

enormous amount from each other. What you can't do for yourself, you can do for others.

One client said last week, 'I always encourage my children to go for contact now, because I will never get out of my head that X said if she could have her time again she wouldn't have involved the children in the conflict and denigrated their father because she really ruined their childhoods.'

I truly believe that if there is no other justification for a support group that justification is enough.

Personal experiences

Another client in a group did nothing but talk about her ex. Not herself, but her ex until three others told her to stop and that they wanted to know about her and they weren't interested in him. Every time she forgot and relayed another story about him, the others wouldn't let it go. She left the group at the end of the sessions with a totally changed sense of self worth.

A man who was in the group because his ex was not allowing him to see the children, learnt from others that in leaving his wife for another woman, she felt she had no voice and no control and manipulating the children was the only she could have some control. It was not something that had occurred to him. He reported back over the weeks to the group that the dialogue with his ex had changed because he allowed her to tell him how angry she was and allowed her to have some control as to what was happening in her life in relation to his contact. As the group sessions finished, he was beginning to see his children again.

There are many examples of the benefits of the groups to people. Perhaps importantly, they are very useful when people are going through the process as they enable lawyers to engage in the real job they are instructed to do, because the emotional issues are being taken care of elsewhere.

Beyond the legal perspective

I believe that we have a duty as family lawyers to see the whole picture, to see beyond the legal perspective informed by the client's story and to offer support through referral in order to truly help clients. Ignoring angry outbursts or huge distress, ignoring skewed perceptions fuelled by loss does not provide a service. Of course, a conference room or an office is not the appropriate venue to explore any of those issues. Nor is it appropriate in our capacity as lawyers instructed to do a job to explore any of those issues. A sympathetic ear and a box of tissues is all that we can aspire to within the context of a lawyer/client relationship. A recognised referral takes support into a whole new dimension; a multi-agency approach recognises that problems do not exist in a vacuum.

As a practising barrister, I have tried to approach cases 'holistically', to refer to family therapists, couple counsellors, child and adolescent psychiatrists when I have felt it necessary.

Now, running divorce support groups, I refer clients to lawyers who I feel have what I call a 'resolution' approach to law. Everything comes full circle.

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Financial Provision for Spouses in Middle Age

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Introduction

Separation and divorce can derail even the best plans. We live in changing times and no one knows if the recent economic changes have set the tone for the future. Married couples separating in middle age need to take particular care to achieve a fair settlement not just in the immediate term but also to cover future retirement planning. Inflation and the issues around personal borrowing are perhaps at the centre of current worries and have changed the personal economic outlook for many. Coupled with the longer standing inadequacy of most UK pensions, today's pressures mean proper financial planning requires a different perspective and approach. Those in middle age face particular issues due to reduced timescales in the current difficult times.

In this article we look at the financial background facing the majority of spouses in middle age, and then at the situation for those whose marriages or civil partnerships (we will refer to all as spouses) break down.

What particular pressures do middle-aged spouses face?

A high proportion of financial advice sought by those from age 45 to 60 relates to retirement planning and debt repayment before retirement. A Fidelity survey (May 2008) found that, on average, workers suffer over a 50% fall in income at retirement. With levels of borrowing at their highest and UK household savings at their lowest since 1959, the ability to save towards retirement is compromised and the nearer one is to retirement, the more expensive saving for retirement becomes.

The prospects for those in retirement are equally depressing. The Fidelity survey reveals that socio-economic groups A and B have high expectations of expenditure in retirement. Expensive holidays, health care, children and grandchildren are among expected higher expenses. Lower socio-economic groups report their expenses will need to be cut, but they will not cut back sufficiently in proportion to their likely actual income at retirement.

Recent inflation (CPI) figures are not good, but not as bad as the underlying annual rate of inflation for 'the essentials':

■ Food	– 7.2%
■ Household energy	– 8.3%
■ Transport Fuel	– 18.7%

These are eye watering rates for those retirees who spend most of their income on these items. It also brings little comfort for those who benefit by having their retirement income linked to RPI (about 1% higher than the CPI). They will find their buying power significantly reduced for their pension incomes. These inflation rates are unlikely to get much better quickly.

Couples may find they have made insufficient provision for retirement by the time they reach middle age. Many find pensions not performing as anticipated and eroded further by creeping inflation. They realise they must allocate more income to fund their pension as they head towards retirement. Planning must be for longer too as life expectancy steadily increases. 16% of the UK population is now aged 65 or over.

