

# How the court decides who gets what

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## GENERAL PRINCIPLES

The law relating to the division of assets on divorce is very complex. One of the main reasons for this is that the Court has a very wide discretion in deciding who gets what.

The rules of dividing assets on divorce are derived from the laws of Guernsey and England and from previous cases in both jurisdictions.

The law is very general in that it merely provides a list of what the Court may take into account. This list is derived from Section 25 of the Matrimonial Causes Act 1973. This is English law which has been imported into Guernsey divorce law by custom.

The decisions made in previous cases both in Guernsey and England can sometimes be helpful in showing how the Courts have applied the Section 25 factors. However, every case really is different and previous cases usually provide no more than general guidance.

The reality is that there are very few hard and fast rules in deciding who gets what on divorce. The upside of this is that the Court retains a great deal of flexibility to enable it to make whatever order is deemed to be fair on the particular facts of each case.

The downside of such a flexible approach is that this can sometimes create uncertainty in predicting the outcome of a case. The law cannot on the one hand be flexible and adaptable and yet be rigid and clear cut. These factors obviously work against each other.

Against this background, there are some guiding principles which can be distilled from established case law and statute.

The main rules of division can be summarised as follows:

- On divorce, the aim is to divide the assets fairly. Fairness does not necessarily mean an equal division. What it does mean is that the parties must be left in the position of equal standing and that there must be no discrimination between the respective roles of breadwinner and homemaker which are regarded as equal.
- First consideration must always be given to the needs of the dependent children. In practical terms, this usually means that accommodation must be provided for the children and the custodial parent. In some cases, this will require the custodial parent to retain the matrimonial home. Ideally if the available assets permit, the Court will always look to accommodate both parties.
- The starting point is an equal division of the assets. The Court is under a duty to consider all the circumstances of the case and in particular the Section 25 factors (see below) and then apply these to the facts of the particular case. Having considered the Section 25 factors, the Court may order an unequal division of the assets. The general rule is that assets should be divided equally unless there is a good reason to the contrary.

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- First and foremost, the Court will always look to meet the needs of each party to be accommodated. If these needs can be met from the available assets and if there is then a surplus, the Court may go on to consider dividing the remaining assets taking into account their origin. This requires dividing the assets into matrimonial and non-matrimonial property. Matrimonial property comprises those assets that have been acquired during the marriage from the joint enterprise of both parties. Most assets in most divorces comprise entirely matrimonial property. Non-matrimonial assets are those assets that have accrued outside the marriage ie. assets brought into the marriage by either party at the outset, assets that have accrued post separation or those assets that have been received during the marriage from a source wholly extraneous to the marriage. Examples of the latter include gifts and inheritances received from one side of the family. Once the reasonable needs of each party to be housed have been met, then any surplus may be divided unequally to take into account any unequal contributions. The financial contribution made by each party is one of the Section 25 factors. In practical terms, this is only likely to be relevant in cases where the assets are substantial.
- Wherever practical, the Court will seek to achieve a financial separation between the parties. This is called a clean break. This means that there will be no ongoing financial links between the parties save for child maintenance, if relevant. If a clean break cannot be achieved immediately, then the Court has the power to order spousal maintenance for a fixed period so as to achieve a clean break in the future. Alternatively, the Court may decide that a clean break is not possible and order spousal maintenance for life. In practice, most financial settlements are on the basis of an immediate clean break. Clean break settlements are not appropriate between parents and children; parents always have a liability to maintain dependent children.

## THE SECTION 25 FACTORS

As stated above, the Section 25 factors relate to Section 25 of the Matrimonial Causes Act 1973. This is English law which is imported into Guernsey law by custom.

The Guernsey law relating to finances on divorce is set out in the Matrimonial Causes (Guernsey) Law, 1939 as amended. This law provides no specific guidance as to what the Royal Court should take into account in dividing assets on divorce, which explains why we borrow the English law.

It must not be forgotten is that there are some areas where Guernsey divorce law differs to the English version. The main example of this relates to the treatment of pensions on divorce, but there are other differences and with this in mind the English law does need to be analysed carefully.

Under Section 25, the Court has a general duty to take into account "... all the circumstances of the case".

The phrase 'all the circumstances' enables the Court to take into account whatever factors it deems to be relevant, even if they are not specifically referred to in Section 25.

So what are the Section 25 factors and how are they applied in practice?

Section 25 says that the Court must focus specifically on the following, where relevant:

1. Welfare of the children.

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2. Financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.
3. Income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future.
4. The standard of living enjoyed by the family before the breakdown of the marriage.
5. The age of each party to the marriage and the duration of the marriage.
6. Any physical or mental disability of either of the parties to the marriage.
7. The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.
8. The value to each of the parties to the marriage of any benefit which by reason of the dissolution of the marriage that party will lose any chance of acquiring.
9. The conduct of each of the parties if that conduct is such that in the opinion of the Court it would be inequitable to disregard it.

