



# Family Justice Council

---

## Sorting out Finances on Divorce

April 2016

# Contents

|   |       |
|---|-------|
| Foreword by the President, Sir James Munby                    | 3-4   |
| Membership of the Financial Needs Working Group               | 5     |
| About this guide  | 6-8   |
| A general overview of the law                                 | 9-16  |
| Frequently asked questions – FAQs                             | 17-25 |
| Dividing the capital assets : Housing and other capital needs | 26    |
| • Housing needs   | 26-27 |
| • Other capital needs   | 28    |
| • Illustrations of how housing needs are approached           | 28-33 |
| • Looking at the overall division of capital                  | 33    |
| • Mesher orders   | 34-35 |
| • Equal division if sufficient capital after needs met        | 35-36 |
| Income needs  | 37-41 |
| • Child maintenance   | 37    |
| • Maintenance of spouses                                      | 38-41 |
| Dealing with pensions on divorce                              | 42-47 |
| Examples  | 48-54 |

# Foreword by the President, Sir James Munby

## FJC Financial Needs Working Group: Guidance for litigants in person on financial needs

I am delighted to endorse this guide, the latest in a series, designed to help Litigants in Person who may be confronting the seemingly daunting prospect of negotiating their own agreements in the context of divorce and family breakdown. This guide, *Sorting Out Finances on Divorce*, is intended to demystify what is a complex area of law which many Litigants in Person may find intimidating. It provides a succinct summary of the law to help those who cannot afford legal advice to reach financial agreements without the need to go to court. The guidance is specifically aimed at a lay audience and its primary purpose is to provide a road map through what is often, for many, uncharted territory. It sets out in clear terms how



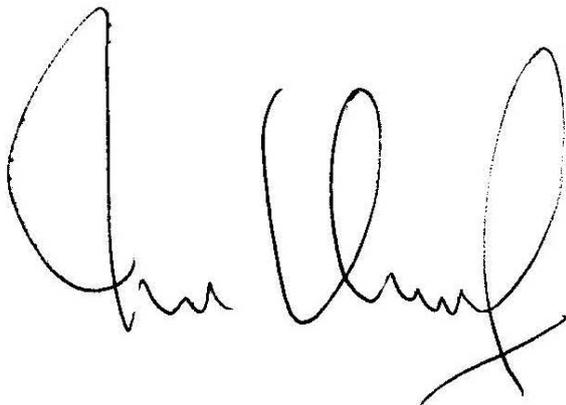
the Family Court approaches financial needs on divorce. Whilst each family's situation will be different, the principles will, I hope, guide Litigants in Person towards a better understanding of how the court would be likely to define their particular financial needs, depending on the assets which they have available to meet those needs. The objective in all cases is to achieve a result which reflects the best possible outcome for each family. In this context, the guide provides a general overview of the law, as well as a detailed explanation of particular issues which are likely to arise, such as maintenance, housing and pensions. It also includes useful examples and FAQs and describes what a judge is likely to do in similar cases.

The guide is a response to the Law Commission's recommendation in its 2014 report on Matrimonial Property, Needs and Agreements for the need for greater clarity regarding the distribution of assets and the determination of financial needs on divorce and civil partnership dissolution. The then Minister of State for Justice, Simon Hughes, wrote asking the Family Justice Council to take this recommendation forward. As Chair of the Family Justice Council, I asked Mrs Justice Roberts to chair a small but hugely experienced Working Group whose task was to produce this guide. We are both extremely grateful to all the members of that Group who put into the project an immense amount of hard

work in their own time and without remuneration. I am confident that the expertise and experience which informed this work will benefit many Litigants in Person who may, in turn, feel more confident about reaching their own agreements or representing themselves in court.

My thanks must also go to AdviceNow which has produced a shorter online version of the Working Group's document in plain English. This can be found at: <http://www.advicenow.org.uk/guides/sorting-out-your-finances-when-you-get-divorced>.

In my view, the guide makes a valuable contribution towards promoting a better understanding of the law which I know many Litigants in Person find intimidating. All too often, decisions have to be taken at a time when either or both of the parties may be feeling emotionally vulnerable; all too often the children may be confused and uncertain about what the future may hold as their parents contemplate separation. The plain common sense approach advocated by *Sorting Out Finances on Divorce* will, I hope, go some way to making the process less daunting. Experience shows that outcomes based upon consensus and agreement are likely to benefit the entire family in the long term.

A handwritten signature in black ink, appearing to read 'James Munby', written in a cursive style.

Sir James Munby  
President of the Family Division

# Family Justice Council Financial Needs Working Group

## Members

- Mrs Justice Roberts  
Chair
- Anne Barlow  
University of Exeter
- Jane Craig  
Penningtons Manches
- Nigel Dyer QC  
1 Hare Court
- His Honour Judge Edward Hess  
Western Circuit
- Julian Lipson  
Withers
- Philip Marshall QC  
1 King's Bench Walk
- Joanna Miles  
University of Cambridge
- His Honour Judge Clive Million  
South Eastern Circuit
- Simon Pigott  
Levison Meltzer Pigott
- Peter Watson-Lee  
Williams Thompson

# About this guide

## Who is this guide for?

This guide is for you if:

- You live in England or Wales, **and**
- You are or were married or in a civil partnership, **and**
- You are or have been involved in divorce proceedings or proceedings to end a civil partnership, or are likely to be so, **and**
- You want to know about the law dealing with your money and property at this point.

This guide is **not** for you if:

- You live outside England and Wales
- or**
- You have been living with someone (cohabiting) **without** being formally married or civil partnered

The law for cohabiting couples is completely different. A guide to living together and dealing with financial issues when you separate from an unmarried relationship has been developed by Advice Now, and can be found at <http://www.advicenow.org.uk/living-together/>

## What does this guide do?

This guide provides the following information about financial settlements for couples who are getting divorced or ending a civil partnership:

- A general overview of the law, dealing with
  - ♦ Making an agreement without going to court
  - ♦ What the law aims to do and takes into account – and so what you should aim to agree
  - ♦ What sort of orders can be made

- Further pages discuss particular topics in more detail
  - ◆ Housing and other capital
  - ◆ Maintenance and income
  - ◆ Pensions
- Some Examples, which illustrate how the law would generally be applied in some typical situations.
- Some FAQs, which deal with particular issues that come up on divorce, including some “myth-busting” of things that lots of people believe the law says but which are not true

### What does this guide not do?

If you think you might end up needing to apply to court for an order dealing with your money without legal help, there is a further guide available which explains that process: “Applying for a financial order without the help of a lawyer”, produced by Advice Now at <http://www.advicenow.org.uk/guides/how-apply-financial-order-without-help-lawyer>

This guide does not deal in detail with child maintenance. For information on child maintenance and a calculator for working out how much maintenance should be paid, you should visit the Child Maintenance Options site, <http://www.cmoptions.org/>

This guide is designed for those who have normal levels of wealth – it does not provide a guide to the sorts of complex legal issues that arise in what lawyers call “high value” cases. These are cases where there are £millions at stake. You should seek expert legal advice if your situation falls into that category.

This guide does not deal with other special situations, for example, where:

- there are complex business interests, trusts or other financial arrangements, or
- a third party (someone other than one of the spouses) claims that they own or have a financial share in some of the assets, or
- you made a pre-nuptial agreement about your finances (though pre-nups are discussed briefly in the FAQ section), or
- you have concerns about your ex hiding or getting rid of assets.

In all of these situations, it would be strongly advisable to take expert legal and/or financial advice as quickly as possible. To find a legal advisor, ask friends and family for a recommendation or you can search:

- <http://solicitors.lawsociety.org.uk> (and search under “Family and relationships”)
- [www.resolution.org.uk/findamember](http://www.resolution.org.uk/findamember)

The information in this guide is for general purposes only. Please do not rely on it as a substitute for getting legal advice about what to do in the specific circumstances of your case.

### The language used in this guide

For convenience, this guide refers to you and your ex as “spouses”, though some readers may already be divorced and some may have been in a civil partnership rather than married. The language of marriage/divorce is used throughout, but everything discussed in this guide applies to civil partnership in the same way.

This guide often talks about what a judge would take into account or decide, and about what happens in particular “cases” – but very few couples end up taking a formal case to court and having a judge decide on the outcome. Most couples agree how to share out their money and property on divorce. But it is useful to know what a judge **would** do, as that can help you reach an agreement that is fair and reflects what the law says.

## A general overview of the law

This guide focuses on the most typical financial situation on divorce: where the resources available (that is all of the couple's income, savings, investments, property and pensions) do not exceed what the two spouses each "need" following their separation. In this context, what someone "needs" depends on their particular situation – this is discussed further below.

In this typical situation, the spouses' financial needs, and the needs of any children of the family, are going to be the main focus of the case. Where the assets involved in a case are more than enough to cover needs, additional considerations may apply and specific legal advice should be sought.

### Reaching an agreement that is right in your case

The law in this area does not set out hard rules or a mathematical formula – it is very different from the rules for child support in this way. Instead, the judge has to decide each case having considered its particular circumstances. This is because people's financial situations are so different that it would be very difficult to make rules covering all the different circumstances that might arise.

So the *specific details* of financial arrangements made on divorce will vary from one case to the next. This has the benefit that couples can reach an agreement that suits their situation. But the same *basic principles* apply to all cases, so the *basic content* of any agreement should be predictable.

Couples who are trying to agree, with or without the help of lawyers or mediators, need to know what the law says and (broadly speaking) what a judge would decide, so that they can reach an agreement that reflects their legal rights and responsibilities. This guide is intended to help you to do that.

### Making an agreement without going to court

This guide talks in terms of what a judge would do if your case came to court. But it is very unusual for divorcing couples to have to get a judge to decide what orders should be made in their case: most couples are able to agree about their money and property on divorce without going to court.

Couples may reach agreement between themselves, or may make an agreement with the advice of lawyers, who can help couples negotiate an agreement without going to court. Couples may also seek the help of mediators to reach an agreement. Where couples are finding it difficult to agree, one of them sometimes starts a court case, but most of those

couples still manage to agree eventually so that the judge does not have to decide the case for them and they can remain more in control of the outcome for themselves and their children.

### Getting a 'consent order'

Once you have made an agreement, if you want to be sure that you will both stick to it you must apply together to the court to get your agreement turned into a court order (known as a "consent order"). This is the only way to make your agreement binding, which means that both spouses must do what it says and you can take your ex to court if they don't. The judge who reviews your application for a consent order will want to check that the agreement you have reached is a reasonable one that properly reflects what the law says. You will also have to have an order if you want to share a pension.

Obtaining a consent order usually does not involve you going to the court in person, unless the judge is unhappy with or puzzled by what you have agreed. In some courts, the judge might ask to see you briefly if one or both of you is acting without the support of a lawyer so that the judge can assure him or herself that you understand what you are agreeing to. However, particularly if the terms of your agreement are complicated, it may still be sensible to seek legal advice on the wording of the documents to be sent to the court to ensure that you create a draft order that the court is willing to approve without requiring you and your spouse to come to court to explain what you were trying to achieve by the order.

You will both also need to disclose to each other all your financial resources before you can apply for a consent order and fill in a "statement of information" for the court to explain the background to the agreement that you have reached. If you do not provide full and clear information about this, the judge will probably ask questions before he or she is willing to make the order that you have asked for. But you should provide each other with full information about your resources anyway, as the first step in reaching any agreement about your finances on divorce.

