COLLAS CRILL

Court orders available

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The powers of the Guernsey Royal Court to make financial orders on divorce are set out at Sections 43, 46 and 47 of the 'Matrimonial Causes Law (Guernsey), 1939'. This is a very old law but it has been amended from time to time.

The main orders that a Court can make are as follows:

- Spousal maintenance
- Child maintenance
- Sale and/or transfer of property
- Lump sum order

Either party to the marriage can apply for these orders.

Proceedings are commenced by issuing an application for financial provision, which is sometimes called ancillary relief. For a detailed explanation of the procedure, see Flow Chart of Financial Application and Finances - The Basics.

The application can only be issued once a petition of divorce, nullity or Judicial Separation has been issued. Judicial Separation in this context refers to a petition for a decree of Judicial Separation and should not be confused with Judicial Separation by consent – see Alternatives to Divorce and Judicial Separation.

With the exception of interim orders for maintenance, the Royal Court can only make order for the sale/transfer of property, lump sum orders and final maintenance orders once a Final Order of divorce, a decree of nullity or a decree of Judicial Separation has been granted. This means that if there has been no decree of Judicial Separation, nullity or divorce, then the Court has no power to make an order. This procedural rule can on occasions cause difficulties. If a party refuses to negotiate a financial settlement on a voluntary basis and there are no grounds for divorce, then the Court has no power to make a financial order.

SPOUSAL MAINTENANCE

The 1939 Law refers to spousal maintenance as 'contributions for support'. The modern terminology is maintenance or periodical payments. The law specifically refers to maintenance being payable after a decree has been granted. Interim maintenance, usually referred to as maintenance pending suit, can be ordered by the Court once a petition has been issued and arrears of maintenance can be backdated to the date of the application.

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Either party to the marriage can apply for maintenance and it is immaterial whether they are petitioner or respondent in the proceedings.

The Court can make an order for maintenance for a fixed or an indeterminate period. Maintenance for a fixed period is usually for a set number of years, but it can be linked to say the youngest child attending secondary school or reaching eighteen, or some other determinate period. The purpose for paying maintenance for a fixed term is usually to enable the recipient to adjust to becoming financially independent over a period of time.

The Court will try to achieve a clean break settlement as soon as possible so that, other than child maintenance, there are no ongoing financial links between the parties. Whether a clean break can be achieved very much depends upon the facts of the case. There are some cases where the only appropriate order is maintenance for life. This is usually referred to as a 'joint lives order', which will cease on the death of either party.

It is possible to secure maintenance to guarantee payment either by way of an insurance policy or by securing maintenance against specific assets.

Invariably, spousal maintenance will increase annually in line with the Guernsey Retail Price Index and this will be specified in the order itself. Figures for Guernsey RPI are available on www.gov.gg.

Any order for spousal maintenance can always be varied up or down if there has been a significant change in either party's financial position. In practice, variation applications are usually difficult and expensive and it is rarely cost effective to instruct an advocate.

Unlike in the UK the remarriage of the payee does not automatically terminate payment of spousal maintenance in Guernsey, but remarriage or cohabitation of the payee could be a significant change in circumstances justifying a reduction or termination of spousal maintenance.

Historically, spousal maintenance orders in Guernsey were fairly uncommon. Spousal maintenance is often restricted to cases where there are pre-school children who need one parent to care for them on a full time basis. These circumstances may require spousal maintenance to be paid for a fixed period to fund the expenses of the family. The other typical scenario where spousal maintenance might be appropriate is a case involving significant wealth, where the parties are in their late fifties or early sixties and are unable to return to work having taken many years out of the work place to raise children. As always, these are just some examples and every case will turn on its own facts.

In most cases, parties choose a clean break settlement with no ongoing spousal maintenance. If there are differences between each party's income and earning capacity, then this may be a reason to increase one party's share of the capital assets over and above an equal division.

As to how much spousal maintenance is likely to be paid, this will depend very much on the income of each party and their monthly needs. This is a balancing exercise which can only be done after detailed consideration

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of monthly budgets. The issue then becomes how the monthly shortfall of one party is to be met, taking into account the other party's resources and needs.

A further consideration is to what extent and in what circumstances a party is expected to return to work. This is a common area for dispute. The general rule is that each party is expected to maximise their income. Courts can and will take into account what each party could earn, reviewing their age, experience, childcare commitments and the availability of employment.

Another area of concern is what happens if maintenance is not paid in accordance with a Court order. The answer is that it is left to the payee to instigate proceedings in the Petty Debt Court. The Petty Debt Court can order payment of arrears at whatever rate it thinks is appropriate.

On divorce, most people seek the certainty of a clean break settlement so that they know exactly where they stand financially and enabling them to cut all financial ties with their former spouse as quickly as possible. Spousal maintenance orders, for all the reasons set out above, come with a whole host of difficulties. Such orders are always open to variation and it is left to the payee to enforce the order in the event of non-payment. That said, spousal maintenance in some cases is an essential part of the balancing exercise required by Section 25 of The Matrimonial Causes Act in achieving a fair settlement.

CHILD MAINTENANCE

Orders for child maintenance are very common.

The 1939 Law simply states that the Court can make 'such order as appears just' with regard to child maintenance. Unlike in England where the Child Support Agency (now called the Child Maintenance & Enforcement Commission) administers maintenance for children, the Guernsey Courts retain the power to order child maintenance against the non-resident parent.

In fixing an appropriate level of child maintenance the Court has complete discretion to the amount to be paid, taking into account the reasonable needs of the children balanced against the financial resources of the non-resident parent.

