COLLAS CRILL

Finances: Common family law questions

DECEMBER 2020

CAN I LEAVE THE MATRIMONIAL HOME?

This will always depend upon the particular facts of the case.

The usual advice is not to leave the matrimonial home unless this is absolutely necessary for reasons for safety. However, if you do leave the property you can always return at any time unless a court order has been made preventing your return. In practice, injunction orders ousting a party or preventing their return are regarded as draconian and will only be made in cases involving violence or other serious conduct.

If you are contemplating leaving the matrimonial home the obvious advice is to consult an advocate urgently.

WHAT IS A CLEAN BREAK SETTLEMENT?

This is a financial settlement made on divorce where there are no ongoing financial links between the parties. A clean break can be in relation to spousal maintenance or capital, or both. Most financial settlements on divorce are clean break settlements and cover both maintenance and capital.

There can never be a clean break settlement between parents and children but it is possible to capitalise child maintenance so that the custodial parent retains a lump sum or other assets in lieu of maintenance on the basis that they will maintain the children.

CAN I CHANGE THE LOCKS?

If you are married or if you jointly own or rent a home then neither party has the right to lock the other out. Both parties have a right to continue to occupy the family home until and unless an order is made by the Court. In the event that you are locked out of your property or you need protection you must seek urgent legal advice.

ARE PRENUPTIAL AGREEMENTS BINDING?

Prenuptial agreements cannot bind the Court. The general rule is that on divorce, the Courts always retain the right to decide how the assets are divided whatever may be written in an agreement. Neither party can restrict the powers of the Court in any way.

However, in recent years, the Courts have shown an increasing willingness to uphold prenuptial agreements in cases where they provide for a fair outcome. In considering whether a prenuptial agreement should be upheld, the Court will look to see if particular safeguards have been followed at the time the prenuptial agreement was signed. These safeguards usually include whether either party entered into the agreement under duress, whether each party received independent legal advice at the time the agreement was signed and whether

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financial disclosure was provided by each party. If these conditions are met and the overall agreement provides a fair outcome then the Court may follow some or all of the terms of a prenuptial agreement.

IS IT ALWAYS 50:50?

No it is not. The starting point in dividing assets on divorce is that there should be an equal division but this is just the starting point. The Court will then look at all the circumstances of the case and apply the facts taking into account the Section 25 factors set out in the Matrimonial Causes Act 1973. This section sets out a whole series of fairly obvious considerations that are likely to be taken into account.

Having considered all the facts of the case and applying these to the Section 25 considerations, the Court may then adjust the division in favour of one party or the other. The Court will then analyse the proposed division against what is called the 'yardstick of equality' i.e. to what extent the settlement deviates from an equal division and to what extent it is fair to do so.

The general rule is that equality should be departed from only to the extent to which it is fair to do so. Fairness does not necessarily mean an equal division. It means 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.

DO THE COURTS FAVOUR WOMEN?

The general perception is that the Courts favour women in dividing the assets on divorce but there is no evidence to support this. The law clearly states that there must be no discrimination between men and women and their respective roles.

A typical scenario is where a wife may have taken a number of years away from work to raise children. This may then result in an unequal division of the capital assets to compensate the wife for her reduced income and earning capacity upon her return to work. This is all part of the balancing act carried out by the Court when considering the Section 25 factors. However, this should not be perceived as the Court favouring women, but simply an attempt by the Court to produce a fair outcome.

WILL MY SPOUSE GET HALF OF MY BUSINESS?

In most cases the value of a business will be taken into account on divorce. The value of a particular business may be very important particularly after a long marriage and where it has significant value.

On divorce, it is very unlikely that a Court will order a business to be sold. The income derived from a family business is usually the main source of financial support for the family so the business will need to be preserved if at all possible. Similarly, it is very unlikely that the other party will be given a direct interest in the business as this is likely to lead to ongoing conflict which could ultimately damage the business. If a business is to be retained, the more common approach is that one party will receive assets to compensate for the other party retaining the business, or for orders to be made by way of ongoing spousal maintenance to take into account the income derived from the business.

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CAN I KEEP MY INHERITANCES?

Inheritances received during a marriage often cause difficulties on divorce.

It may be argued that an inheritance is an unmatched contribution made by one of the parties received from a source wholly extraneous to the marriage. However, it is clear from the case law that inherited assets cannot be quarantined or excluded from the schedule of assets.

The fundamental rule on divorce is that all of the assets will be taken into account and that a special allowance for any inheritance will only be made in cases where the parties' needs and the needs of the dependent children are adequately met without recourse to the inherited property.

In practice this means that the source of a particular asset, be it a gift or an inheritance, is only likely to be taken into account in a case where the assets are substantial and where each party's need to be accommodated can be met from the available assets. Once those needs have been met, then any surplus may be divided taking into account the origin of a particular asset. The Court will also look to see whether the inherited assets have been mixed with the other matrimonial assets and will also consider the length of the marriage. In short, the more the inheritance has been mixed with the other matrimonial assets and the longer the marriage, the less likely the Court will have regard to inherited assets.

HOW MUCH CHILD MAINTENANCE WILL I HAVE TO PAY?

This depends upon the income and needs of each household.

As guidance, the Royal Court will generally look to the rules of the English Child Support Agency (CSA). These rules provide that an absent parent is liable to pay 15% of their net income if there is one child, 20% of net income if there are two children or 25% of net income if there are three or more children. These sums are then reduced depending upon the number of nights that the children spend with the absent parent. The reduction is one-seventh if the children have staying contact between 52 and 103 nights per annum, two-sevenths between 104 and 155 nights per annum, etc.

However, it cannot be emphasised enough that these are nothing more than guidelines and that ultimately fixing the level of child maintenance is always a matter for the Court balancing income against reasonable needs of the children.

CAN I APPEAL?

In matrimonial cases, an appeal will only succeed if the original decision was 'plainly wrong'. In other words, the Court must have made a fundamental error in understanding the basic facts of the case or the relevant law. In practice, this is very rare.

The Matrimonial Court has a very wide discretion in deciding who gets what on divorce. In practice, this means that unless the Royal Court has made a major mistake, then it is generally very difficult to persuade the

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Appellate Court that the original decision should be changed on appeal even if the Court of Appeal might have made a different decision to that of the lower Court.

Any appeal from a decision of the Royal Court is heard by the Guernsey Court of Appeal. The general view of the Appellate Court is that they should be slow in overturning a decision of the lower Court when the trial Judge had the benefit of hearing live evidence from the parties.

WHAT IF I COHABIT?

If you cohabit before your divorce has been completed or before your financial settlement has been finalised, then there are two possible consequences:

You risk the possibility of your spouse issuing a petition on the grounds of your adultery. You risk the possibility of your new partner's finances being taken into account in your divorce.

Also, if a party is already cohabiting then this can weaken their argument that they need a share of the matrimonial assets to be re-housed.

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