More information about the process of getting a consent order is available on page 14 of the Advice Now guide, "Applying for a financial order without the help of a lawyer", <http://www.advicenow.org.uk/guides/how-apply-financial-order-without-help-lawyer>

To see the statement of information that needs to be completed go to hmctscourtfinder <https://courtribunalfinder.service.gov.uk/search/>

### Getting legal aid to help with this process?

Legal aid is not available for most divorce cases, unless there has been domestic violence or child abuse in the relationship. However, legal aid is still available for mediation and

for legal help with mediation. A guide to legal aid eligibility can be found on the Citizens Advice Bureau website: <https://www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/help-with-legal-costs-legal-aid/> You can also use the Family Mediation Council's website to contact a mediator near you to find out about local costs (<http://www.familymediationcouncil.org.uk/>).

### What you should aim for: meet needs and put children first

The aim of the law is to share out all of the assets of both spouses (property, money, pension savings etc.) in a way that is fair to both spouses.

People very often have different views about what is "fair" in these cases. The FAQs deal with some examples of what some people might think is fair, but where the law takes a different view.

If you are trying to agree between yourselves, with or without the help of lawyers or mediators, you should take the same approach as a judge would. Then any agreement you reach can be made into a consent order without the judge raising any queries about what has been agreed.

There are three key points:

- If there are "**children of the family**" under the age of 18, the law says that their welfare is the **first consideration**. If you are making an agreement out of court, you should work from this starting point as well.
- In most cases, the law says that a fair outcome starts by making sure – as far as possible, given the available resources – that both spouses' **needs** are met, in the short term and, if the resources allow, in the long term. The law says that the judge should consider whether it is appropriate to make a package of orders which leaves the spouses independent of each other, either straightaway or over time.

"Children of the family" are any children of both spouses and any other children (other than foster children) who have been treated by both spouses as children of their family. So, for example, it includes children of one of the spouses who have lived as part of the family during the marriage, but does not include new children or step-children that either spouse now has with a new partner. Those children may be relevant, as may children of the family who are aged over 18, but they are not the first consideration. All references below to the couple's children are to children of the family in this technical sense.

All circumstances of the case are potentially relevant. But needs are almost always the most important factor.

## So what are “needs”?

“Needs” here is a very broad concept. It includes making sure that each of the spouses has a home and income for daily living costs, both in the short term and often the longer term (for example, it can include making sure each spouse has a pension for later life). “Needs” is not just the minimum each spouse needs to survive on: “needs” is usually interpreted more generously, taking into account the standard of living during the marriage and for how long that standard of living was enjoyed. So, for example, where there has been enough capital and/or income available during the marriage to enable both spouses to have become accustomed to a high or luxurious standard of living for several years, their “needs” may well be regarded as greater than the needs of spouses who have lived more modestly (whether through choice or necessity). However, if a high standard of living has only been enjoyed for a relatively short marriage, it may be fair for the less well-off spouse to revert to a more modest standard of living after the divorce.

The standard of living enjoyed during the marriage can be measured by considering things like: What was your average monthly grocery bill? What sort of car (if any) did you have? How often did you go on holiday as a family and where to? How often did you eat out and where? Were the children privately educated?

It is important also to bear in mind that a spouse’s needs, and his or her ability to meet those needs, may be affected by age, by any physical or mental disability or by illness.

Significantly, choices which you both made as spouses during the marriage may well give rise to future needs when the marriage ends. For example, if you both decided at the beginning of your marriage that one of you would give up work (or take a part-time job) to stay at home in order to look after your children, it may be much more difficult for that spouse to pick up the threads of a career and/or to find employment after many years at home. Sometimes he or she may need to look at retraining or acquiring new skills. A judge would try to ensure that the objective of any financial orders made to meet needs in these circumstances was limited to enable that disadvantaged spouse to make a transition to independent living to the extent that it is possible. Sometimes, it will not be possible to achieve the goal of independence, especially if one of you is older and/or because of the choices you may have made earlier in your marriage.

In most cases neither spouse will be able to continue to enjoy the same standard of living as they did during the marriage, because the assets and income usually just won’t stretch that far. Resources that were just enough to support one household will struggle to cover two. A more modest view will have to be taken about what each spouse “needs”. It will often be necessary to take welfare benefits, tax credits and housing entitlements into account, or to rely on family. But the first consideration in these difficult cases will, as always, be the welfare of the couple’s children.

## Housing is the priority

If a case were to come to court, the judge's main concern would be to make sure, as far as possible, that any children have a suitable home, with their main (or 'primary') carer, and then to make sure – as far as possible – that the other spouse also has suitable housing.

So you should think about how each of you is to be housed following divorce, and how that housing can be afforded, before moving on to consider other issues.

In some cases, it may also be appropriate for the spouse who earns more to make maintenance payments to the other spouse, at least for a period after the divorce. That may be essential to enable that spouse to afford to pay for their accommodation and its running costs.

## What about equal sharing?

In some cases, for example where there are no children and both parties are earning similar amounts, or where there is a lot of money to go around, a half share of the pot will be enough to cover each spouse's needs and so equal sharing may be appropriate.

However, in other cases the available assets may not exceed the spouses' joint needs, or one spouse may have greater needs than the other and be less able to meet those needs alone, for example, if he or she is looking after the couple's children and cannot work full-time. In those situations, the court would not just divide the money 50/50. In those cases, one spouse may receive more than half of the assets to ensure that his or her needs and the needs of the children are met.

## What about bad behaviour?

Only in very rare cases will a spouse's share of the assets be reduced because of his or her bad conduct: the law says that the simple fact that one spouse is responsible for the marriage ending, (for example, because of an affair) is not relevant to the financial arrangements on divorce. In very rare and extreme cases, the law has recognised that one spouse's behaviour can have an impact upon how assets are divided on divorce. For example, if one spouse attempted to murder the other, or if one spouse causes severe injury to the other which prevents him or her from working in the future, that might be conduct which a court would decide it was unfair to disregard. However, a court may take account of financial misconduct which has significantly reduced the level of assets available to share out on divorce (for example fraud or heavy gambling).

## Achieving a "clean break"?

Ideally, couples share out their assets so that they can become financially independent of each other, either straightaway or over time (possibly, several years). This is known as

having a “clean break”. If it is possible to achieve this, then this should be the aim.

**However**, whether and when it will be fair – and possible – to achieve a “clean break” will depend on the circumstances of each case. Where there are children or the marriage has been long, a clean break may not be fair or possible unless there are enough assets available to split between the spouses and both spouses have enough income to be self-supporting. The most important thing is to ensure, wherever possible, that the needs of both parties and any children of the family are met.

### What resources can be used to meet needs?

If a case were to go to court, the first thing the judge would do is to review all the **assets, debts and income** of both spouses to see how much there is “in the pot” to share out in order to meet the needs of the spouses and any children. This should be your first step, too, in trying to reach an agreement.

#### Key points to note

- **All** assets and debts are relevant and all assets can be used to meet the parties’ needs, not just those owned jointly by or held in the name of both parties, but also assets owned or paid for by just one of them (e.g. pension savings and future/current pension benefits, personal savings accounts and investments).
- In a lot of cases, the **family home** will be the most important asset. This will almost always be the case irrespective of who actually owns the property and/or whether one of you owned and was living in the property before the marriage.
- **Pensions** are easy to overlook, but they are very important and can sometimes be the most valuable asset in the case. It is particularly important to look at each spouse’s pension savings where the way family life was organised meant that one spouse earned less than the other and so was less able to make his or her own pension savings.
- Each spouse’s **ability to acquire assets in the future** (e.g. by borrowing on a mortgage) and **earning capacity** are also relevant. If one spouse’s ability to work is limited because of child-care responsibilities, reducing that spouse’s ability to meet their own needs from their own resources, that fact will be very relevant to deciding what is fair – it will often mean that that spouse needs access to more of the couple’s resources following divorce, and may also need to receive spousal maintenance from the other spouse (if that can be afforded), at least for a period of time.
- The court will also have regard to **existing financial obligations**, for example, to pay child support to children of the family or for other children.

## Being honest about what you've got

It is very important that both spouses are honest about what they own and what income they have. The first step in any negotiations is for each spouse to provide full information – “disclosure” – of their income and assets. In cases that go to court, there is a special form – **Form E** – for doing this. This Form is also useful for couples who have no intention of going to court but who want a convenient template to use for providing disclosure, because it helps to ensure that you cover all the relevant points. You can find a useful guide to Form E in the Advice Now guide, “Applying for a financial order without the help of a lawyer”: <http://www.advicenow.org.uk/guides/how-apply-financial-order-without-help-lawyer/>

You must provide full information about all assets, even where you might want to make a special argument about why particular assets should not be taken into account or should be kept by you. The courts treat failure to give a “full and frank disclosure” of all assets, liabilities and income very seriously. If either spouse fails to provide full and frank disclosure, that spouse may be subject to serious penalties and your case may be reopened if it is later discovered that one of you failed to disclose significant facts.

## Both spouses' contributions to the marriage count, financial or not

The law generally regards each spouse's contributions to the marriage as being equally important, whether those contributions were earning money and acquiring assets, or raising the children and looking after the home. So a spouse who earned all the money (or more of the money) cannot simply say that the other spouse has little or no claim because he or she didn't bring in any (or as much) money or property. In most cases, where the spouses' combined assets do not exceed their needs, the requirement to meet needs first means that it is generally not possible for either spouse to keep an asset out of the pot, for example, because they inherited it or were given it, or acquired it before the marriage. Even if the family home was inherited, or bought by one spouse before the marriage, that asset will still be taken into account to ensure that both parties' needs are met as far as possible.

## How can you achieve this in practice?

The court has wide powers to distribute assets. You should consider these powers when trying to reach agreement out of court, particularly bearing in mind the need to draft a consent order for the court to approve in order to make the agreement binding. You may not need to use all the different types of order in your case, and different combinations of orders may achieve equally satisfactory outcomes. How you go about doing this will partly be a matter of what you both prefer to do in your case in order to meet each other's needs.

These powers include:

- Transferring a particular piece of property (including a rented home) from one spouse to the other, or from both spouses' names jointly to one spouse's name
- Selling a property and splitting the proceeds from that sale between the spouses
- Allowing one spouse to live in the family home for a specified period or until a particular event occurs (for example, the children growing up and becoming independent), after which it will be sold and the proceeds shared out between the parties
- Requiring one spouse to pay a "lump sum" of cash to the other spouse
- Sharing a pension fund or pension payments between the spouses
- Requiring one spouse to make regular payments to the other spouse (usually called "maintenance", but formally known as "periodical payments")
- Requiring one spouse to pay school fees or other special expenses regarding the children

Or, in appropriate cases, simply ordering that no transfers are to be made (or no other transfers other than those already specified in the order) and/or that no maintenance should be paid now, or from some point in the future.

More technical information about the full range of orders that a court can make is provided in the Advice Now guide, "Applying for a financial order without the help of a lawyer", at page 10: <http://www.advicenow.org.uk/guides/how-apply-financial-order-without-help-lawyer>

Except for maintenance payments, it is normal for all the other types of orders to be made together as a "once and for all" settlement of all claims relating to the capital assets. Maintenance, by contrast, is a continuing obligation. Once maintenance has been ordered, if there are any relevant changes in the circumstances of either spouse or any children it is possible to review both the amount to be paid and how long it should be paid for.

## FREQUENTLY ASKED QUESTIONS - FAQs

### Do we have to go to court?

No. It is usually much better if you and your spouse can reach an agreement together about how to share your assets, perhaps with the help and advice of solicitors and/or a mediator. While negotiations can sometimes take a long time, this will generally be cheaper and quicker than starting a contested court case, and will hopefully result in an agreement with which both of you are happy.