## **1. Welfare of the children**

At the beginning of Section 25, the Court is directed to take into account the needs of any dependent children. This must be the 'first consideration' of the Court ie. the needs of the children always come first.

## **2. Financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future**

Whilst the various Section 25 factors are not ranked in order of priority, if they were need would be top of the list.

In short, need trumps all other considerations. By far the vast majority of cases are decided solely on the basis of need.

The Court will always look to provide viable accommodation for the dependent children and the custodial parent. In some cases, this consideration will consume all of the assets leaving nothing immediately available for the non-custodial parent. In this scenario, it is likely that an order will be made for a deferred sale of the matrimonial home, which is usually referred to as a Mesher Order. (See [Finances/Orders available](#))

If there are other assets available, then the Court will next look at providing accommodation for the non-custodial parent. Clearly, this is of great importance when the children will enjoy regular staying contact with the other parent.

In cases where there is to be a shared residence order, it may be argued that both parties have an entirely equal need in terms of accommodation. If the parties have similar incomes and resources then it could be argued that equal need plus equal resources results in equal outcome ie. an equal division of all assets, but this very much depends upon what assets are available.

In cases where the assets are substantial and far exceed the reasonable needs of each party to be accommodated, it may be that the other Section 25 factors will be of greater importance.

In considering need, the Court will always look at the respective incomes and outgoings of each household. This may require a detailed analysis of the budget for each household.

If one or both parties have remarried or cohabit or intend to do so imminently, the Court can take into account the new partner's income and resources. If the new cohabitee or spouse is to provide accommodation, then this can have a major impact on the ultimate outcome. If the needs of the divorcing party to be accommodated are met by their new partner's resources, then that party may find it difficult to claim a need to be accommodated using the assets of the marriage. This can cause difficulties in cases where the new relationship is short lived or where there is a factual dispute as to whether a party is in fact cohabiting.

### **3. Income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future**

The income of each party is often a critical aspect of each case.

In considering income, the Court may take into account bonus and commission payments. The Court will often look at the history of such payments and assess what is likely to be received in the foreseeable future on the basis of what has been received in the past.

Courts will also take into account fringe benefits and perks such as company cars, petrol, payment of phone bills, pension payments, etc.

The Court will take into account not only the current income of each party, but also potential income. The general rule is that each party is expected to maximise their income. This can cause some difficulty where there are young children to be cared for. There are previous cases where the Court has decided that the custodial parent should return to work when the youngest child attends secondary school, but there are no fixed rules in this difficult area and financial necessity may require both parents to work full time even when the children are young.

The income and potential income of the parties is also important in that it determines mortgage capacity, which is often a critical factor directly linked to providing accommodation.

Another common issue is the income of any new partner. The rule is that if a party has remarried or is cohabiting, then the new partner's income can be taken into account in so far as it releases more of the payee's income for maintenance to be paid to the former spouse or children.

Clearly, the value of the assets and financial resources of the parties are critically important. Whatever the needs of the parties, the Court can only divide the available assets.

The Court adopts a very wide definition of 'property'. It covers just about every kind of asset including real property and interests in property such as tenancies or contingent interests, savings, life policies, investments of any kind, trust interest, pensions, retirement annuity trusts, shares, business interests and chattels including contents of the matrimonial home, livestock, cars and any other assets of value.

Courts can also take into account not only the assets that each party has now, but also the assets that are likely to be received in the foreseeable future.

The issue of future inheritance may be raised by one or both parties. The general rule is that future inheritances are not taken into account.

The Court can take into account the value of a business. This includes sole traders, partnerships and shares in limited companies. The value of a business can be extremely important, particularly so after a long marriage and where the business is of significant value. If the business is to be retained then it will need to be valued by a forensic accountant. This is usually done by way of a joint valuation. The valuation of a business is a complex exercise and the method used to value the business very much depends upon the nature of the business itself. In practice, it is extremely unlikely that the Court would order the business to be sold or for the other party to be given a direct interest. The more common approach is for the business to be retained by one party and for the other spouse to receive other assets in lieu. The family business is usually the main source of financial support for the family and for this reason it will be preserved wherever possible.

Pensions are another asset that will be taken into account. Unlike England, Guernsey has no pension splitting provision. This means that a Court cannot order division of a pension fund, but it can be done by consent if the parties, the pension company and the States Tax Office all agree.

Pensions are valued on the basis of their Cash Equivalent Transfer Value (CETV). Despite its name, the CETV of a pension cannot be regarded as a readily available liquid asset. A pension fund is nothing more than an income stream over which the parties do not have control. That said, in cases where there is a significant disparity in the pension provision for each party then this should be taken into account. In Guernsey, this is usually achieved by allowing the party with the lesser or no pension provision to retain a greater share of the other assets. This is called 'set off'. As to calculation of the amount of the set off, this is something of a dark art for which there is very little judicial guidance.

