnership with both parties being entitled to share in the fruits of the relationship

The court should consider all three, being careful to avoid double counting. The ultimate objective of the court is to give each party an equal start on the road to independent living. In *Charman [2007] EWCA Civ 1791*, the Court of Appeal reviewed the three principles identified in *Miller/McFarlane* and discussed how to apply the principles in practice. The court made the general point that in the event of irreconcilable conflict between the principles, the overriding criterion is fairness.

### Reasons to Depart from Equality of Division

Reasons the court may depart from equality include:

- Shortness of marriage, especially where both parties have their own careers and have kept their finances separate (*Sharp v Sharp [2017] EWCA Civ 408* and *E v L [2021] EWFC 60*).
- Non-matrimonial property. This can include inheritance (whenever received) and wealth generated prior to the marriage and/or after separation. This factor will only carry weight in cases where the assets available for distribution exceed the parties' reasonable needs and where the non-matrimonial property can be clearly identified.
- Illiquidity (difficulties in borrowing and the nature of assets may justify a departure from equality).
- Special contributions (in order to be taken into account, the contribution must be wholly exceptional). In *Cooper-Hohn v Hohn [2014] EWHC 4122 (Fam)*, the court held that a significant departure from equality was justified because of the husband's special contribution in building up vast wealth through his "financial genius". However special contribution is rarely successfully argued (*Work v Gray [2017] EWCA Civ 270*; *XW v XH [2019] EWCA Civ 2262*).
- Needs exceeding resources. Equality is commonly departed from in cases where the parties' needs exceed the assets available for distribution (that is, where most of the capital is required to house the children and their main carer).

### Spousal Maintenance

The court can order either party to make periodical payments (also known as maintenance) to the other for a specific period of time.

In deciding whether spousal maintenance is appropriate, the court will have regard to the checklist of factors in section 25 of the MCA 1973 (see above) Although there is no presumption in favour of a clean break between the parties on divorce, the court is under a duty to consider whether it would be appropriate to terminate the financial obligations of the parties towards each other. In addition, the court must consider how any ongoing financial obligations can be terminated as soon after divorce as the court considers just and reasonable.

Recent cases have recognised and promoted the goal of financial independence for both parties' post-divorce with the emphasis on the transition to financial autonomy as soon as that is possible without causing undue hardship for the recipient party.

There is no formula for calculating periodical payments and the amount payable is decided by the courts in consideration of the discretionary checklist set out in MCA 1973. In broad terms, periodical payments are calculated by balancing the income or earning capacities of the parties against their needs. The assessment of periodical payments is "an art and not a science". Recent cases such as *Waggott v Waggott [2018] EWCA Civ 727* and *O'Dwyer v O'Dwyer [2019] EWHC 1838 (Fam)* have made it clear that one party's earning capacity is not a matrimonial asset to which the sharing principle applies for the benefit of the other party, and the applicant does not have an ongoing entitlement to share in it.

### Child maintenance

Child maintenance is calculated using a fixed statutory formula which works on the basis of the paying parent's yearly gross income, less any pension contributions, using information supplied by HM Revenue & Customs.

The courts can only deal with child maintenance orders for one year after they're made. After that, if you can't agree, the Child Maintenance Service (CMS) will decide the payments.

The courts can make or vary orders for child maintenance on an ongoing basis in the following circumstances:

- The CMS has made a maintenance assessment and the paying party's gross income exceeds £156,000 a year, in which case the court can make a top-up order.
- There are expenses to be met in connection with instruction at an educational establishment or training for a trade, profession or vocation even if the child is in gainful employment.
- The child is resident in England and Wales and the non-resident parent/paying party or non-resident step-parent is resident abroad and is not employed by the civil or diplomatic or armed services of the Crown or employed by a company registered in the UK.

The court has discretion in its approach to top-up awards where the paying party has a gross income exceeding the statutory limit of £156,000 per annum. The most recent decision which aims to clarify the methodology in calculating top-up awards is *James v Seymour [2023] EWHC 844 (Fam)*.

In general terms, the legal requirement for parents to support their children financially continues after divorce. Non-resident parents must provide payment to the parent caring for children under the age of 16, or under the age of 20 and in full-time secondary education.



**Rachel Jaysan**  
Family Lawyer & Mediator

Telephone 020 8958 2073  
Email [rachel@racheljaysan.co.uk](mailto:rachel@racheljaysan.co.uk)  
Website [www.racheljaysan.co.uk](http://www.racheljaysan.co.uk)

**RACHEL JAYSAN**  
Family Law. Together