If you want any agreement you reach to be binding, however, then you will need to apply to the court to have that agreement turned into a "consent order". This may not necessarily involve you going to court in person but there is a possibility that a judge might ask you and your spouse to attend for a brief hearing if one or both of you is acting without the support of a lawyer so that he or she can be assured that you understand what you are agreeing to be agreeing to the making of a consent order. However, particularly if the terms of your agreement are complicated, it may still be sensible to seek legal advice on the wording of the documents to be sent to the court to ensure that you create a draft order that the court is likely to be willing to approve on your first application.

If you cannot reach agreement, for example because your spouse refuses to negotiate with you, is refusing to disclose his or her assets, or is not making reasonable proposals in your negotiations or mediation, then you may have to apply to the court. But you may still be able to reach agreement before a judge comes to decide the case. Before you can apply to court, you will usually need to attend a mediation information and assessment meeting, or "MIAM" [see below].

### Can I get financial help to make an agreement or go to court?

Legal aid is not available for most private family cases, including disputes about finances. The main exception is if you are (or are at risk of being) a victim of domestic violence or abuse; this includes psychological, physical, sexual, financial or emotional abuse.

You may be able to get legal aid for mediation, and for legal advice and assistance to help you with that mediation, depending on your income and assets. A guide to legal aid eligibility can be found on the Citizens Advice Bureau website: <https://www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/help-with-legal-costs-legal-aid/>. You can also use the Family Mediation Council's website to contact a mediator near you to find out about local costs (<http://www.familymediationcouncil.org.uk/>).

### What is a consent order and do we need one?

A consent order turns an agreement into a court order so that it is fully enforceable.

Although an agreement between spouses may appear to be fully binding as a contract, it is always possible for either spouse to apply to the family court to ask it to order something different. But once a consent order has been made, the case cannot be reopened in that way.

If you have agreed that you want to share a pension, then you will always have to get a consent order because pensions cannot be shared by private agreement – the pension fund manager has to receive an order from the court telling it to share the fund.

### **How do we get a consent order?**

Obtaining a consent order usually does not involve you going to the court in person, unless the judge is unhappy with or puzzled by what you have agreed and feels that it would help him or her to discuss the order with you before confirming its terms in a consent order. However, particularly if the terms of your agreement are complicated, it may still be sensible to seek legal advice on the wording of the documents to be sent to the court to ensure that you create a draft order that the court is likely to be willing to approve without requiring you and your spouse to come to court to explain what you were trying to achieve by the order. You will both also need to tell each other about all your financial resources before you can apply for a consent order and fill in a “statement of information” for the court, to explain the background to the agreement that you have reached. If you do not provide full and clear information about this, the judge will probably ask questions before he or she is willing to make the order that you have asked for. But you should provide each other with full information about your resources anyway, as the first step in reaching any agreement about your finances on divorce.

More information about the process of getting a consent order is available on page 14 of the Advice Now guide, “Applying for a financial order without the help of a lawyer”, <http://www.advicenow.org.uk/guides/how-apply-financial-order-without-help-lawyer>

To see the statement of information that needs to be completed go to HMCTS Court and Tribunal finder. <https://courtribunalfinder.service.gov.uk/search/>

### **Do we have to use mediation?**

No. You do not have to use mediation to make an agreement: you may be able to reach agreement between yourselves, perhaps having had advice and help from solicitors.

However, if you wish to apply to the court for an order other than a consent order – so, if you want the court to decide how to divide your assets – then you will have to attend a mediation information and assessment meeting (MIAM). This meeting will allow you to find out more about how mediation works, including whether it is right for you, how long it is likely to take and how much it might cost. Having attended the information meeting, you are not obliged to use mediation if you do not wish to do so.

In some situations you do not have to attend a mediation information and assessment meeting, for example, if you are a victim of domestic violence. For more information, see the Family Mediation Council's website: <http://www.familymediationcouncil.org.uk/>

### **If I do use mediation, what are some of the advantages ?**

Many divorcing couples want to reach agreement but find direct communication with each other very difficult. A mediator offering a safe, neutral environment to look at what could be agreed is often very helpful and research indicates that mediation is effective in about two-thirds of cases. Fees will vary but legal aid *is* available for those who qualify. There are also other forms of dispute resolution in addition to mediation such as collaborative law and arbitration. All these forms of dispute resolution require both parties to make full and frank disclosure. Agreements reached in mediation (or in other forms of dispute resolution outside of the court) can subsequently be turned into a consent order by the court.

Does it make any difference if I'm divorcing my spouse because he/she had an affair or otherwise behaved badly, or if my spouse is divorcing me for that reason? No. Except in the most extreme cases, a court will not take account of bad conduct by either spouse, even if it is the reason why you are getting divorced.

'Personal misconduct', such as adultery or behaviour by one party which is said to have led to the breakdown of the marriage (such as bullying or controlling behaviour or a refusal to have sex), will not be taken into account in deciding how much each spouse gets, unless the misconduct is extremely serious (for example, serious criminal activity). 'Financial misconduct', such as gambling or reckless spending on expensive luxuries before divorce proceedings, may be taken into account, and the court will sometimes try to put the damage right by acting as if the spouse who spent the money still has that money, and balancing this in what it awards to the other spouse. However, as claims based on conduct are not likely to be successful, you may want to get legal advice before trying to bring one.

### **Isn't it always just equal sharing of everything?**

No. In some cases, for example where there are no children and both parties are earning similar amounts, or where the assets are substantial, a half share of the assets will be enough to cover each spouse's needs and so equal sharing may be the fair outcome. However, in other cases the available assets may not exceed the spouses' joint needs or the spouses' needs may be unequal (for example, where any children will be living full or most of the time with one spouse). In those situations, the court may not adopt a 50/50 approach. The court's focus will instead be on meeting each spouse's needs, giving first consideration to the welfare of any children of the family under the age of 18. In those cases, one spouse may well receive more than half of the assets to ensure that their needs are met.

### **Can I get a “clean break” divorce?**

That depends on the circumstances of your case. A “clean break” divorce is one where the spouses do not (or after a period of time will not) have any continuing financial responsibilities towards each other, in particular where neither spouse is required to pay maintenance to the other. Where there are children, child maintenance should be paid. In many of those cases, and if it is affordable, it may also be appropriate to make some order for spousal maintenance to be paid as well, even if only a small amount, particularly if one spouse’s earning capacity will continue to be limited after divorce because of continuing child-care responsibilities. Sometimes just a nominal amount is ordered, simply to keep the spousal maintenance order in place to act as a safety net, which could be varied upwards in the future if a change in circumstances required this. But in many cases, particularly where there are no children, a clean break may be possible and fair, and may be desirable for both parties as they will be financially independent of each other.

### **If I have to pay maintenance, how long will I have to go on paying?**

That depends on the situation. If the money you are paying is child maintenance (probably calculated in accordance with the Child Maintenance Service scheme), then that is generally payable either until the child turns 16 or until they finish full-time, non-advanced education (e.g. A levels, BTEC national diploma), up to their 20th birthday; this is the same test as the one used to decide whether you can receive child benefit. If the money you are paying is spousal maintenance – that is, money paid to your former spouse for his or her personal benefit, rather than for the benefit of the child – then how long you will have to pay depends entirely on the circumstances of your case. Ideally, spouses would become financially independent of each other following divorce, either immediately or after a period of time during which they are able to adjust to their new situation. But this is not always possible owing to the parties’ financial needs, and so sometimes spousal maintenance will be paid for a longer period or indefinitely. A judge will always try to ensure that any maintenance order made to meet future needs provides a platform for a move or transition to independence which the spouse who receives those payments will be expected to make provided that he or she can achieve that adjustment without undue hardship if those payments were to end.

What is the right outcome for your situation will depend on various factors: how much you can afford to pay, given other commitments (including child support); how much your spouse needs to support themselves (you should prepare and discuss a budget); how much of that they are able to cover from their own income; how much they will be able to earn through paid employment and, if they have been out of the labour market for a time, whether and (if so) how quickly they will be able to return to employment and build up their earning capacity. That will often depend on whether and for how long they will be involved in looking after children. If your spouse remarries, your obligation to pay maintenance to him/her will come to an end automatically without the need for any further order.

**Can't I just leave the marriage with all the property that is in my name?**

No. The family court has the power to share out all of the assets that belong to either spouse, regardless of who owns what, in order to ensure a fair outcome in which the parties' needs are met. In some cases, it will be appropriate for each spouse simply to walk away with what they own and for no transfers to be made, for example, after a short marriage where both spouses are working and financially independent. But in a lot of cases, it will be necessary to share assets regardless of ownership.

**Can I protect assets that I brought into the marriage from claims by my spouse?**

That depends on the circumstances of your case. If your case is one where the assets available do not exceed your needs and those of your spouse, then assets that you acquired before the marriage will be included in the pot of assets to be shared in order to meet those needs.

Can I protect assets that I was given or inherited during the marriage from claims by my spouse? That depends on the circumstances of your case. If your case is one where the assets available do not exceed your needs and those of your spouse, then the assets that you received or inherited during the marriage will be included in the pot of assets to be shared in order to meet those needs.

**Can my spouse make any sort of claim against my pension fund, or can I make a claim against my spouse's pension fund?**

Yes. A pension fund is just like any other asset in the marriage and the court has specific powers to share pension funds ("pension sharing") or the benefits paid from that pension ("pension attachment"). Sharing orders are far more common than attachment orders as they allow a new pension to be created in the recipient's name. Whether it is appropriate for a pension order to be made, and what shares each party should receive, will depend on the particular circumstances of each case. In some cases, it may be better to "offset" the pension fund by giving the other spouse a larger share of the other assets. Pensions are complex, and it is sensible to get specific legal advice if you or your spouse has a significant pension fund.

If you want to share a pension, you will have to get a consent order as pensions cannot be shared by private agreement – the pension fund manager has to receive an order from the court telling it to share the fund or pay out benefits to the other spouse.

**How, if at all, are our benefits entitlements relevant?**

Your entitlement to benefits is very important and you will need to explore what your benefit and tax credit entitlements are, as well as eligibility for social housing. Your local Citizens Advice Bureau will often be a good place to get advice. Tax credits in particular are an important source of income that may well help boost the income available after separation.

### **What if our home was rented?**

Where your family home was rented, there are various options available. The best course of action for you is likely to depend on the type of tenancy you have and who is named as the tenant on the tenancy agreement. This is a complicated area of law and if you are unsure about your situation, it is a good idea to get specialist advice about where you stand. Shelter England (and Shelter Cymru in Wales) have a free Housing Advice helpline - 0808 800 4444. Some general guidance is given below.

It is likely to make a difference whether the tenancy agreement is in joint names or in the name of just one of you so finding a copy of the tenancy document may be important. You will need to consult with and get the agreement of your Landlord if you agree to a change in the person(s) who will be the tenant(s) of the family home after separation. If you can't agree, you may need to apply to the court to ask for the tenancy to be transferred to one of you on divorce. Any order made is binding on your landlord. Sometimes it will be possible for one of you to stay on as the sole tenant, as long as you can afford the rent (perhaps with the assistance of housing benefit) and the landlord agrees. Sometimes you will both need to move home.

Remember even if you move out, if your name is still on the tenancy you are still responsible for paying the rent.

### **What if we want to have the children share their time equally between us?**

Any plan for fully shared care of children will impact on your financial arrangements. Fully shared care will only be possible where both spouses are able to have accommodation that is large enough to house themselves and the children adequately for prolonged periods. That may not be possible in a lot of cases. You and your spouse will need to consider carefully what housing each of you would need, how that housing would be financed, what the running costs would be and how they would be met. If you want to share care equally, you will also need to think about how your childcare responsibilities will impact on your earnings – for example, whether you have the financial resources or childcare facilities in place to enable each of you to care for the children whilst maintaining an income to meet your financial needs, and whether one of you will need to make payments to the other in order to make it work.

