How to divide assets on separation and divorce

This mediation guide is primarily based on the 2022 case of WC v HC and specifically paragraph 21, in which the Judge sets our the general law applicable to the division of assets on divorce.

It can be found in the resources section of the Divorce Manual, chapter 9- How to reach your own financial agreements- 5 stages

2 main stages

There are 2 main stages to the process of deciding how to divide assets, namely

1. **Computation of the assets/liabilities**- As set out in an Open Financial Summary of assets and liabilities for mediation
2. **Distribution**- Deciding how to divide them which is recorded as mediation proposals in the mediation Memorandum of Understanding which becomes a financial consent order for the Judge to make binding

The objective and approach

The objective is to achieve an outcome which should be *"as fair as possible, in all the circumstances"* (Lord Nicholls in White v White 2000)

In assessing what amounts to a fair approach, there is *no place for discrimination* between husband and wife and their respective roles.

In constructing a fair approach (in law) the court has regard to the S25 criteria, in the Matrimonial Causes Act 1973 with the *first consideration being given to any child of the family*.

The court *encourages a clean break* if and when realistically possible.

Needs v Sharing principles

The 3 essential principles at work are

1. Needs
2. Compensation- "A very rare creature indeed"- Only reported in one case since 2006
3. Sharing

A fair outcome is reflected by an equal division of the assets (sharing principle) unless otherwise justified by one spouse needing more than half (need principle)

It is only in those cases (the minority) where there is a surplus of assets over needs that the sharing (equality) principle is applied.

Non-matrimonial assets

If there are surplus assets over (assets required to meet) needs, non-matrimonial assets are ordinarily retained by the person they belong to *unless* there is good reason to the contrary.

In practice, the only justification for a spouse pursuing a claim against non-matrimonial assets is because their *financial need dictates* this.

There has been no reported court outcome in which a spouse has "secured an award against non-matrimonial assets, in excess of their need"

What are non-matrimonial assets

They have one or more of 3 origins:

1. Property brought into the marriage by one spouse
2. Property generated by one spouse after separation (for example, by significant earnings)
3. Inheritances or gifts received by one spouse

To decide whether property, which started out as non-matrimonial property, acquires a 'marital character' requiring it to be divided under the sharing principle will depend on factors such as;

1. When the property was acquired
2. How it has been used
3. Whether it has been mingled with family finances
4. What the parties intended

The Needs principle is an elastic concept and cannot be looked at in isolation (contextual)

The principle of need requires consideration of, among other things:

1. Financial needs, obligations, and responsibilities of the parties
2. The *standard of living* enjoyed by the family before the breakdown of the marriage (see below)
3. The age of the parties
4. Physical and mental disability

Standard of living

The Family Justice Council guidance on Financial Needs states that

"In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."

That said, application of the 'standard of living' factor is fact-specific.

The main drivers in the discretionary exercise (of assessing needs) are, among others:

- the scale of the payer's wealth,
- the length of the marriage,
- the applicant's age and health, and
- the standard of living, **although standard of living cannot be allowed to dominate the exercise".**
- The source of the wealth- If it is substantially non-marital, it would be unfair not to weigh that factor in the balance.

For more information and assistance about how to apply the information in this guide please have a look at the Divorce Manual and speak to one of our team.

John E Hind- Author of the Divorce Manual