

## Divorce and the Downturn

Financial agreements on divorce can take a wide variety of forms and in a time of economic downturn how you choose to divide your assets demands particular thought. Financial agreements based on current circumstances may be inappropriate if circumstances change, therefore thought needs to be given to this possibility when deciding what form the financial arrangements on divorce should take.

When children are involved, a common way of providing for them is by way of periodical payments. Varying the amount paid each week or month under a periodical payment order is relatively easy to achieve compared with varying capital settlements, which are difficult to adjust. Under Section 31 of the Matrimonial Causes Act 1973, the court can suspend, vary or discharge any provision for a periodical payment order. If you do wish to make an application to alter a periodical payment order, it is important to do so promptly. The court has the power to backdate any alterations it makes to the order but will normally only do so from the date the application was made. It does, however, have to take into account any changes in circumstance since the original order was made. It is possible to apply for a downward or upward variation of periodical payments.

Another common problem in a recession occurs when the ex-spouse falls into arrears with their payments. If this happens and there is an outstanding variation application to alter an order, any application to enforce payment of arrears will be put on hold until the outcome of the variation application is known. In the meantime, the person claiming the arrears can use a garnishee order to force payment. A garnishee order effectively ring-fences funds in the debtor's bank account equivalent to the amount of the payment due, giving that payment preference over other sums owing. However, this type of order can only be issued once and if there are insufficient funds in the bank account to make the payment, the order will fail and cannot be used again.

Failing to pay money due under an order will mean that you are in contempt of court, so if you are applying to vary an order whilst in arrears, the court can use its discretion to refuse to hear the application or impose conditions upon you.

In the current economic climate, the court is likely to be sympathetic with regard to problems involving the payment of lump sums due. The court can adjust the amount and timing of lump sums to be paid in instalments but are unlikely to adjust the actual amount due. Where there is an agreement to pay a series of lump sums, these may be viewed by the court not as individual lump sums but rather as a series of instalments making up a larger lump sum, in which case the amounts could be varied.

Although people's financial situations can change rapidly, the courts will only allow an appeal of an order out of time in respect of capital sums if specific conditions are met. The new event justifying the need to change an order must have occurred within a relatively short time of the order being made and a change to the order must not prejudice a third party. However, these conditions do not include a change in financial circumstances arising from the recession. This also works in reverse – i.e. a divorce settlement agreed in a time of

economic downturn will not be altered if the economy booms. Once a capital sum is settled, economic fluctuations are not a basis for appeal.

Renegotiation of an agreement will be difficult even if you attempt to do this before an order is made. The current economic situation is likely to make the courts more sympathetic to the idea that husbands and wives should share the risk of holding assets that are subject to rapid changes in value (such as a business or shares). This may lead to a couple having shared interests long after they are divorced. It may also be more difficult to achieve a 'clean break', as neither party may be willing to give up an interest in the 'copper-bottomed' assets. If a couple does agree that one of them should have less risky assets whilst the other keeps the interest in the riskier ones, then the variation in risk is likely to be reflected in the respective proportions of the total assets retained by each.

Contact Sandy Edwards or Sarah Jane Smith for advice on any matrimonial issue on 01743 248148 .

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