### **What if the wife has the higher income or owns more of the assets?**

The law that deals with the financial consequences of divorce is gender neutral. It does not matter who has been the higher earner or who has done most of the childcare. The same basic principles apply.

### **Are debts taken out in the sole name of just one of us relevant on divorce?**

That depends on the circumstances of the case and the nature of the debt. Just as all

assets are taken into account, whoever's name they are in, all liabilities and debts also need to be taken into account, again, whoever's name they are in. However, while the courts has the power to transfer assets from one party to the other, it cannot transfer debts, and so an unpaid debt will remain in the name of person who took out the loan or credit card liability. Even so, the need for the debt to be paid is certainly a factor to be taken into account in reaching a fair settlement. If there is enough available cash, the ideal solution is for all debts to be cleared at the point of divorce so that both parties can start afresh, debt-free. Often, however, that will not be possible and the need to be responsible for – and in due course to clear – existing debts will be one of the needs of the parties to be weighed in the balance. Where a debt has been incurred by one party for their sole benefit – rather than for the benefit of the family – and the level of indebtedness incurred is reckless, the court may take that into account too if it is fair to do so in all the circumstances of the case.

**Is it relevant that we were living together for several years before we actually got married?**

Potentially, yes. One of the factors the law takes into account in deciding what outcome is fair is the length of the marriage. Where a couple have lived together as a couple (“cohabited”) before marrying, that period of cohabitation is almost certainly likely to be added to the length of the actual marriage and treated as the overall length of the marriage for these purposes. This will only be done where the cohabitation was stable and was followed immediately by the marriage.

**Is it relevant that I am now cohabiting with a new partner, or that my ex is now doing so?**

Potentially yes, although the mere fact of living with someone else does not mean that a spouse will automatically lose his or her entitlement to maintenance from a former spouse. One spouse having a new partner may be relevant to any spousal maintenance payments that have been ordered as it may affect that parties' needs. For example, if your ex has moved into a new partner's home, that may cover their need for accommodation and free up some of their income. Exactly how relevant cohabitation is depends on who is or would be paying (the “payer”) or receiving (the “payee”) any spousal maintenance payments.

The amount of any maintenance payments depends in part on the payee's needs and his or her ability to meet those needs without the help of the other spouse. Where the payee has a new partner living with them, it will be expected that the new partner will contribute to the running costs of the payee's household, and that the payee may as a result need less from the payer. The amount of any maintenance payments may therefore be reduced accordingly.

Where an order has been made for maintenance payments, the terms of the order may

specify that maintenance payments will terminate completely when the payee cohabits for more than a specified number of months (which is often 6 months). In some cases, an order permitting one spouse to continue to occupy the family home after divorce may also end if he or she cohabits with a new partner for a specified period, so that the house will then have to be sold and the proceeds of sale shared as specified in the order. However, you may find that a judge is not willing to include in any consent order an automatic dismissal of those maintenance payments and/or an immediate order for the sale of the house either because the new relationship might break down or because the needs of your children for a secure home will still come first.

Where the payer has a new cohabiting partner and a child or children, then depending on the new partner's circumstances that may alter the payer's household needs and it may be necessary to review how much the payer can afford to pay the payee.

Cohabitation by the payee is not relevant to child maintenance. Cohabitation by the payer is only relevant to child maintenance payments where there are children in their household as well, in line with the child maintenance formula. For information about child maintenance, see the Child Maintenance Options site: <http://www.cmoptions.org/>

### **Is it relevant that I – or my ex – now have a child with a new partner?**

Potentially yes, particularly where it is the payer of any maintenance who has the new child. The new child increases the payer's needs and financial responsibilities and so may reduce his or her ability to pay maintenance to the other spouse. The presence of children in the payer's household (whether they are new children or children brought to the relationship by the new partner) will also automatically reduce any child maintenance payable to the other spouse, in line with the child maintenance formula.

### **What if I get remarried to a new partner, or if my ex does so?**

Remarriage by the spouse receiving spousal maintenance payments (the "payee") is the one event – aside from death – that automatically brings a maintenance order to an end. An order relating to occupation of the family home may also say that remarriage is an event which will trigger the sale of the home and division of the proceeds of sale as specified in the order. (See the section in this guide on 'Mesher orders'.)

### **My ex and I made an agreement before we got married about how our money would be divided if we got divorced. Does this make a difference?**

Such agreements are called pre-marital or pre-nuptial agreements and are commonly referred to as "pre-nups". Pre-nups have become increasingly prominent, but for most people they will not be relevant on divorce. This is because the current law says that a pre-nup will only be followed by the court if the parties entered into it voluntarily and fully understanding what they were agreeing to, and even then it will not be followed if

in the circumstances which exist at the point of divorce it would not be fair to hold them to the agreement. The courts will not regard an agreement as fair for these purposes if it does not meet each parties' needs and the needs of the children. The sorts of couples for whom this guide is intended – that is to say, the majority of couples – are ones for whom meeting needs is the central factor on divorce. It is only in cases where there are plenty of assets available to meet both spouses' needs, and then a surplus left over, that a pre-nup is likely to have real value. A pre-nup can be used to protect that surplus so that it does not have to be shared with the other spouse. For the majority of couples, there is no surplus remaining after needs have been met, and so nothing in relation to which a pre-nup can make any difference. The one exception to this is where an individual might want to have a pre-nup to say that a specific item of property should stay with them in the event of divorce – an agreement of that type might be respected, *provided* that the court did not have to use that asset in order to meet the other spouse's needs. But if there are enough other assets available to do that, then the pre-nup can protect the particular item of property.

# Dividing the Capital Assets: Housing and other Capital Needs

This section of the guide deals with capital assets. By “capital” we mean everything apart from income - things like houses and other property, furniture, cars, investments, pensions, jewellery, and so on.

## 1. Housing Needs

Usually the most significant need of each spouse is housing, so providing the spouses with housing is the starting point for sharing out the assets. In many cases, the housing needs may use up all the available assets and so may be the only capital issue to consider.

There are various points to keep in mind when considering housing needs:

- The welfare of any children is the first consideration. This means that appropriately housing the parent with whom the children are likely to be living most of the time will be the priority. But it is still important to consider the housing needs of the other parent, which may include his or her need to provide appropriate accommodation when the children come to stay.
- If it was owned by you rather than rented (including where it was being paid for with a mortgage), then the family home is likely to be the main available asset. But you might also want to take into account any other high-value items that are owned jointly or by one spouse, such as investments, cars, buy-to-let property and so on.
- The name in which the family home is owned is generally of no significance on divorce: the court has powers to transfer assets between the spouses in order to meet their needs.
- Where the family home was rented, this may, depending on the type of tenancy, be treated as an asset and can be transferred on divorce between spouses to meet housing needs.
- An important first step is to get a full picture of the assets available. This will normally mean that you need to get an up to date valuation of any property, an up to date figure for the sum due to be paid on any mortgage (including any penalties for paying the mortgage off early, known as early redemption penalties) and an understanding of the extent and repayment schedule for any other debts or liabilities.

- In many cases, it will also be important to establish how much each spouse will be able to borrow on a new mortgage in their own name.
- You should consider whether the family home can be kept for one of spouses to live in. Keeping the family home has the benefit of reducing change at what is likely to be an unsettling time, particularly where there are children, and especially where a move may require a change of school and disrupt local friendships and activities. Keeping the family home may also have financial benefits, e.g. in avoiding the costs involved in a sale, move and purchase, and may enable the existing mortgage to be retained in a situation where getting a new mortgage may be difficult.
- If you would like to keep the existing home and mortgage for one spouse, you will need to find out whether the mortgage company will agree to that and be prepared to release the other spouse from the mortgage.
- Keeping the family home is often not feasible. Having to fund a new home for the other spouse (whether by renting or buying) may put so much pressure on the income available that the family home can no longer be afforded. In these circumstances, selling the family home may be necessary and it may release funds to help either or both spouses to acquire alternative, more modest homes.
- The standard of living enjoyed during the marriage will provide a benchmark for the standard of housing to be considered. However, dividing the assets (and incomes) between two homes will often mean it is impossible for that standard to continue. If there is a reduction in the standard of housing, that should not fall disproportionately on one spouse, although the needs of the children may often mean that the spouse with whom they are not living most of the time has to make do with a lower standard of accommodation.
- The physical or mental disability or ill-health of either spouse or any children may have an impact on housing need, (for example, where the family home has already been adapted to meet the needs of a disabled family member, which may be a further reason for that spouse / the spouse caring for the disabled family member to keep the family home, if that is financially possible).

## 2. Other capital needs

Once the spouses' housing has been dealt with, their other capital needs will have to be looked at. These might include:

- Each spouse's debt and liabilities. If there are significant debts, these will need to be taken into account when reviewing what is available to meet housing needs. If possible, debts incurred for the benefit of the family during the marriage should be cleared to enable both spouses to start their life after divorce free of any debts incurred during the marriage.
- Money with which to pay course fees to enable one or other spouse to retrain or refresh their skills in order to help them get back into the labour market.
- Putting a property in which one of the spouses will live into good repair.
- Furniture and contents. As well as deciding what is to happen to the family home, decisions also need to be made about the contents. The cost of asking a court to decide on how house contents should be divided is disproportionate and you should make every effort to agree on a list of who gets to keep what from the family home. One or both of you may then need to replace furniture, appliances or other items which the other spouse has kept, so you need to think about how that can be afforded. The standard of living during the marriage will be the starting point for deciding the quality of replacement items.
- Car. If you had a car during the marriage which is kept by one spouse then, depending on need, the other spouse may need money to acquire a car of a similar standard.

Expenditure which is frequently repeated is normally considered as an income need rather than a capital need. So expenditure on things like holidays, replacement domestic appliances and the costs of maintaining a property are normally considered things to be paid for out of the spouses' incomes, and so as a matter for maintenance payments (see below) rather than to be covered by the division of capital on divorce.

## 3. Illustrations of How Housing Needs are Approached

The options for housing both spouses after divorce generally depend initially on whether the family home in which you lived together during the marriage was rented or owner-occupied (with or without a mortgage). This section first discusses owner-occupied cases, and then considers the position of rented family homes. There is also a specific section on one type of order for owner-occupied cases, known as "Mesher orders".

It can often be a good idea to try to reach a solution where one spouse stays living in the family home (whether rented or owned), and some of the solutions discussed below explore that option. But that will not always be possible or desirable. Of course, even where the family home is owner-occupied, the financial situation on divorce may dictate that at least one spouse, and possibly both, have to move into rental property instead, at least to start with.

This part of the guide focuses on how to divide capital, but in thinking about housing costs you must bear in mind that income is important to housing as well, whether it is used to cover rental payments or to repay a mortgage. So in working out what housing can be afforded, you must think about each spouse's housing benefit entitlement (for rental property), or borrowing capacity and ability to repay a mortgage (for owner-occupied property). You should also look at how the capital is shared out between you to help with housing, whether from the family home or other capital assets, such as savings and investments. Where one spouse could only afford a mortgage at a particular level if they had financial help from the other spouse, it may be better to give that spouse more of the capital so that they can borrow at a lower level. That may then mean that they can repay the mortgage themselves, without having to rely on maintenance payments from the other spouse.

