GUIDE- How do you split everything when you separate and divorce?

The purpose of this guide is to provide you with a starting point and broad framework to base your discussions on about reaching post separation financial arrangements in mediation which feel and are fair to you both and the children, within the 'shadow of the law', where there has been a medium to long term marriage (very short marriages require a different approach).

In mediation, although we do not focus on law, rights and entitlements, it is important that everyone works within the 'shadow of the law', reaching an agreement that the Judge is able to make binding.

The framework below broadly reflects the legal approach to most straightforward situations involving a house or two, a handful of other assets, a pension or two, spousal and child maintenance.

There are separate guides covering spousal, child maintenance and pensions.

If your circumstances are slightly complicated by owning businesses or assets that may have been 'brought into the marriage' from an 'external source' such as an inheritance, there are separate guides to help with these situations.

Broad approach

In most cases there are 3 main areas and 3 main timeframes to consider.

THE MATRIX

Capital agts relating to; • Realiseable assets Bricks and mortar, Investments, Cars/belongs, Liabilities • Non-realiseable, future, contingent assets. Pensions Beneficial interest in Trusts	**Spousal Maintenance options** • Clean break • Nominal order • Substantive order How much, how long and whether to dismiss at the end of the term? • Consider how this relates to the capital division considerations.	**Child Maintenance options** • Child Maintenance Service formula (consider impact on disposable incomes and spousal maintenance calculation) • Include or exclude from the final financial order?
Short term • Until sale of home if on the market	**Medium term** • Children's independence • From sale of home	**Long term** • Post retirement

3 main areas to consider include: CAPITAL, SPOUSAL MAINTENANCE, CHILD MAINTENANCE.

These are all inter-connected to some extent. For example;

- you may want to exchange some pension for a larger share of the house equity or

- the amount of capital received may mean a smaller mortgage is needed and therefore a smaller amount of spousal maintenance to pay for this or
- you may want to capitalise spousal maintenance into a lump sum payment needing more than half the capital (see below).

The key is to take a broad approach.

3 timeframes: SHORT TERM, MEDIUM TERM, LONG TERM.

The relevance and significance of each of these will vary from situation to situation so again, it is important to take a broad approach when considering how these 3 time frames affect decisions about maintenance and the division of capital. For example;

- The short term might mean from now until the house is sold, while you are still living together which may affect the amount of maintenance payable while the bills are still shared.
- The medium term might be from the time the house is sold until retirement.
- The medium term might also end when the children become independent which might coincide with the end of maintenance.
- The long term might be when retirement begins which might coincide with the end of maintenance.

These are just broad examples. Each situation must be considered as unique to you. It is important to work through your own circumstances and to explore the a range and impact of a number of options.

STEP 1

Apply the MATRIX to your situation and circumstances.

So, what is needed first is an agreed and sufficiently detailed financial summary of available financial RESOURCES with agreed values for the house, assets, liabilities, pensions and incomes, for example. The mediator will put this together with you in mediation and may give you some forms to complete beforehand (financial disclosure forms)

Most people have some capital, even if it just a car.

Even if it is agreed that there is not going to be any spousal maintenance (maintenance clean break), all the options still need to be considered before any final decisions can be made (see spousal maintenance guide). And, where there are children, a good starting point is usually the Child Maintenance Service formula (see child maintenance guide)

STEP 2

Decide what is important to each of you and the children in terms of what you NEED/want. Most situations have a few key areas and questions to focus on whether it is;

- how to divide up the capital to house everyone and/or
- whether maintenance is payable and for how long and
- whether there is enough capital to ‘capitalise this’ and
- what to do with the pension (see pension guide).

The first main consideration and focus is usually, where you are all going to live after separating and how is this going to be paid for. This often affects not only how the capital is distributed including pensions (see pension offsetting) but also the question of maintenance to ensure that everyone's outgoings can be met, where they are living.

At this point, we should make it clear that THERE ARE NO FORMULAS FOR HOW THE CAPITAL RESOURCES SHOULD BE DIVIDED despite what many may think.

