

Family Law An Overview for Non-lawyer Mediators

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Topics

- Legal Framework
- Divorce
- Children
- Finances / Property
- Co-habitation



Legal Framework

- Matrimonial Causes Ordinance (Cap. 11.04)
- Family Law (Guardianship, Custody and Access to Children Ordinance (Cap. 11.05)
- Domestic Proceedings Ordinance (Cap. 11.03)



Domestic Proceedings Ordinance



- Came into force on 7 April 1986
- Jurisdiction is the Magistrate's Court
- Deals with:
 - Spousal and child maintenance outside of divorce
 - Protection against domestic violence against a party to a marriage or a child of the family
 - Affiliation (declaration of paternity)

Family Law (Guardianship, Custody and Access to Children Ordinance)

- Came into force on 1 October 2016
- Jurisdiction is the Magistrate's Court*
- Deals with:
 - Custody, access and maintenance of children
 - Protection from Harassment

*The Supreme Court has jurisdiction where it is already dealing with the child for other reasons

Matrimonial Causes Ordinance



- Came into force on 28 December 2012
- Jurisdiction is the Supreme Court
- Deals with:
 - Divorce (Nullity and Judicial Separation)
 - Custody and access to children (in divorce)
 - Child Maintenance (in divorce)
 - Financial claims in divorce (ancillary relief)
 - Matrimonial property

Divorce



Divorce

In order to be able to present a petition for divorce the parties have to have been married for a period of 3 years.

It is a 3-limb application:

- The Divorce – the legal dissolution of the marriage
- Children – custody, access and maintenance
- Ancillary Relief – spousal maintenance and property adjustment



Dissolution of the Marriage



- There is just 1 ground for divorce which is the irretrievable breakdown of the marriage.
- This must be proved by 1 of 5 facts:
 - a) Adultery.
 - b) Unreasonable behaviour.
 - c) Desertion for a period of at least 2 years.
 - d) The parties living apart and/or separately for a period of 2 years or more and the respondent consents to the divorce.
 - e) The parties have lived apart for a period of 5 years or more.

Dissolution of the Marriage



It is a 2-stage process:

1. Decree Nisi – this is the 1st decree from the court and confirms that the petitioner has made out the claim for divorce.
2. There is then a cooling off or reflective period of 6 weeks after which an application for Decree Absolute can be made. The pronouncement of Decree Absolute is the legal termination of the marriage.

Dissolution of the Marriage



- Decree Absolute cannot be granted until the court has declared that the arrangements for the welfare of the children of the family are satisfactory.
- Welfare includes:
 - Custody and access
 - Education
 - Financial provision

Questions and Answers



Children



Children



The main issues that arise in respect of children are:

1. Custody.
2. Access (by the non-resident parent) ('NRP').
3. Child maintenance.

Other issues are:

- a) Specific issues, for example:
 - choice of school.
 - whether the child can travel out of the jurisdiction.
- b) Prohibitive steps, for example:
 - Not to remove the child from the country.
 - Not to let the child come into contact with specified persons.

Custody



Custody is a misunderstood term. It is the declaration of parental responsibility over a child.

It differs from one parent having day to day care and control of the child which is what most people understand as custody.

In most cases the appropriate result will be a joint custody order with one parent having day to day care and control over the child and the non-residential parent having access.

Custody



It is possible for the day to day care and control to be divided between the parents but practically such arrangements are not easy to manage and give rise to instability.

Parental Responsibility



This is inherent in custody of the child.

In the England and Wales this is now a separate concept and can be granted independently of residence (day-to-day care and control).

Parental responsibility is defined in the Children Act, in England and Wales, as being *“all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”*.

Parental Responsibility



It is suggested that the concept includes:

- To take, on behalf of the child, all of the many and minor decisions that arise everyday.
- To maintain contact with the child (NRP).
- To actively consider and provide for the child's education.
- To actively consider the need and provide for medical treatment on the child's behalf.

Parental Responsibility

- To administer the child's property.
- To actively consider the wisdom of and consent or otherwise to the child's marriage between the ages of 16 to 21.
- To protect the child from physical and moral danger.
- To maintain the child financially.



Access

Access is term given to the parent who does not have day-to-day care and control of the child (NRP).

This leads to issues over who the child will be with on weekends and school holidays.

Invariably the absent parent will end up spending less time with the child which is often the source of difficulty in getting parents to agree arrangements.



Other issues

Other issues that arise from the Custody and Access arrangements can include:

- Choice of School.
- Contact with new partners of the parents.
- Hand over of the child for access and return (particularly if there are issues of domestic violence).
- Supervised access in circumstances where it is deemed not appropriate for the child to be with a parent unsupervised.