### **If your family home is owner-occupied**

Circumstances vary widely and it may be helpful to consider the following four broad types of situations in trying to decide what will be workable in your situation:

#### **a) Not enough capital for either spouse to live in an owner-occupied home**

In some cases, the only solution is for both spouses to rent accommodation, or to return to live in shared accommodation with family members or friends.

The size of the mortgage (and possibly other debts) and level of income may simply mean that it is not possible for the home to be kept after divorce. In those circumstances the property will have to be sold.

Any balance from the sale (after the mortgage has been paid off and other costs of sale have been covered) will then be shared out in accordance with the spouses' needs. Priority will be given to the parent with whom the children live for most of the time, or to the spouse with the lower income, who may need money for a deposit for a tenancy and/or furnishings for themselves and the children in order to meet their housing needs.

## **b) Only enough capital for one spouse to live in an owner-occupied home**

Often much of a family's capital (and income) is used to provide and run the family home. When the couple divorce, there are often not enough funds for a second property to be bought for the spouse who is leaving the family home. In these situations, where there is not enough capital for both spouses to be housed in owner-occupied property, careful consideration has to be given to the alternatives.

If there are children of the family under the age of 18 still living at home, their welfare is the first consideration, and so the housing needs of the parent with the main care of the children will be the priority. This may result in the parent with main care retaining the house, if that can be afforded. But it may be necessary for that spouse to downsize to a smaller property in order to reduce the mortgage payments to an affordable level, bearing in mind the costs of accommodating the other spouse and the income available to cover both sets of costs.

Ensuring that the children and main carer are appropriately housed may mean that there is little or possibly no capital immediately available for the other spouse to re-house, so that spouse may have to find rented accommodation or live with family/friends. However, we discuss below one type of order – a “Mesher order” – which involves that other parent keeping some interest in the family home and recovering some of the capital value at a later point in time.

If there are no children under 18 living at home (or where there are no children), it will be harder to justify one spouse keeping the family home to the exclusion of the other without ensuring that the other spouse is compensated with capital from another source to let them re-house at a similar standard. If that is not possible, then the family home may have to be sold and the proceeds shared out.

Where there are children over 18 who are still in full-time education and still living at home, consideration should be given to whether it is possible to delay any sale until they have finished their studies.

## **c) Enough capital for both spouses to live in owner-occupied homes but at a reduced standard**

In some situations, divorce may lead to the family home being sold so that the capital in the property can be released and divided between the spouses so that both can buy a house. In most cases, however, even if both spouses can afford to buy a new home, these may be more modest properties than the family home.

Where there are no children and the spouses have a similar income and mortgage-borrowing ability, they may have similar housing needs and a 50/50 division of the net proceeds of sale is likely to be appropriate.

However, that will not always be appropriate, and it will be necessary to examine each spouse's capacity to borrow on a mortgage. Where one spouse's earning capacity has been limited during the marriage (and/or following divorce) because of child-care responsibilities, that spouse may have less borrowing capacity than the other spouse. The spouse with greater borrowing capacity can often be expected to take out a mortgage (or a larger mortgage) in order to help fund new housing for themselves, while the other spouse is given a larger share of the capital from the sale of the house to enable them to rehouse to a suitable standard either with no mortgage or a smaller mortgage (depending on what level of mortgage can be obtained and afforded).

If this sort of unequal division of capital from the sale of the family home is required, it may be appropriate to consider whether, in order to be fair, the spouse who receives the smaller share of capital from the sale should receive a greater share of other assets (see below).

#### **d) Enough capital for both spouses to live in homes of a similar standard to the family home**

Where there is enough capital for both spouses to have homes of a similar standard to the family home enjoyed during the marriage that would normally be the appropriate outcome. Where both spouses may wish to acquire new homes, the family home can be sold and the proceeds of sale shared or the family home may be retained by one of the spouses, especially if there are children.

However, this will not always be appropriate or possible. For example, the family home may be larger than is required for the remaining spouse or the mortgage on the family home may be unaffordable. As discussed in the "Maintenance/income" section of this guide, even where payment of maintenance is appropriate, it may only be appropriate for a fixed period of time. If so, it may be necessary to sell the home immediately or before the maintenance payments are due to stop.

However, after a short marriage with no children where one spouse has made a significantly greater financial contribution, it might not be fair for the spouse who has brought the lesser sum into the marriage to expect to be rehoused to the standard of living that has only been enjoyed only for a few years. But even in those circumstances, that spouse's needs are likely to require that they are helped to secure housing, even if at a more modest level.

#### **If your family home is rented**

- This is a complicated area of law and if you are unsure about your situation, it is a good idea to get specialist advice about your situation. Shelter (in England) and Shelter Cymru have a free Housing Advice helpline - 0808 800 4444. Some general guidance is given below.

- Whether the tenancy agreement is in joint names or in the name of just one of you can also make a big difference to what happens, so finding a copy of the tenancy document may be important. This will determine who is liable to the landlord for the obligations under the tenancy agreement if you take no further steps.
- If your name is still on the tenancy, even if you move out, you are still legally responsible for payment of the rent until the tenancy is assigned or transferred to your spouse or brought to an end.
- While you are still married you have the right to live in a home which is rented in the sole name of your spouse for as long as the tenancy is continuing. Unless certain steps are taken this right will come to an end on divorce.
- If you give notice to quit on your tenancy (whether it is in your sole names or jointly rented with your spouse), you will probably be considered to be 'intentionally homeless' by your local authority and will probably not be eligible for re-housing as a homeless person.
- If you are joint tenants of your rented family home with your spouse, if either one of you gives notice to quit then the whole tenancy comes to an end and none of the family will be able to continue to live there. If you are worried that your spouse may give notice to quit against your wishes then you should think about obtaining a court order to stop this happening, possibly even on an urgent basis.
- You should try and reach an agreement with your spouse as to which (if either of you) wish to remain in the family home after separation and divorce. If you can reach an agreement then this is likely to make things much easier to deal with.

**a) If your family home is rented from a social landlord (i.e. a local authority or housing association)**

- Your tenancy in these circumstances will probably be an assured or secure tenancy (and likely to be on more favourable terms than a tenancy in the private sector) so both you and your spouse might want to have the tenancy after divorce.
- If both you and your spouse want to have the tenancy, and you cannot agree which, then the court can decide which of you should have it.
- In making this decision the court is likely to favour the spouse with whom your children will be living after the divorce (if there are any), but can also take into account the respective needs and financial resources of both spouses and the

circumstances of the initial grant of the tenancy. Your landlord is allowed to express a preference as to which spouse should take the tenancy, but will be bound by the decision of the court. Most social landlords remain neutral in these circumstances.

- If you and your spouse reach an agreement as to who should have the tenancy, but the landlord for some reason objects, then the court can approve your agreement and this will in most circumstances be binding on the Landlord.
- When your family separates your landlord cannot insist that you give up your property and take a smaller one, but sometimes it is possible to negotiate with a social landlord to provide, for example, two smaller flats (one each) in return for giving up a larger one. The landlord's willingness to do this may well depend on their stock of available properties and the court cannot impose an agreement on them.

#### **b) If your family home is rented from a private sector landlord**

- Your tenancy in these circumstances will probably be an assured shorthold tenancy which can be terminated by the landlord after the initial term (likely to be six months or a year) and the divorce court's powers to intervene are very limited.
- It may be that neither you nor your spouse wish to continue with the tenancy after the divorce, in which case you may want to talk to your landlord about getting out of the tenancy obligations (in particular the rent) as soon as is practical. The divorce court cannot prevent the landlord insisting that all contractual obligations are met.
- If either you or your spouse (or both of you) wish to continue with the tenancy after the divorce, then again you may want to talk to your landlord because the divorce court will not impose an arrangement against the wishes of a landlord and you will not be able to insist on anything that is different from the original tenancy agreement.

#### **4. Looking at the overall division of capital**

In order to meet each spouse's needs, one spouse will often receive a larger share of the assets than the other spouse. It may then be appropriate to consider whether any steps can be taken to even up the overall share of capital.

It is important to look at needs generally (see 2 above), not just housing needs. In many situations, the differences in the spouses' needs and their differing abilities to meet those needs may mean that it is not possible to leave the spouses with an equal share of the capital assets – the spouse with greater needs will need to have the greater share. This

will commonly be the situation where one spouse is to be doing most of the childcare after divorce – that extra contribution they will be making to the children’s welfare will increase the needs of their household and, particularly if they are unable to work full-time, will reduce their ability to meet those needs themselves.

So the priority is to ensure that both spouses’ needs are covered. In the unlikely event that there are surplus assets after the needs have been met, then the other spouse may have those other assets allocated to them in order to reduce the imbalance. This may include, for example, the spouse not retaining the home receiving any investments or a larger share of the pension funds.

### Mesher Orders

In many situations, the need for a home to be retained for the children will result in one parent keeping the family home whilst the other parent has to find new accommodation. The money tied up in the family home may be the only or main asset of the marriage and, as a result of giving the home to the primary carer of the children, the other spouse may receive little or no capital at the time of separation.

One way of re-balancing the capital division is for the spouse who does not retain the property to be given a percentage share of the value of the property, to be paid to them at a specified time in the future, e.g. when the youngest child finishes education (either school or college/university). This enables the primary carer of the children to continue to live in the home whilst providing the other spouse with a share of the value of the property in due course. It is also possible to add further or alternative “trigger events” which will result in the spouse with the percentage interest being paid out, e.g. if the spouse living in the property remarries, or cohabits permanently with a new partner (normally defined as cohabitation for over 6 months) or dies.

These types of orders need to be considered very carefully because of their effect on the future housing for the parent who retains the property immediately after the divorce. That spouse who remains in the property will need to be able either to raise enough to buy out the share of the spouse who has the percentage interest when the repayment is due, or will have to sell when the trigger event occurs. If he or she has to sell, it will be important to consider how his or her housing needs will be met when the sale takes place. Careful thought therefore needs to be given as to the effect of the order.

Deciding how much of a percentage share to give each spouse depends on several factors, including the age of the children, the future contributions of the spouses, and the anticipated earning capacity (and borrowing capacity) of the spouse who will need to rehouse when the property is sold. Where the spouse who has the percentage interest is still making a significant contribution by paying the mortgage and/or spousal maintenance, a 50% share of the property may be appropriate. Where that is not the case,

and if the spouse remaining in the property is continuing to provide the main care for the children for several years then the percentage could be set at between 30% and 40%.

The percentage share to be retained is specified at the time of the agreement so that both spouses have certainty. The value which the non-resident spouse receives in due course will be a percentage of the value at the point of sale rather than the value at the time of any agreement reflected in a consent order.

These clauses need careful drafting and it would be sensible to take advice from a solicitor. Meshor Orders will normally result in the property being transferred to the spouse who is going to continue to live in it with the other spouse having a legal charge to protect their percentage interest. Whether that is possible will depend on the attitude of the mortgage company. It will also be important to agree and record each spouse's responsibility to pay the mortgage, utilities and insurance for the property, and for continuing decoration and repair, to avoid confusion or disputes in the future.

## 5. Equal division if there are enough assets to do so, after both spouses' needs have been met

In some cases, there will be enough assets involved that it will be possible to meet both spouses' needs comfortably, and for there to be a significant surplus left over. It may be the case that an equal share of all the assets would cover both spouses' needs. If so, the law is likely to regard equal sharing as the fair outcome, particularly after a long marriage.

However, there may sometimes be good reason to depart from equal sharing. Reasons for departure from equality in these higher value cases are beyond the scope of this guidance on the interpretation of needs. However, the main reasons for departing from equality are:

- In short marriages, an unequal contribution due to one of the spouses bringing more assets to the marriage. For example, one of the spouses may have brought in the family home or significantly more savings at the start of a marriage. So long as the other spouse's housing and other needs have been met, it would be appropriate to acknowledge the greater contribution, but the significance of that contribution will reduce with the length of the marriage.
- The future contribution by one of the spouses to the welfare of the family in providing for the care of the children (in so far as that has not been taken into account already).
- The existence of a pre-nuptial agreement.