For example, there is no law that automatically gives the children's main carer more than half of the capital because they will be caring for the children. It is a question of looking at 'all the circumstances' and a fine balancing act according to some **guiding principles** and **statutory factors**. (This can lead to some fairly unpredictable court outcomes due to the 'tumble dryer application of factors and principles')

Family law is essentially based on a number of **broad principles** derived from cases that go to court and statutory FACTORS set out in **s25 of the Matrimonial Causes Act 1975** which are worth a read. They include factors such as present and future financial resources, financial need, obligation and responsibilities, earning capacity, ages, health, length of marriage, contributions, standard of living etc.

The FACTORS start by stating that 'all the circumstances' are taken into account, with the first consideration being given to the children. 'All the circumstances' effectively means that your circumstances need to be looked at 'in the whole', taking a broad approach.

In most cases, the most important factor is NEED which requires you and your former partner/spouse to explore first, what your children need and secondly, what you both need, in terms of capital and income.

In most cases, this means HOUSING NEED and how the capital can be stretched (if at all) to house the parent, with whom the children are to have their main home as well as the other parent, with whom the children are to spend some of their time, ensuring that the disparity between the two households in terms of size of house and incomes is not too great and reflects a similar standard of living, from the parent's and children's perspective.

This might mean (but does not automatically mean) that the parent with whom the children are to spend most of their time will need more than half of the housing capital because, for example they have a lower income and borrowing capacity. However, this may also mean that parent giving up more than half their interest in the other parent's pension to balance things out.

But, all the circumstances need to be explored, weighed up and balanced, applying 3 main principles as they apply to the main factors relevant in your circumstances (see factors above).

1. The overriding principle is the requirement to achieve a **fair outcome**. Fairness is of course subjective so, what guidance do we have?
2. What is Fair? Fairness is an equal division of the capital **UNLESS** there is good reason to depart from this.
3. What is good reason? One person may **NEED** more than half the realiseable capital, for example to house themselves.

NOTES

1. You can probably now see why it is so difficult to predict how the Judge might apply these factors and principles to your situation and why so many outcomes are not what people expect which is why most couples are best served exploring their options in mediation albeit within the shadow of the legal approach, set out in this guide.

2. The principled approach of trying to achieve of an equality of division does not apply to income and maintenance (see separate guides)

3. An equal division of what? This may be an important question because £100k of equity in a house is not the same as a £100k of pension benefits (see pension sharing guide). With a pension, you may want to ensure that you both receive the same pension benefits on retirement including pension income, in which case you would have to calculate how to divide the current pension values (cash equivalent benefits) to achieve this. It may not be a 50/50 split of the current cash equivalent values. Alternatively, you may want to work out how much pension to trade in/off set for £100k of equity in the home which is unlikely to be £100k of pension due to the different nature of the assets

4. People often focus on how much they each contributed to the marriage in terms of income or capital. However, in a medium or long term marriage, the law takes the view that a marriage is a journey of shared decisions and choices resulting in the financial circumstances at the time of separation. The legal approach does not generally seek to analyse the financial consequences of decisions made during the marriage. Marriage is a 'joint venture' resulting in a 'matrimonial balance sheet' at the time of separation that needs to be divided to meet everyone's needs.

5. The same is true of inherited monies contributed to the marriage (see guide). There is no principle that on separation these or indeed any of them, automatically go back to the person who inherited them unless there is more than enough capital and income to meet everyone's housing needs (which usually means a few million). It is true that inherited money does not derive from the joint venture of marriage but once again, all the circumstances including everyone's need for capital on separation, must be taken into account.

6. Although this guide focuses on the law, the focus in mediation will be on exploring options for dividing capital and income to meet everyone's needs without too much reference to the law, in the hope that you, the separating couple feel that you are able to reach a decision that is fair (also according to your values and beliefs) to you both without using the law, or threat of court, as a weapon.

We hope that this guide is helpful but it is only intended as a guide to support you with your decision making process in mediation. We always recommend that you take independent legal advice from your lawyer who we see as an invaluable member of your 'decision making team', to support you and your former partner/spouse to reach your own decisions in mediation.