

Divorce Planning

Article

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Thomas Duggins, solicitor in the family office at Charles Russell, explains how the correct advice can minimise the financial and emotional stress of a divorce.

Along with moving house and bereavement, divorce is one of the most stressful experiences faced by adults in the 21st Century. In particular, wrestling over shared financial assets and possessions amassed over many years can be emotionally draining for the couple involved.

There is no set formula for redistribution of assets or income on divorce and the courts are at leave to use their own discretion, with reference to case law and statutory criteria.

When considering whether a maintenance order is appropriate, the courts will consider the parties' respective financial needs, the contribution they have made to the other parties' income and whether one party (generally the wife) has sacrificed their career to raise children.

Other variables will be the longevity of the marriage and whether there are children involved. If the parties are older and have limited earning capacities, maintenance may last for the remainder of the recipient's life.

Maintaining maintenance

In most cases, spousal maintenance is a recipient's only source of income and they will be reliant on it to meet regular outgoings. Payments must therefore continue in the event that the paying party dies.

This can be achieved in a number of different ways. For example, the paying party can formally undertake to change their will, so that a portion of their estate on death is left to the recipient and/or the children. However, if at some point they subsequently change their will, in breach of the order, it may not become apparent before they die, which will inevitably lead to litigation upon their death.

If the deceased has not made sufficient financial provision for their former spouse in their will, the recipient may be able to make a claim against the deceased's estate under The Inheritance (Provision for Family and Dependents) Act 1975.

Under this Act, certain classes of people (which include former husbands or wives, provided they have not remarried) are able to make a claim against the estate of the deceased if they were financially dependent on them at the time of death.

The deceased must have been domiciled in England or Wales at the date of death.

A successful application will also require the deceased's estate to have sufficient capital to release ongoing financial commitments. However, if the remaining maintenance term is for many years, this may not always be the case. Where it is not possible to settle at an early stage, the courts will have to become involved and this can be costly and time consuming.

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The most secure way to ensure that sufficient funds exist to discharge maintenance obligations after the payer's death is to take out a life insurance policy. Although the courts are not able to order that one party insures their life to meet their ongoing financial obligations, the parties can formally agree in a court order that a policy will be taken out.

When calculating the level of life insurance required, solicitors commonly refer to actuarial tables that outline the amount of capital required to produce an income at the agreed level for the rest of the recipient's life. This may include sufficient funds to meet school fees, as well as spousal and child maintenance.

The tables are based on assumptions about interest rates and life expectancy. The income received is also calculated on the basis of capital draw down, as well as interest, so that on the recipient's death, none of the lump sum remains. Figures are calculated by use of the Duxbury tables, which illustrate how much is required to capitalise maintenance for the rest of the recipient's life.

For example, to provide the other party with an annual income of £50,000 a year from the age of 51 onwards, requires a lump sum of £1,017,000 on a Duxbury basis.

Either party can pay the policy premium: indeed, the recipient may prefer to pay it if they are concerned about their former spouse's ability or determination to keep payments up to date. The paying party may have to agree to undertake a medical examination and to produce regular updates on the status of the policy to the recipient party.

In the event that the paying party dies and the insurance policy pays out, the recipient will receive, in some cases, a significant lump sum and will need advice on how best to invest these funds. If the figure has been calculated on a Duxbury basis, they will need advice on how best to invest the funds and what portion of their income, if any, should be capital draw down.

Security

While divorce is one of the most stressful experiences that adults will face, with care, planning and proper advice, the impact on both parties' finances can be reduced to a minimum.

It is vital for both parties to receive proper legal advice to ensure that decisions made at the time do not threaten future financial security.

The provision of security for maintenance in the final financial order is an important part of these negotiations.

More information

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