Considerations

- When considering arrangements for children, the paramount consideration is the welfare and best interests of the child ('the Paramountcy Principle').
- This may or may not align with what the parents desire.
- It is not uncommon for one parent to attempt to use custody and access as a 'tool' to get at the other.



The Welfare Checklist



The matters to which consideration need to be given when making arrangements for children include:

- a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- b) His/her physical, emotional and educational needs;
- c) The likely effect on him/her of any change in his circumstances;
- d) His/her age, sex, background and any characteristics of him/her which the court considers relevant;
- e) Any harm which he/she has suffered or is at risk of suffering;

The Welfare Checklist



- f) How capable each of the parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his/her needs.

This is commonly known as the welfare checklist which has its origin in the Children Act 1986 in England and Wales.

The Paramountcy Principle



The matters to which consideration need to be given when making arrangements for children include:

- a) A parent's conduct. This may be considered only to the extent that it is relevant to the child's welfare and best interests.
- b) Regardless of a child's age it must not be presumed that placing a child in the day-to-day care of a particular person will, because of that person's gender, best serve the welfare and best interests of the child.
- c) A child's parents or guardians should have the primary responsibility, and be encouraged to agree to their own arrangements, for the child's care, development and upbringing.

The Paramountcy Principle



- d) There should be continuity in arrangements for a child's care, development and upbringing, and the child's relationship with his family should be stable and ongoing (in particular, the child should have continuing relationships with both of his parents or guardians).
- e) A child's care, development and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with the child.
- f) Relationships between a child and members of his family should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development and upbringing.

The Paramountcy Principle



- g) A child's safety must be protected and, in particular, the child must be protected from all forms of violence (whether by members of his family or by other persons).
- h) A child must be given reasonable opportunities to express views on matters affecting him.
- i) Any views a child expresses (either directly or through a representative) must be taken into account.

Questions and Answers



Child Maintenance



Child Maintenance



This accounts for most of the applications that come before the court.

Generally, these are applications by mothers against errant fathers.

It is a difficult problem to solve in this jurisdiction as frequently there are a number of children, to different mothers, and low income levels.

There is no legislation in the TCI that prescribes how child maintenance is to be calculated.

Child Maintenance

In 1993 child maintenance jurisdiction was taken away from the courts in the UK and placed in the Child Support Agency ('CSA') under the auspices of the Department of Work and Pensions.

The formula applied by the CSA was complex and took into account up to 108 different criteria and resulted in a an amount to be paid by the NRP of between a $\frac{1}{4}$ to a $\frac{1}{3}$ of net disposable income.



Child Maintenance



The CSA came under much criticism and by 2011 arrears stood at £3.8bn.

In 2012 responsibility passed to the Child Maintenance Service ('CMS') under the management of a new Child Maintenance and Enforcement Commission and new legislation.

Child Maintenance

Although a more simplified formula is now employed by the CMS it is still not straightforward but the starting point is the net weekly income of the NRP.

Matters then taken into consideration are:

- Other children the paying parent is paying maintenance for.
- The number of nights the children live with the NRP.



Child Maintenance



The formula for child maintenance is now a fixed percentage of:

- 15% for one child.
- 20% for two.
- 25% for three or more.

The amount of maintenance is also reduced if the NRP has children in their current family. Where this is relevant, credit is given of:

- 15% if there is one child living with them.
- 20% if they are two children living with them.
- 25% for three or more.

Child Maintenance



A worked example

- There are 2 children of the relationship who live with the claimant mother.
- Both were born after his 1st child for whom he already pays maintenance by order of the court.
- He also has a further child who lives with him.
- Father earns a net income of \$500 per week.

Child Maintenance



\$500.00 per week*

- A deduction of 15% is given for the child living with father which reduces the available income to \$425.00.
- A further deduction of 15% is made for the maintenance he is already paying leaving available income of \$350.00.
- Child maintenance of \$70.00 would be payable.

*Note that a 40 hour week at the new minimum wage of \$8.00 an hour gives a wage of \$320.00.

Questions and Answers



Ancillary Relief



Ancillary Relief



Ancillary Relief is the term given to the consideration of distribution of marital property and maintenance of the parties post divorce.

It is ancillary as the court is only empowered to make matrimonial financial orders ancillary to divorce.

A matrimonial financial claim remains alive even after Decree Absolute, so it is important that an order is made even if the parties are financially equal or do not wish to make a claim.

Ancillary Relief



There are a number of different orders that the court can make:

- a) an order that either party to the marriage shall make to the other periodical payments, (spousal maintenance).
- b) an order that either party to the marriage shall pay to the other a lump sum payment.

Ancillary Relief



- d) an order that a party to the marriage shall make for the benefit of a child of the family, or to the child, periodical payments.
- e) an order that a party to the marriage shall pay for the benefit of a child of the family, or to such a child, a lump sum payment.