External pressures are mounting. Around 38,000 people lost their jobs between February and April 2008, and tens of thousands more are expected to be laid off in the financial services and manufacturing sectors alone. The Council of Mortgage Lenders expects house prices to be about 7% lower in Q4 of 2008 compared with Q4 of 2007.

Couples are now finding it harder to re-house after they separate. There has been a sharp jump in mortgage applications refused and a fall in mortgage equity withdrawals as the credit crunch bites.

Financial hardship is being felt keenly by many families whose children are years away from financial independence, facing a seemingly never-ending barrage of school exams or leaving the family to go onto further education. 43% of all 18-30 year olds are estimated to be in higher education.

The legal issues

■ Do all assets have to be available to meet needs?

Separation in middle age often coincides with the accumulation of assets created outside marriage,

usually an inheritance from a close relative or the sale of a business. Both spouses need affordable housing, adequate for their own needs and responsibilities towards the children, who may not be quite so ready or able to leave home. Heading towards retirement, a large mortgage can become a pressing liability where there is less income available to meet rehousing costs. Income is often needed to fund child maintenance and education costs. But making further pension provision from income must also be a priority.

If needs cannot be met except through inherited assets such as a house, the courts are likely to take these assets into account in the settlement regardless of when or how they were acquired.

As Lord Nicholls pointed out in *White v White* [2001] 1 AC 596:

"The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."

This reasoning was confirmed by Mr Justice Bennett in *Norris v Norris* [2002] EWHC 2996 (Fam) who was firmly of the view that inherited property could not be 'quarantined' from the pool of assets on which the s 25 exercise operated.

"...the court is required to take into account all property of each party. That must include property acquired during the marriage by gift or succession or as a beneficiary under a trust."

... merely because an inherited property has not been touched or does not become part of the matrimonial pot, is not necessarily, without more, a reason for excluding it from the court's discretionary exercise."

More recently in *S v S* [2007] EWHC 1975 (Fam), Mrs Justice Baron considered a wife's possible inheritance from her parents to be:

"a background factor which weighs lightly in the overall analysis of fairness in this case."

She declined to ring fence assets, taking into account the couple's requirements.

"This is not a big money case, particularly as half of the assets are held in pensions, the largest of which is already in payment. Given the background factor of the wife's possible inheritance and the parties' respective needs I do not consider it was right to ring-fence the wife's assets which had emanated from her parents. All of the assets which came into this marriage have to be available to cover the parties' requirements."

■ What is a fair quantum for periodical payments?

Due to economic pressures facing couples, exacerbated by the current economic slowdown, expenditure must be carefully approached so that any order for periodical

payments reflects what is reasonably affordable rather than what the other spouse would like to spend.

This was made clear by Lord Justice Thorpe in *Purba v Purba* [2000] 1 FLR 444:-

"... in this field of litigation budgets prepared by the parties often have a high degree of unreality... the essential task of the judge is not to go through these budgets item by item but stand back and ask, what is the appropriate proportion of the husband's available income that should go to the support of the wife?"

In these times of increased food, energy and fuel costs, and reduced lending facilities, particular care must be taken to ensure each spouse can meet his or her own reasonable outgoings and retain the ability to save for retirement.

■ **When is a joint lives periodical payments order justifiable?**

The clean break principle under s 25A MCA 1973 points the courts explicitly towards financial independence after divorce. In *Miller, MacFarlane* [2006] UKHL 24, Baroness Hale assumed:-

"... that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation".

Duckworth: Matrimonial Property and Finance (Jordans) suggests that to justify needs, the non earning spouse will be expected to demonstrate

- a handicap, such as poor health, impaired earning capacity or the need to care for young children;
- an ability to pay on the part of the earning spouse; and
- a continuing uncertainty as to when, if ever, the non earning spouse will become self supporting.

Compensation may also be awarded (usually but not invariably to the wife) where :

- a wife has an established track record of high earnings or the makings of a successful career, interrupted when she decided to have children or give priority to the husband's career; and
- the husband continues to enjoy high earnings that result from decisions made during the marriage to the wife's prospective economic disadvantage.