- The existence of “non-matrimonial assets”. These can include such things as assets brought into the marriage which have not been mixed with matrimonial assets and inheritances which again have not been mixed.

The way in which pre-nuptial agreements and non-matrimonial assets are viewed by the courts are all developing areas of the law. If one spouse intends to propose a departure from equality in a high value case of this sort, it would be sensible to seek legal advice.

## Income Needs

The issues of income needs and housing and other capital needs are linked and should be considered in the round. When considering the affordability of any proposed arrangement, you need to take account of the fact that the running costs and the day to day living costs of two households may have to be paid from the income which previously only had to cover the costs of one.

In some cases, where both spouses work and earn enough to support themselves fully, neither will need to pay the other any money to meet their day to day income needs. In other cases, where one spouse does not work, or does work but earns significantly less than the other, it may be necessary for one spouse to pay a regular sum of money to support the lower - or non-earner. This payment is usually referred to as spousal maintenance, though the court calls it "periodical payments".

Payments by one spouse to the other towards the income needs of any children, "child maintenance", are not usually dealt with by the court. However, child maintenance needs to be included in any settlement discussions and factored into any agreement which is reached.

### Child maintenance

Parents are encouraged to agree between themselves on the amount of money to be paid by one to the other to maintain their children. The parent with whom the children do not live most of the time, or "non-resident" parent, should pay child maintenance to the other parent. **Note:** child maintenance is something paid by one parent to the other to meet the income needs of their children; it is not the same as child benefit which is paid by the State.

It is a good idea to use the formula applied by the Child Maintenance Service (CMS), which used to be known as the Child Support Agency, as a starting point for discussing child maintenance. The law prescribes this formula for calculating the correct amount of child maintenance to be paid. You can find out how much child maintenance you should be paying or receiving for your child by going on to the official online child support calculator [www.gov.uk/calculate-your-child-maintenance](http://www.gov.uk/calculate-your-child-maintenance).

If you are not able to agree on the amount of child maintenance to be paid, either parent can apply to the CMS for it to carry out an assessment and, if necessary, to collect the payments. However, if the CMS collects the child payments for you, they will charge the payer an extra 20% on top of the maintenance payable and the person receiving the maintenance will be charged 4% of the maintenance payable.

If you can agree on the amount of child maintenance to be paid, you can include this in

an application for a “consent order” dealing with the rest of the financial matters that you have agreed. However, if either spouse decides at least a year after the consent order was made that he or she is not happy with the amount of maintenance being paid in accordance with the order, that spouse can apply to the CMS for an assessment of the right level of maintenance to be paid. The CMS assessment will then replace the order. It is not possible to apply to the court for child maintenance unless you are applying for a consent order, or unless the paying parent lives abroad or there are very large sums of money involved. The court can make orders in respect of private school fees if these are relevant and in circumstances where they continue to be affordable after divorce.

## Maintenance of spouses

When a marriage breaks down, it is essential to consider each spouse’s future income needs and whether those needs can be met from the available income. Decisions made during the marriage and/or the care arrangements needed for the children following divorce may mean that one spouse will not have enough income to meet his or her needs on divorce. If so, the other spouse may be required to pay spousal maintenance, in addition to any child maintenance that may also be payable. However, the court expects both spouses to contribute financially to their own needs so far as they can.

It is also important to remember the various State benefits which may be available to separating couples on divorce, which can make a real difference. For example, Working Tax credits, child tax credits, housing benefit and child benefit, as well as Universal Credit in those parts of the country where the Universal Credit scheme applies. There are calculators and explanations of eligibility criteria on these websites:

<https://www.gov.uk/government/organisations/hm-revenue-customs/contact/tax-credits-enquiries>

<https://www.gov.uk/child-tax-credit/overview>

<https://www.gov.uk/housing-benefit/overview>

<https://www.gov.uk/browse/benefits/child>

The court asks itself three questions when considering whether to require the higher-earning spouse to pay maintenance to the other spouse. These are questions that you should consider with your spouse in reaching an agreement about spousal maintenance:

### 1. Should there be a spousal maintenance order at all?

Ideally, couples share out their assets so that they can become financially independent of each other, either straightaway or over time (possibly, several years). This is known as having a “clean break”. If it is possible to achieve this, then this should be the aim. As we

have said earlier in this guide, the objective of a spousal maintenance order should be the transition to financial independence, where that can be achieved.

**However**, whether and when it will be fair – and possible – to achieve a “clean break” will depend on the circumstances of each case. Where there are children or the marriage has been long, a clean break may not be fair or possible unless there are enough assets available to split between the spouses and both spouses have enough income to be self-supporting. The most important thing is to ensure, wherever possible, that the needs of both parties and any children of the family are met. For example:

- **If there are children:** if one parent is staying at home looking after the children, or works only part-time because of the child-care he or she provides, then it is unlikely that that parent will have the income needed to pay the costs of running the home. In such cases, the other parent is likely to be ordered to pay spousal maintenance to the stay-at-home parent. In cases where the child care is more equally shared between the parents, it may still be fair for the higher-earning parent to pay spousal maintenance to the other parent, in order to ensure that the other parent’s income needs are met and the children enjoy a similar standard of living when spending time with each of their parents.
- If a couple have been married for a long time and one of them has been the main earner and the other has not worked for many years (perhaps having stayed at home looking after children), the spouse who has not worked for years is likely to find it difficult or even impossible to obtain a job. The court is likely to make a spousal maintenance order in such a case unless it is satisfied that the spouse who has not been working can get a job and support him - or herself.
- If a couple are both working but one earns much less than the other and does not earn enough to support him- or herself, the court is likely to make a spousal maintenance order to cover the shortfall between what the lower earner earns and the amount needed for that spouse to support him - or herself.
- If a couple are both working and earn a similar amount, the court will not make a spousal maintenance order.

## 2. If a spousal maintenance order is made, how much maintenance should be paid?

- Unlike for child maintenance, there is no set formula for the payment of maintenance to a spouse.
- How much it is fair to require the higher earning spouse to pay the other spouse depends on several factors:

- ◆ how much income each spouse has from all sources, including full-time and part-time employment, tax credits and benefits.
- ◆ what each spouse requires to cover their income needs. Income needs include payments for accommodation (whether rent or mortgage payments) as well as day to day living expenses. Each spouse should write out a budget to calculate their needs and the budgets should be exchanged and discussed. The budget on the Advice Now website is a useful starting point. <http://www.advicenow.org.uk/advicenow-guides/family/survival-guide-to-divorce-and-dissolution/budget-form,10095,FP.html>. It is important to remember that, in a lot of cases, it may not be possible for either spouse to enjoy the standard of living that they shared during the marriage, and so each may have to reduce their living costs.
- ◆ how much the spouse who would be paying the maintenance can afford to pay, bearing in mind their own needs and their other financial obligations, including child maintenance payments.

In a lot of cases, once child maintenance payments are taken into account, it may not be possible for the higher-earning spouse to pay significant spousal maintenance as well.

If maintenance cannot be afforded at the time or if it is too early to say with certainty that it will never be needed, it is possible to create a safety net in such cases by making a “nominal order”. This is an order requiring a tiny payment, e.g. £1 per year, which can be varied in future to a higher amount, or cancelled, as changing circumstances require. For example, the spouse looking after the children may suddenly be unable to work at all if one of the children becomes seriously ill or suffers a disabling accident. If the other spouse can afford to pay more at that point, it would then be fair for the spousal maintenance award to be raised to a significant amount to support the spouse who is now unable to work.

It may sometimes be possible to reduce one spouse’s need for spousal maintenance from the other by giving him or her a greater share of the capital on divorce.

### 3. If a spousal maintenance order is made, how long will it last?

After divorce, the aim is for spouses to become financially independent where this is possible, although this may not happen immediately and in some cases may not be possible at all. Much will depend on the ages of the spouses, the ages of any children and the way family life was organised before divorce. However, as a general principle, the court will always want to consider whether it is possible to bring to an end any financial dependence between the parties after a divorce as soon as it is fair and reasonable to do so.

- If it can be shown that a non-working spouse is likely to be able to return to work and earn sufficient income to support him- or herself within a reasonable period of time, the court is likely to make a spousal maintenance order which only lasts for a set amount of time (what the court calls a “term” order). For example, a maintenance order may be fixed to last between two and five years, depending on how long it is thought it will take the non-working spouse to get back into employment and earn enough to support him- or herself. If there are children, then this sort of “term” order is only likely to be made if the children have reached secondary school age.
- If one spouse is staying at home to look after very young children, a court is likely to make any maintenance order open-ended, meaning that it will not be for a fixed period of time. These open-ended orders are often referred to as ‘joint lives’ orders because they come to an end when either of the spouses dies. This type of order can be reviewed later on, for example, if the spouse receiving the maintenance is able to return to work because the children are older.
- Where a couple are divorcing after a very long marriage, during which one spouse stayed at home to bring up children or be a home maker, that spouse is unlikely to be able to return to full-time work and earn enough to support him- or herself. In such cases, the court usually makes an open-ended order, i.e. one which is not limited in time. That order can be reviewed if circumstances change in the future.
- After a short marriage where there are no children, then even if one person earns much less than the other, the court may only order maintenance for a limited period of time if at all, to allow the spouse who earns less (or who has not been working at all) to adjust to the need to live off his or her own earnings again.

# Dealing with Pensions on Divorce

## Introduction

In the aftermath of marriage breakdown, it can be tempting to focus on immediate needs, such as housing, and the assets available to meet them. But it is very important not to overlook the pension funds held by each spouse, as these are an important source of income in later life.

Indeed, in some marriages, the pension funds may be even more valuable than the family home. After a long marriage and when the pension funds are large, the division of the pensions to cover each spouse's needs in retirement can be the biggest issue to deal with.

Most people have some entitlement to state pension, but this may not be extensive. Where one or both spouses have any kind of pension fund, it should be taken into account. Equally, it is vital to consider the situation of a spouse who does not have significant pension savings. This may be the case, for example, where one spouse has spent significant time out of full-time employment because of the way that child care was arranged during the marriage, and so has not had the chance to put aside pension savings. Meanwhile, the other spouse may have acquired a substantial pension fund. In circumstances like those, it would be fair for the pensions to be adjusted to help protect the longer-term position of the spouse without the significant pension.

## The Family Court's powers

On a divorce, the family court has the power to make a "pension sharing order" to adjust pension savings between the spouses. A pension sharing order directs the trustees of one spouse's pension fund to transfer a percentage of the fund (anything up to 100%) to the other spouse as their own pension fund.

The family court can also order one spouse to pay a percentage of their pension income to the other spouse, which is known as a "pension attachment order". These types of order are not as common as pension sharing orders, as the pension payments will cease if the spouse who owns the pension fund dies or if the spouse receiving the pension payments remarries.

An alternative to either a pension sharing order or a pension attachment order is to "offset" the pension. This means that if one spouse retains their pension fund, it is taken into account by allowing the other spouse to retain a bigger share of the other assets. The difficulty with this approach is that it is hard to equate the value of a pension fund (a right to draw income or capital in the future) with other cash assets due to the very different nature of the assets.

## Some important warnings

### This is complicated!

The proper treatment of pensions on divorce is a complex and technical subject, to which this guide can only provide the most basic introduction. There may be several options available in your case. Deciding which is the best course of action can be difficult.