In practice, the Guernsey Courts will often look to the Child Support Agency rules as guidance. These rules provide that the non-resident parent should pay 15% of their net income (ie, net of tax, social insurance and pension contributions) in respect of one child, 20% in respect of two children and 25% in respect of three or more children. These sums are then reduced if the children stay overnight with the non-resident parent. The sums are reduced by one-seventh if the children stay overnight between 52 and 103 nights per annum, two-sevenths between 104 and 155 nights per annum, etc.

For a very useful aid in calculating the level of child maintenance, see the child maintenance calculator at www.cmoptions.org.

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It should be stressed that the CSA rules do not bind the Guernsey Courts, but are generally followed unless there is a good reason to the contrary.

Invariably child maintenance is paid until each child shall attain the age of eighteen years or cease to be in full time education or training, whichever shall be the later. These terms are included in every child maintenance order. As with spousal maintenance, child support will be index linked and increase annually in accordance with Guernsey RPI.

Child maintenance is usually paid monthly. The Court order should preferably specify payment by standing order into a nominated bank account.

In the event of default, proceedings will need to be issued in the Petty Debt Court.

As with spousal maintenance, child maintenance orders are capable of variation up or down if there is a significant change in the financial position of either party.

A well drafted child maintenance order should also make provision for the cost of university or higher education fees and maintenance. Provision should also be made for the possibility of a gap year. This usually requires no payment of maintenance for the actual gap year itself, with maintenance resuming once the child returns to education.

Child maintenance orders can also make provision for payment of school fees, cost of school uniform, clothes, extra curricular activities and medical and dental expenses.

Since 2003, tax relief is no longer available to the payer in respect of maintenance payments.

Unlike spousal maintenance, it is not possible to achieve a financial clean break between a parent and a child. A parent always has a duty to contribute towards the maintenance of their child. However in some circumstances, it is possible to capitalise payment of child maintenance so that the custodial parent receives or retains a particular asset in lieu of child maintenance and that parent will then assume sole financial responsibility for the children.

TRANSFER OF PROPERTY

Under Section 46 of the 1939 Law, the Court has power to order a sale/transfer of both real and personal property. Real property comprises houses and land. Personal property includes just about everything else including cash, chattels, bank accounts, cars, shares, life policies, etc.

Clearly for most people, the main asset will be the matrimonial home. The Court can make an order transferring the property from one party to the other, but this will be subject to third party rights such as those of a bank where monies remain owing under a mortgage. The Court cannot weaken the security required by a bank and any transfer is always subject to the rights of the lender, unless alternative security is available.

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Another type of order available to the Court is where the matrimonial home is retained in the joint names of the parties to accommodate dependent children. The order will specify when the house is to be sold and how the net proceeds are to be divided. This is usually referred to as a 'Mesher Order', after a Mr and Mrs Mesher who were divorced in England in 1980.

In Guernsey, the usual triggers for a Mesher Order are:

- The youngest child attaining the age of 18 years or ceasing full time education or training, whichever shall be the later.
- Voluntary sale by the custodial parent.
- Death of the custodial parent.

In England, remarriage and cohabitation are usually included as triggers. This is no longer the case here in Guernsey, following a decision of the Guernsey Court of Appeal in 2007.

Once a trigger has been activated, the house will be sold and the net proceeds divided in the percentage shares specified in the Court order. The starting point in determining the percentage split is an equal division, but a departure from an equal division may be appropriate depending on the facts of the case.

Mesher Orders are appropriate in cases where there are dependent children where it is not possible for the custodial parent to downsize. In any financial application on divorce, the dependent children are always the first consideration of the Court. In practical terms, this means that the Court should always look to accommodate the minor children. If it is not possible to downsize, then it may be that a Mesher Order is the only way of providing accommodation for the children.

In practice, Mesher Orders can be very difficult for all concerned. Whilst they meet the immediate needs of the children to be accommodated, such orders can be very restrictive for both parties.

For the custodial parent, such orders will often tie them to a particular property. Difficulties can also arise when third parties come on the scene and may be expected to contribute to the household expenses.

For the non-occupying party, the situation can be even worse. They will remain tied to the mortgage on the matrimonial home. They will be required to contribute not only child maintenance, but also towards the mortgage and upkeep of the property. For some, being on the wrong end of a Mesher Order can mean that they are condemned to rented accommodation until the order crystallises and the house is sold. If the children are very young this can be many years, and by the time the house is sold it may be that that party is unable to rejoin the property ladder.

All in all, Mesher Orders are often seen as making the best of a bad situation. However, it may be that a Mesher Order provides the only possible outcome in a case where the financial resources of the parties are limited and where the needs of the children require retention of the matrimonial home.

LUMP SUM ORDER

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As its name suggests, a lump sum order is payment of a specified sum of money. A lump sum order can provide for an immediate payment of money, or payment on a specified date or by instalments. If there is to be any deferment, then security is often required to guarantee payment. Provision may also need to be made for the payment of interest.

In practice, a lump sum order is a very flexible form of financial provision. It can, for example, be used to compensate one party for the transfer to the other party of their interest in the matrimonial home, the house contents, investments, savings or other assets.

ORDERS THAT THE COURT CANNOT MAKE

In Guernsey law, the Court cannot make the following orders:

- An order for pension sharing.
- Transferring debts from one person's name to another.
- An order for payment of an interim lump sum.
- An order transferring real or personal property before a decree of Judicial Separation, nullity or divorce has been granted by the Court. These orders can only be made once a decree has been granted.

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