Further, offsetting assets is clearly not possible in cases where there are no other matrimonial assets to be divided. All in all, the situation regarding pensions on divorce is somewhat unsatisfactory and needs reform.

#### **4. The standard of living enjoyed by the family before the end of the marriage**

This factor is usually only relevant in cases where the assets are substantial and far exceed the reasonable needs of the parties. In a needs case where all of the available assets are taken up accommodating one or both of the parties, the standard of living consideration is of lesser importance.

The reality of divorce is that the standard of living for both parties is likely to fall.

However, in cases where the assets are substantial and where the parties were able to maintain a good or high standard of living during the marriage then this can be a relevant fact.

#### **5. The age of each party to the marriage and the duration of the marriage**

The age of each party can have an important bearing on the decision of the Court. If the parties are young and are financially independent, then almost certainly a clean break will be imposed so that there are no ongoing links between the parties.

Younger parties will also retain a larger mortgage capacity than those parties divorcing in their 50's or older. Mortgage capacity can be crucial to the issue of retention or sale of the matrimonial home.

The length of the marriage is also an important factor. The longer the marriage, the greater the obligations between the parties and the more difficult it may be to achieve immediate independence upon marital breakdown.

In the case of a short childless marriage, the Courts will generally seek as far as possible to return the parties to their financial position as it was at the time of the marriage and impose a clean break settlement. A clean break settlement may not be possible in the case of a long marriage, where one party has taken a career break to raise children and is now disadvantaged in the labour market with far less income and earning capacity. These factors should be taken into account in dividing the capital assets. If one party has a far greater income, the other party may receive a greater share of the capital as part of the balancing exercise required by Section 25.

In short marriage cases where there are young children, the shortness of the marriage may be of lesser significance. This is because the children will almost certainly restrict the ability of the custodial parent in returning to immediate full time work and thereby achieving financial independence.

What must also be borne in mind in considering the length of the marriage is that in some circumstances, the Courts can now take into account pre-marital cohabitation. There is case law which suggests that where the cohabitation moves 'seamlessly' into marriage, then this can be taken into account as one of the 'circumstances of the case'.

## **6. Any physical or mental disability of either of the parties to the marriage**

If either of the parties is physically or mentally disabled, then this may impact on income and earning capacity and also their accommodation needs, expenses and life expectancy. If relevant, all of these factors can be taken into account.

## **7. The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family including any contribution by looking after the home or caring for the family**

The Courts have on many occasions made it clear that the contribution of the custodial parent in raising the children is entirely equal to that of the breadwinner. The contribution of each party is seen to be entirely equal on the basis that there must be no discrimination. The Courts have made clear that domestic contributions should not be undervalued simply because they cannot be quantified in the same way as economic activity.

Contributions also cover assets brought into the marriage either at the beginning or monies or other assets received during the marriage by way of gift or inheritance by one of the parties. In practice this can be a very contentious issue, particularly in cases where substantial assets have been received from only one side of the family.

The reality is that need trumps contribution. First and foremost, the Courts will always look to accommodate the parties before taking into account the source of the assets. On this basis, contributions are only likely to be relevant in cases where the matrimonial assets are substantial.

## **8. The value to each of the parties to the marriage of any benefit which by reason of the dissolution of the marriage that party will lose any chance of acquiring**

This is one of the lesser factors but can be very relevant, especially in cases involving pensions. Upon death after divorce the surviving party will not be regarded as a widow. Unless specific provisions are made to the contrary, the survivor is unlikely to receive any entitlement under the deceased's pension. Any loss of pension rights on divorce must be factored into the overall settlement, so that the party losing out should be compensated by receipt of other assets.

### **9. The conduct of each of the parties if that conduct is such that in the opinion of the Court it would be inequitable to disregard it**

Conduct in this context means exceptionally bad behaviour. Many years ago, the English Courts decided that in dividing assets on divorce they would only take into account misconduct if it could be regarded as exceptionally bad. Guernsey has followed this rule.

In practice, conduct is very rarely taken into account in dividing assets on divorce. Whilst conduct may easily satisfy the test of unreasonable behaviour for the purposes of obtaining a divorce, this is very different from satisfying the test that conduct should be taken into account in division of the assets.

Examples of such behaviour include attempted murder, extreme violence or child abuse.

One of the great urban myths regarding divorce is that the innocent party will retain all or most of the assets on divorce, where the other party has committed adultery or not behaved particularly well. This is simply not correct. Whilst such behaviour may be grounds for divorce, the Court will not take into account such conduct in dividing the assets. Some find this concept unfair and will often plead that they are the innocent party. These arguments may well have great moral force but legally carry no weight.