It will be important to understand what rights each spouse has to a state pension. Anybody retiring prior to 6 April 2016 will probably have rights to the “basic state pension”, but may also have rights to an “additional state pension”. Because of changes introduced by the Government, anybody retiring after 6 April 2016 will only have rights in the “single tier state pension”.

The way these rights are acquired (e.g. through national insurance contributions over a working life, caring for young children and, formerly, acquiring a spouse’s contribution record on divorce) also changed very significantly in April 2016.

Although an additional state pension can be subject to pension sharing on divorce, neither the basic state pension nor (subject to some complicated transitional arrangements) the single tier pension can be subject to pension sharing on divorce; but even if pension sharing is not available it is important to know what these rights are because other orders might be made by the court to meet one party’s need for income in retirement.

Information on what rights an individual has to state pension can be found by downloading and completing a Form BR19 (or BR20 in relation to additional state pension) and sending it to the Pension Centre in Newcastle. These forms can be found at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/361854/br19-interactive.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/361854/br19-interactive.pdf) and

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/313048/br20.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/313048/br20.pdf)

It is possible that these changes will produce a change in the way that courts deal with pensions on divorce.

### You should take professional advice

Because of the technical nature of pensions, if you or your spouse has significant pension funds, whether from a private pension scheme or by virtue of employment (e.g. in the NHS, police, armed services, or teaching profession), or if you are close to retirement, it is strongly advisable that you seek legal advice and/or advice from an Independent Financial Advisor who has experience in dealing with pension divisions on divorce. In certain cases, they in turn may suggest a report is obtained from a pension actuary about your situation.

Unless you are eligible for legal aid, this will involve some cost – but it is likely to be an investment worth making to secure your longer-term financial position.

### You will need a court order

This guide has already indicated why it is important to get your agreement enshrined in a “consent order”. It is essential also to bear in mind that you will have to have a court order if you wish to share a pension fund (“pension sharing”) or seek a pension attachment order as the pension trustees will only share a pension or put an attachment into effect if a court order says it should be done. This can be a “consent order”, i.e. an order based on what you and your spouse have agreed which can usually be made without the need for you to attend the court in person.

### Dealing with pensions involves various costs and time

There are often costs associated with implementing pension orders and these can vary: they may be nothing, or they may be as much as £3,500 or more. This is something to take into account in deciding what route to take, and your agreement – and order – will need to deal with the question of who is to bear those costs. If nothing is agreed, the person with the pension fund who is making the transfer bears the cost, but often spouses agree to share the cost equally. Bear in mind also that the implementation of pension sharing can take several months.

### Step 1: Identifying and valuing each spouse’s pension entitlements, and gathering other key information

The first step is to establish what pension entitlements each spouse has, whether they are “in payment” (i.e. the spouse is already retired and drawing a pension income) or not. This in itself can be time consuming.

Most of us do not have an accurate idea of how much our pension savings are worth and it will be necessary to contact the pension providers to ask for the cash equivalent value (CEV) of each fund and for details of any other benefits that the funds might produce.

You are entitled to get one CEV per year free of charge from each pension provider, unless the pension is already in payment, in which case there may be a charge. Alternatively the spouse in whose name the pension is held should send off a Form P [http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court\\_forms\\_id=1122](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=1122) to the pension trustees to obtain the information required.

However, in some cases the CEV will not provide all the necessary information, as the true value of all the benefits of the pension fund may not always be reflected in the CEV. This is particularly true for defined benefit/ salary-related pensions, especially for uniformed services pensions, so further information will be required. Also it is always important to identify any additional benefits that the particular pension provides on top of the

regular income payment. For example, the NHS pension also provides a tax-free sum on retirement and many employer funds also carry death in service payments. These are the sort of issues in relation to which an IFA's advice may be particularly helpful.

It may also be important to establish whether the pension rights can be "cashed in". Since April 2015 this has been possible for people of age 55 or over for most pensions (though not including most public sector schemes such as the NHS scheme). Cashing in pension rights may, however, give rise to tax consequences at a level which makes this not a good idea so it is important to know what these consequences are before any decisions are made.

Finally, it is sensible to establish from the pension trustees what they will charge for carrying out a pension share and whether they will agree to the spouse (who is going to receive a pension share) remaining within their pension scheme or whether (as is often the case) they will require the spouse to transfer their share of the fund to a another pension scheme. If the spouse receiving the pension share does need to invest elsewhere, it is sensible to take professional advice about where best to reinvest the funds.

Obtaining these details can take several weeks (if not months) and it is therefore advisable to start this work early on as it is not normally possible to settle matters overall until this information is known.

## Step 2: How to handle the pensions in the settlement - identifying and weighing up the options

There are three common ways of dealing with the division of pension funds, particularly after a long marriage. We outline those options here, but highlight below some circumstances in which a different approach might be appropriate:

### 1. Dividing the Pensions in accordance with the income they will produce

Where the spouses are older and/or the pension funds are significant, then it is important to consider the spouses' income needs in retirement.

Where the spouses have retired, or are close to retirement, a budget of their needs as compared with their resources can be drawn up to establish what income needs each has. The pension funds can then be shared in the proportions which will provide sufficient income to each spouse to cover their retirement income needs. If there is insufficient income to do this, the shortage should not fall disproportionately on one spouse.

As any children of the family are normally no longer financially dependent by the time the spouses reach retirement, it is often the case that the spouses' needs in retirement will be similar. Accordingly, unless there is reason not to, for example because it was a short marriage, then a pension division to equalise income in retirement is often the approach that is taken. Advice may well be needed from a pension actuary as to how this is to be

achieved.

Where the spouses are not yet close to retirement, it may be difficult to predict with any certainty what each spouse's financial position and needs might be at retirement. Again, the assumption is usually made that you are likely to have similar needs in retirement and that the pensions will therefore normally be shared to equalise retirement income.

## 2. Dividing the Pensions in accordance with Cash Equivalent Values (CEV)

Where both spouses are relatively young and retirement is a distant prospect, or where the pension funds may be modest and not large enough to justify the costs of calculating the division required to equalise income in retirement, then an alternative is to divide the pension funds by reference to their CEV. After a long marriage, this would result in both parties sharing equally in the total CEVs that they have between them. However, it is important to realise that simply sharing the CEVs equally will not necessarily give the spouses the same income in retirement. First, the two spouses may have different ages and life expectancies. Secondly, different types of pensions might produce different amounts of income even though their CEV looks similar. Either way, an equal division of the CEV may result in significantly different incomes to the spouses in retirement.

For this reason, dividing the pensions with reference to the income they produce may be preferable, unless the relatively small size of the pension fund or the young age of the parties or some other valid reason (such as the shortness of the marriage) makes it uneconomical to carry out the exercise of comparing the incomes produced by the pensions.

## 3. Offsetting the Pension funds against other assets

The final alternative is offsetting. This is where it is agreed that one spouse retains their pension funds, or a larger share of the funds, in return for the other spouse retaining other assets.

Examples are given above in the Housing and Capital needs section, where the parent with the main care of the children retains the family home and the other spouse retains the pension funds as a way of balancing the division of the assets.

Offsetting needs to be approached with care. A party giving up a claim to a share of a pension fund might run the risk of being short of income in retirement.

Also, it is important to bear in mind that pension funds and liquid capital cannot be exactly equated and is not always right to compare them on a pound for pound basis. There is no accepted formula for comparison and doing this may make it uneconomic and/or unwise. In practice, the present value of £1 is often discounted between 20% and 40% when comparing current assets with the value of £1 of pension CEV which can only be drawn in the future. However, this is not a hard and fast 'rule'. The discount reflects

the incidence of tax on the pension benefits and the 'utility' of having cash to spend now rather than waiting for it in the future. What this means, by way of example, is that a court might treat £1,000 of pension as being worth the equivalent of £600 or £800 when set against the value of liquid assets being retained by one of you.

### Unequal division of pension funds?

In the above guidance, it has been indicated that when dividing pension funds you should first consider the spouses' respective income needs in retirement. If both spouses' income needs in retirement can be met by sharing the pensions equally (either to provide an equal income in retirement or an equality of CEVs), that would be an appropriate outcome.

However, there may be reasons for splitting the pension assets unequally, such as:

- One spouse has a demonstrably greater income need in retirement (for example owing to health issues)
- It has been a short childless marriage with one spouse bringing in a larger share of the pension funds
- The pension fund(s) of one of the spouses accrued prior to the marriage. This is likely to have reduced significance the longer the marriage is. If there is a proposal for an unequal division on this basis it is important that careful consideration is given to ensure that the spouse receiving the smaller proportion of the pension fund still has sufficient income in retirement to cover their needs
- One or both of the spouses will have other non-pension income available to them in retirement.

A helpful guide on dealing with pensions on divorce called "When a relationship ends" can be found at the Pension Advisory Service webpage at <http://www.pensionsadvisoryservice.org.uk/publications/category/leaflets-and-guides>

## Examples

These are not real cases. They are made-up examples. They show some common situations which arise when couples divorce. We then show how a judge may decide to share the income and capital of the couple after divorce. The couples in the examples are a man and a woman. If a same sex couple divorced (or dissolved their civil partnership), the judge would make decisions in the same way. The examples may help you reach your own agreement with your husband or wife. If your case goes to court, the judge will try to do what is fair for everybody after the divorce. The judge will decide what money the family has, and how best to meet the financial needs of the husband, wife and any children from that money. The judge can change who owns the family's property. The change can be from the husband to the wife or from the wife to the husband. If there are debts, the judge cannot change those debts, but the judge will decide how best to deal with them, when deciding how to deal with the distribution of other assets. What is financially fair may be very different from one family to the next. It depends on the circumstances of the individual family.

One of the examples may be a lot like your situation. Maybe your situation falls between two or more of the examples. The examples give an idea of what things may be important and the orders a judge may make in different situations. This may help you think about how to deal with your own situation.

Important questions are:

- What income and property does the couple have?
- What are the debts?
- Are there any children?
- How old are the children? If the children are independent adults, their financial needs are no longer relevant to the judge's decision.
- How long have the couple been married? Did they live together before marriage, if so for how long?
- How old are the husband and wife?
- Are the husband and wife in paid work, or could they find paid work?
- Does the husband or wife, or any child, have a significant health problem which

affects the income or property needed ?

- What is the cost of renting or buying a home in your area?

You will find information about other types of case in our FAQs. Also look at our detailed pages on housing and other capital, pensions, and maintenance.

### This is an example of a Mesher order

Jade and Steve are in their early thirties and are getting divorced after being married for five years and having separated six months ago when Steve moved out. They have two children Mark (5) and Scarlett (3). Jade has not been working since Scarlett was born so that she can look after the children. Scarlett currently goes to nursery five mornings a week. Steve is working full time and earns £35,000 gross; he brings home £2,230 each month. Before the children came along, Jade was earning £22,000 working full time. She can earn £10,000 on part time basis, working 2½ days each week on Monday and Tuesday and on Thursday morning. Both her and Steve's mothers have agreed to look after Mark and Scarlett when Jade is at work. They have agreed that the children will continue to live with Jade and will still see Steve every weekend. The family home is worth £180,000 but is subject to an interest only mortgage of £120,000 which costs £400 per month. Steve's rent (for a two bedroom flat) costs £600 per month. When they separated Jade went to the CMS for child support and they have assessed that Steve should pay £398 per month.

<https://www.gov.uk/calculate-your-child-maintenance>

They have a joint debt on credit cards of £3,500. They both have cash ISA accounts: Steve's has £4,000 and Jade's has £2,800. Steve has a small pension connected with his work worth £5,000, but Jade has no pension savings.