Ancillary Relief



Matters to be considered in financial/property claims.

- a) the 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.
- b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.
- c) the standard of living enjoyed by the family before the breakdown of the marriage.

Ancillary Relief

- d) the age of each party to the marriage and the duration of the marriage.
- e) any physical or mental disability of either of the parties to the marriage.
- f) the contributions which each party to the marriage has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by looking after the home or caring for the family.



Ancillary Relief



- g) the value to either of the parties to the marriage of any benefit (for example, a pension) which that party will lose the chance of acquiring as a result of the divorce.
- h) the conduct of each of the parties if that conduct is such that it would in the opinion of the court be inequitable to disregard it.

Ancillary Relief – General Principles



General Principles

- All matrimonial property is taken into consideration regardless of legal ownership. This includes business assets or shareholdings.
- Pre-marriage assets fall into the matrimonial pot.
- Pre-nuptial agreements are generally not enforceable, but can be used to show the parties' intentions. The longer the marriage the less relevant.
- Assets acquired after separation but before a financial settlement is achieved, are not claimable, but are relevant when considering the division of matrimonial assets.

Ancillary Relief – General Principles



- The length of the marriage is relevant. If very short, then a claim may not be appropriate or maintenance may be time-limited.
- The aim is to place the parties, so far as it is practicable, in the financial position in which they would have been if the marriage had not broken down.
- A party's new partner's/wife's/husband's assets cannot not be claimed but their income is relevant insofar as it frees up the other party's living costs.

Ancillary Relief – General Principles



- Maintenance payments can be for a limited time period but in longer marriages they generally continue until the receiving party either remarries or dies.
- If at all possible we try to get to a clean break position rather than on-going maintenance.

Clean Break



- A clean break financial result means that the assets are divided such that the parties can go their separate ways.
- This can be achieved by giving the party entitled to maintenance, a larger share of the real property to 'buy-out' the maintenance (periodical payment) claim.

How to value the claim



Where do we start?

- Determine the assets.
- The starting point is then a 50/50 division.
- The percentage is then shifted having consideration of the principles we have already discussed.

The Matrimonial Home



The matrimonial home is in many cases the largest and most important asset.

Both parties have a right of occupation even if the legal title is vested only in one of them so the court can order who should be allowed to occupy.

Problems invariably arise if there are insufficient assets/income to allow for another property to be purchased or if a sale of the matrimonial home will not generate sufficient funds for both parties to re-locate.

The Matrimonial Home



Possible Solutions

- A sale of the property. The equity released can then be divided.
- One party transfers their interest in the property to the other (possibly by way of buying out a maintenance claim) but this can be problematic if there is a mortgage.
- One party buys out the other's interest.

The Matrimonial Home



What if there are insufficient funds for one of the parties to remain in the property and service the mortgage?

Even if one party can afford to take over the mortgage, it should be noted that the court cannot make orders against a lender, for example, to release one of the parties from the loan. The lender must consent.

The Matrimonial Home



A mechanism that is frequently used is that one party is allowed to have occupation of the home to the exclusion of the other and the excluded party's interest is deferred.

They both remain liable for the borrowing and the realisation of the absent party's interest is deferred to a later time, for example:

- a) Until the youngest child has attained the age of 18 or completes full time education, if longer (known as a 'Mesher' order); or
- b) Upon the happening of a specific event such as re-marriage or co-habitation (known as a 'Martin order').

The Matrimonial Home



In such circumstances, the occupying party will normally be required to account for an occupational rent which is usually equated to the interest portion of the mortgage payment.

Questions and Answers



Co-habitation



Co-habitation



Co-habitation is when a couple live together but are not married. They have to show that they had a 'settled' relationship which they intended to be permanent.

There is presently no civil partnership law giving the same or similar rights to a non-married partners (whether same sex or not) in the TCI.

There is no such thing as a common law wife/husband.

Co-habitation



This means that co-habiting does not give right to any claim for maintenance (other than child maintenance) or other ancillary relief.

Co-habitant Property Claims



To understand co-habitant property claims it is necessary to understand the 2 co-existing titles of ownership of property, that is :

1. The legal title; and
2. The beneficial title.

The 2 titles can be held by the same person but do not necessarily have to be. The beneficial ownership is held on trust by the legal owner.

Co-habitant Property Claims



Example 1

- A intends to purchase a property.
- He incorporates a company, B Ltd. of which he is the sole shareholder. B Ltd. has the sole purpose of being a land holding company for that property.
- A company is a legal person capable of owning property.
- The property is sold to B Ltd. who is recorded on the land register as being the proprietor (owner).

Co-habitant Property Claims



Result

- B Ltd. is the legal owner of the property.
- As all the shares in B Ltd. are owned by A, he is the beneficial owner of the property.
- B Ltd. holds the property on trust for A.