Where these factors arise, a joint lives order is more likely to occur following a longer marriage when the disparity between them has widened over time, or when the spouses are older, when there is little or no time to re-establish a career.

The economic constraints of divorce compounded by the economic downturn also suggest that clean break orders are likely to be less common for middle aged spouses until there is a sustained upturn in the economy.

However, where money is available from the commutation of a pension, from a lump sum received on redundancy, or perhaps the return of a partnership or other business investment there are much greater opportunities for capitalisation to facilitate a clean break, often involving a discount for early payment. This outcome can be desirable as it allows a husband and wife to plan independently for their future, free of financial dependency or involvement with the other following the divorce.

The matrimonial laws of other countries, not least Scotland, which has a three year rule, generally do not impose a lifelong obligation. With a view to harmonisation with other jurisdictions, perhaps we will see a move towards more term and non extendable term periodical payments orders in future.

Financial guidance

Although many families do their best to plan for the years ahead, a couple in marital difficulties seldom create a financial plan together in anticipation of divorce. It costs significantly less to cohabit than to live separately. This means that there is frequently not enough to go round when separation takes place, so resources must be stretched.

Bear in mind the following when considering financial matters.

■ **House purchase**

Credit crunch issues mean a remortgage or house purchase may be more of a challenge. Discuss mortgage capacity and options with a qualified mortgage adviser early on to give realistic expectations to your clients.

■ **Retirement planning (pre and post)**

Those in middle age and beyond should have a keen eye on retirement provisions. The 'dash for cash' for the maximum tax free lump sum pension payment at the point of retirement may be detrimental for retirement income. A longer term balanced view should be taken to create a workable financial situation for now and the future.

Where sufficient cash is available, funding pensions before divorce can provide a tax efficient way to achieve a financial settlement and allow the couple to invest sufficiently in their pensions.

Pension sharing following the divorce should ensure each party receives similar retirement benefits, not only in terms of income, but also indexation of benefits. Obtain advice from a pensions expert on how to achieve this.

■ **Using *Duxbury* and/ or *At a Glance* tables**

These provide valuable sources of easily accessible information, but must be used carefully. Much of the data is historic: annuity rates, life cover costs, exchange rates and the application of

assumptions for growth rates should be 'reasonable' and actuarially acceptable. Use of *Duxbury* tables can give a good 'rough guide', but the compounding effect of using mildly inaccurate data can be significant, especially with large sums.

■ Annuity rates

These change regularly and up-to-date figures can be obtained from the FSA website <http://www.fsa.gov.uk/tables/>. Knowing how to use the data is crucial. Partnership Assurance claim up to 30% of annuitants may qualify for an enhanced annuity rate due to ill health or pre-existing conditions, so ask an IFA to make enquiries in individual cases. Finally, where possible, make sure the style of annuity matches the style of benefits you are trying to match.

■ Triggering tax charges or loss of benefits

Realisation of cash often means encashing or surrendering a policy that may result in a tax charge or surrender penalty. Choice of product to surrender, timing and methodology can all reduce or eliminate any tax charge. Methods such as surrendering across two tax years, full or partial encashments can all make big differences. Make sure your clients take prior advice.

Some with profit investment products such as bonds and endowments will apply a MVA (market value adjuster) if surrendered early or in difficult investment periods. Consider choosing alternative sources of cash.

Some pension schemes offer guaranteed annuity rates or enhanced tax-free cash allowances that are lost during a pension share. Any life cover and waiver of premium benefits which may be attached could also be lost.

The sale or surrender of endowment policies inevitably mean the loss of associated life cover. The effects of an untimely death should be considered and discussed with your clients. This is especially relevant with older clients and those with health issues. Replacing life cover in such cases is significantly more expensive and some may even discover they have become uninsurable.

Conclusion

Couples separating in middle age often strive to achieve equality of capital and disposable income, so that neither the husband nor wife are disadvantaged up to retirement and beyond. Finding fairness and parity for them has never been easy. With an economic slowdown and credit crunch now upon us, framing a workable fair legal and financial solution is likely to become even more difficult, especially when one considers the necessity to rebuild finances anyway in retirement. Practitioners and the courts will need to be ever more imaginative and resourceful to achieve a fair outcome on divorce for middle aged spouses that last into their later years.

This article is based on information publicly known about the UK economy and the position at English law as at July 2008.



...it can happen to any of us



Resolution
mentoring