### Possible outcome

The children need to have a home. If the family home was sold, the mortgage discharged and the sale costs paid, there will be about £54,600 left. This is unlikely to be enough to enable either Jade or Steve each to buy a new home each, even with a mortgage. So, as the needs of the children must come first, this means that Jade and the children should probably continue to live in the family home. Steve will need to rent. After paying his rent and child support Steve is left with £1,238. Jade will not have to pay tax on her earnings of £10,000 per annum and can qualify for Working Tax Credit (as she will be working more than 16 hours each week) and Child Tax Credit.

<http://taxcredits.hmrc.gov.uk/Qualify/DIQHousehold.aspx>

These benefits will provide Jade with about £367 each month and she will have her Child Benefit of £147.50 per month.

<https://www.gov.uk/child-benefit-tax-calculator>

So her monthly income will be about £1,350 plus the child support, so in total £1,748. It is fair that Jade's income is more than Steve's as she has the children with her most of the time, but the mortgage and other household bills have to be paid. It might be fair to suggest that Jade pays £300 and Steve pays £100. Then Steve will have available for himself £1,138 each month; Jade will have £1,448 for herself and the children.

Jade's claims for support for herself should not now be dismissed; because the children are so young and the future uncertain she should have a nominal order to last until Scarlett goes to secondary school.

It would make sense to pay off the credit card debt by using the ISAs. If they paid the debt 50/50, Steve would have £2,250 left over and Jade would keep £1,050. No pension sharing order would be required.

The home can be kept in Steve and Jade's joint names. It can then be sold when the children have both left school or are over the age of 18. It could be sold earlier if Jade remarries or perhaps was to live with somebody else as a couple. On a future sale the mortgage will be paid off and what is left can perhaps be divided as to 60% to Jade and 40% to Steve, a division in Jade's favour to reflect not only the continuing contribution she will make to the welfare of the family by caring for the children but also the impact that that will have on her earning capacity. Jade may then have to rent, as Steve has been doing.

### This is an example of a reducing maintenance order illustrating the move to independence in a case based on need

Karen (49) and Sam (54) are getting divorced after being married 25 years. They have two children, Nikki (23) and Michael (20). Both now work full time, Karen having taken a career break from the NHS for 8 years from when Nikki was born until Michael went to primary school. Sam earns £40,000 per annum (£2,613 net per month) as a programme manager for their local NHS Primary Care Trust; Karen works as a medical secretary for her local GP practice, earning £17,500 a year (£1,238 net per month). Nikki lives away from home and is independent but Michael, who is in his last year at university, still lives at home. The family home is worth £240,000 and the mortgage will finally be paid off early next year. They have a joint loan of £8,000 that was taken out to help fund an extension to the house two years ago. Sam has a cash ISA account and some savings together worth £18,350 and Karen has £30,000 left over from an inheritance (of £40,000) she received when her mother died several years ago. They are both members of NHS Pensions although as Karen had her career break, Sam's is more valuable; they have therefore agreed to share the fund value of their pensions equally. It will cost each of

them £145,000 to buy a more modest home.

### Possible outcome

At the end of this long marriage the family home will need to be sold as each will need somewhere to live. On a sale, once the final mortgage payment has been made, the sale costs paid and the loan repaid, there will be about £224,800 left over. It would be fair for Karen and Sam to share this asset and Sam's ISA and savings equally, so there is £243,150 or £121,575 each. Sam and Karen will have to down size. One option would be for Karen to get £121,575 and keep her inheritance. Whilst this is not an inevitable outcome, it would enable her to re-house without a mortgage, which she will need to do because she cannot afford to pay a mortgage from her income. They have agreed to divide the fund value of their pensions equally.

On this basis, Sam will need a mortgage of £35,000. On a repayment basis at 4% over 15 years this will cost £268 per month. His take home pay is £2,613 each month so after his mortgage he will have £2,345.

Given the difference in their incomes it would be fair for Sam to pay some financial support to Karen until he retires. On this basis, and because Karen has kept her inheritance and has no mortgage, it is only fair on Sam that his support should be for a limited period but long enough for Karen to adjust and make the transition to independence without undue hardship. Karen's take home pay is £1,238 each month.

Sam could pay maintenance to Karen for 5 years on a sliding scale; say £400 per month in the first year (Sam would have £1,945 / Karen would have £1,638); £320 each month in the second year (Sam £2,025 / Karen £1,558); £240 each month in the third year (Sam £2,105 / Karen £1,478); £160 per month in the fourth year (Sam £2,185 / Karen £1,398) and £80 a month in the fifth year (Sam £2,265 / Karen £1,318). Then maintenance could stop. Sam would be 60 and Karen 55 and they would be independent of each other before each retires.

### This is an example of a maintenance order ending on retirement / a deferred clean break

Mary is 63 and Adrian is 59. They are getting divorced after being married for thirty three years. They have three children but all live away from home and are independent. Mary gave up work when she was pregnant with their first child and has not worked out of the home for 27 years. The family home, a three bedroom property which they have lived in for 19 years, was bought for £125,000 with a 25 year repayment mortgage of £100,000 and is now worth £260,000; there is now only £24,000 outstanding on the mortgage. Adrian and Mary both have cash ISA accounts worth £7,000 each. Adrian is self-

employed and owns a shop in their town's high street (which is leased and has six years left on the lease)). Last year his income was £47,500, which is less than he has earned in the past. Business has suffered since a shopping mall was opened out of town five years ago. He has a substantial pension savings worth £300,000 in a scheme into which he has been paying throughout the marriage. Mary has no pension savings, but receives her state pension.

<https://www.gov.uk/calculate-state-pension>

Mary plans to move away from the town and live near their youngest child, who has just had a baby boy and who has asked Mary to help look after him. Adrian plans to move into a flat in the town, near his shop. Each believes they will need not more than £110,000 to buy somewhere new to live.

### Possible outcome

Mary and Adrian have been married for a long time. The family home will need to be sold because it is their main cash asset and each will need the money to buy a new property, in Mary's case, near her daughter and in Adrian's case, near the shop. After paying off the mortgage and paying the sale costs, there will be £228,200. This can be shared equally. Add the ISA they each have and each will have £121,000. This will meet their housing need.

Mary is a pensioner. She is active but has promised to look after their grandson. Her only income is her state pension of £490 per month, which she has received for the last two years. She will need to receive financial support from Adrian. Adrian has another six years work in front of him until he reaches 65 and retires. His income after tax and National Insurance is £2,992 per month. He will pay Mary maintenance. Were he to pay Mary £1,250 per month she will have this amount and her pension, in total £1,740 each month; Adrian will be left with £1,742 per month. The maintenance should continue until he retires. But what happens then?

Adrian's pension scheme will need to be shared now. It is as much of an asset as the family home. A pension sharing order can be made. If the pension is shared equally now, the maintenance he will be paying to Mary can stop when Adrian retires at 65. There will then be a clean break.

### This is an example of an immediate clean break

Sally and Raj are in their early thirties and have been married for six years. They have no children and have been living in a flat that they bought together for £100,000 a year before they got married with an interest only mortgage of £80,000. The deposit of £20,000 came from Sally's savings of £5,000 and a £15,000 loan from Raj's father. They have decided to divorce. Their flat is now worth £125,000. They each work full time; Sally works as theatre nurse and earns £27,900 a year; Raj now works in IT for a small start up company (and was given a 15% shareholding in the company) and is paid a salary of £22,000 but can receive a discretionary bonus, which last year was £8,000. Sally has a credit card debt of £3,000, resulting from a holiday that she and Raj took last summer to try and "mend" their marriage. Raj has been repaying his father the money he and Sally borrowed to use towards the deposit and still owes him £5,500. Sally has savings of £900 and Raj has £3,750 left over from last year's bonus. Sally has her NHS pension. Raj has no pension provision but does own 15% in the company, although its value is unknown and has not been valued.

#### Possible outcome

Sally and Raj will need to sell their flat. Once the mortgage has been discharged and the costs of the sale have been paid, there will be about £41,250 left. Sally's credit card debt should be paid off since it was taken out for her and Raj to have their holiday. Raj's father should also be repaid as the loan was made for both of them and has been repaid regularly throughout the marriage. That will leave them with £32,750 which they can share equally. This can be used for a deposit if either wants to buy or put in the bank should either decide to rent. Neither Sally nor Raj will need to pay maintenance to the other. Sally's monthly take home pay is more than Raj's, but he can get a bonus, as he did last year. Sally will keep her own pension and Raj will keep his shareholding. This will be a clean break. Each goes their own way.

### This is an example of a joint lives order

Anne and Rob are in their mid-forties and have been married for 18 years. They have one child, Garry, who is 16 and has just done his GCSEs, who will live with Anne but see Rob from time to time, as Garry wishes. They live in a house bought ten years ago for £200,000 with a £150,000 repayment mortgage over 25 years. Their home is currently worth £300,000 with a mortgage debt of £100,000. They have both worked throughout their marriage. Rob currently earns £55,000 (and brings home £3,253 each month). Anne worked until the birth of Garry, took time out until he went to school and has worked three days a week since then. She earns £20,000 (£1,383 take home each month). Rob and Anne have agreed that Anne can and will return to full time work when Garry goes to university from when Garry will support himself from a student loan. Her income will then

increase to £34,000 (£2,208 net each month). They each have cash ISAs, Rob's is worth £15,000 and Anne's £8,000, and a joint savings account with £10,000. Neither has a private pension. A new home for each of them will require each to have £150,000.

### Possible outcome

It will be necessary to sell the home and release funds to enable each to purchase somewhere to live. The equity in their home will be about £191,000. If this was shared between Anne and Rob each would have £95,500. It would be fair to share equally the ISAs and the savings, in total £43,000, so that each then has £117,000. Both will need a small mortgage to buy and move into a new home, say of £40,000, on a repayment basis at 4% of 20 years this would cost each of them £242 per month.

Rob will pay to support Garry. Anne and Rob have agreed that Rob should pay £515 a month which is in line with the amount the CSA would assess as being payable.

<https://www.gov.uk/child-benefit-tax-calculator>

So Rob's available net income after the mortgage and for Garry will be £2,496.

Anne has her net monthly income of £1,383, will receive the child support of £515 and has also Child Benefit (£88pm) and can receive Child Tax Credit (£71 pm), in total £2,057 per month. However after her mortgage will have £1,815.

<http://taxcredits.hmrc.gov.uk/Qualify/DIQHousehold.aspx>

It would be fair for Rob to pay towards Anne's needs for the next two years and before her return to full time work. Were he to pay £400 per month he would be left with £2,096 and Anne would have for herself and Garry £2,215.

When Garry goes to university and Anne returns to work full time, her take home pay will increase to £2,208 but will no longer receive Child Benefit or Child Tax Credit. After her mortgage she will have £1,966 each month. In contrast Rob, no longer paying for Garry, will have £3,011 per month after his mortgage payment.

After a marriage as long as theirs it would not be unfair for Rob to continue assist Anne financially and, were this to remain at £400 per month, Anne would have £2,366 each month. These payments would continue until Anne remarried or until there was a change of circumstances, such as retirement, which would merit a review. The court is likely to view this as a fair outcome since Anne's future needs have been generated largely as a result of the choices which she and Rob made together during their marriage which resulted in the interruption of her full-time career whilst she cared for Garry. If, at some future point, the situation were to change so that the difference in their respective incomes was not so great (i.e. Rob's disposable income after Garry goes to university will be one third greater than Anne's), a court might take the view that the time had come to bring to an end Rob's payments to Anne (or at least to reduce them significantly).