Co-habitant Property Claims



Example 2

- A intends to purchase a property.
- He incorporates a company, B Ltd. of which he owns 50% of the shares and his wife C owns the other 50%. B Ltd. has the sole purpose of being a land holding company.
- All the money for the acquisition comes from A.
- The property is transferred to B Ltd. who is recorded on the land register as being the proprietor (owner).

Co-habitant Property Claims



Result

- B Ltd. is the legal owner of the property.
- As all the shares in B Ltd. are owned in equal amounts by A and C, they are joint beneficial owners of the property.
- B Ltd. holds the property on trust for A and C in equal shares notwithstanding all the money came from A.
- This would be the case whether or not A and C were married.

Co-habitant Property Claims



Example 3

- A intends to purchase a property.
- He incorporates a company, B Ltd. of which he owns 50% of the shares and his wife C owns 25% of the shares and his brother D owns the other 25%. B Ltd. has the sole purpose of being a land holding company.
- 75% of the purchase price for the acquisition comes from A, and the 25% balance comes from D.
- The property is transferred to B Ltd. who is recorded on the land register as being the proprietor (owner).

Co-habitant Property Claims



Result

- B Ltd. is the legal owner of the property.
- A and C and D are joint beneficial owners of the property.
- B Ltd. holds the property on trust for A, C and D in the amount of their respective shareholding.
- In the event the property is sold, A is entitled to 50% of the net proceeds of sale, C and D 25% each.

Co-habitant Property Claims



So how does this relate to co-habitant property claims?

There are a number of ways a co-habitant can claim an interest in the co-habitational home.

- Co-ownership.
- Payment towards the purchase price.
- Common intention inferred from conduct.
- Express agreement.

Co-ownership



Co-ownership is declared on the transfer when the property is acquired and is shown on the land register. Property can co-owned in 2 ways:

The legal title is transferred into the names of both parties.

The beneficial ownership is then expressed to be either:

- a) as joint tenants; or
- b) tenants in common.

Co-ownership



Joint tenants

- If the beneficial interest is held as joint tenants then both parties have an equal interest in the property regardless of financial contribution.
- Importantly, should one joint tenant die then his/her interest passes automatically to the other. This happens even if the deceased has left his/her interest to someone else in a will.

Co-ownership

Tenants in Common

- Holding the beneficial interest as tenants in common means that the co-owners can agree that they have different interests in the property to reflect, for example, different contributions to the purchase price.
- The beneficial interest as a tenant in common also does not automatically pass to the other co-owner. The interest can be left in a will or, if there is no will, it will pass under the rules of intestacy.



Co-ownership



Co-ownership does not raise significant issues in the breakdown of a relationship as the respective interests will have been expressed in writing.

Disputes can arise as a result of allegations of duress or fraud.

Careful pre-planning is advantageous to prevent an adverse outcome in the event one of the parties dies.

Payment towards the Purchase Price



If X provides the whole or part of the purchase price of a property and it is transferred to Y solely, there is a presumption that X intended to benefit from his contribution.

This 'results' in Y holding the property on trust for X and Y. This is known as a 'resulting trust'.

Common Intention Inferred from Conduct



It is possible, where the legal title of property is vested in 1 of the parties, for the other to claim an interest in the property.

For example, where that other party has acted to their detriment by making payments towards the mortgage, with the common intention that they would acquire an interest in the property.

The common intention is inferred from the conduct of the parties.

This will very much depend on the individual facts of the case.

Common Intention Inferred from Conduct

The claiming party will have to show that based on the conduct of both parties:

- a) There was a common intent to acquire an interest in the property; and
- b) That the claiming party acted to their detriment in reliance of that conduct (by making a direct contribution to the purchase price).



Express Agreement



In contrast to Inferred Common Intention, a claimant may be able to establish an interest by showing evidence of an express agreement that if the claiming party acts to their detriment then they will acquire an interest in the property.

Express Agreement



In this kind of case it is not necessary that the detriment is a direct contribution to the purchase price. It could be for example:

- a) Where the parties agreed that if the claiming party pays for general household expenses and for the food, freeing up the other party's income so that they can pay the mortgage.
- b) It need not be a financial contribution. Extensive improvements to the property may be sufficient.

Constructive Trusts



Where property ownership arising from Common Inferred Intention or by Express Agreement is found to exist then the property is said to be held by the legal owner on a constructive trust for the parties.

Quantification of a Beneficial Interest



Once a trust is established, it is necessary to quantify the extent of the interest.

- If the parties have declared their respective shares in which they hold the beneficial interest then that is the end of the matter.
- In the case of resulting trusts, then the share is directly referable to the extent of the financial contribution.
- In an implied trust the shares are determined by the parties' intentions.

Closing Questions and Answers

