MARRIAGE BREAKDOWN – PROPER PROVISION

Unfortunately we hear a lot about marital breakdown at this time of year - when a couple separate or divorce how is it decided what assets each are entitled to?

This can be done in two ways:

1. By the parties agreeing between themselves as to what each will take from the assets available- If no agreement can be reached there are options like mediation may assist;

2. If ultimately the parties cannot agree then the matter will be brought before the courts and the Judge will decide (this option takes control away from the parties);

HOW DOES A COURT DECIDE?

In dealing with the breakdown of a marriage the courts will look to make what is deemed to be "proper provision" for the parties involved. There overarching aim is fairness and justice. The court will consider a list of criteria and arrive at the asset or financial split based on this criteria.

These criteria include:

- the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future

- the financial needs, obligations and responsibilities which each of the spouses had or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise)

- the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be

- the age of each of the spouses and the length of time during which the spouses lived together

- the physical or mental disability of either of the spouses

- the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family

- any income or benefits to which either spouse is entitled by or under statute

- the conduct of each of the spouses if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it

- the accommodation needs of either of the spouses

- the rights of any other person other than the spouses but including a person to whom either spouse is married

IS IT BETTER TO AGREE IF POSSIBLE?

The Courts have expressed support for the notion that couples can make agreement between themselves as to how they wish to order their affairs.

Any such agreement should be given significant weight should either

of the parties later wish to re-visit the matter. This is particularly important if the couple at the time of coming to the agreement had specified that it should be final.

The courts then, should only get involved to alter the situation after this, if such an agreement does not "properly provide" for one party or if the circumstances of one or other of those involved have changed dramatically since this was entered into.

In a similar vein, the courts have indicated that any windfall or wealth which one party gets after the couple's relationship has formally ended or, very importantly, assets which were inherited by one party should not automatically be open to a claim by the other unless they were involved directly in obtaining same. Any such assets however, may be considered relevant to the "proper provision" criteria.

DOES SEPARATION OR DIVORCE REALLY MEAN THE END?!

While the formalising of Separation will recognise that a couple are no longer living with one another as husband and wife and a divorce will legally end a marriage there are some limited cases where any division of assets that has taken place in doing so can be re-visited and varied.

IS CLEAN BREAK A REALITY?

There is no provision for a "clean break" in Irish family law legislation. However, the Courts have accepted that there is a principle of law that supports any effort made by the Courts or parties to arrive at finality or closure, wherever possible.

This is particularly true in a breakup where there are ample resources to cater for both parties (and their dependents) needs.

CHANGE IN CIRCUMSTANCES

What then, if an agreement or court order is made and one or other of the parties finds themselves in a situation where their financial position after the matter has been finalised changes so that the terms entered into now affect them very differently down the road? (for example, if assets divided were to significantly reduce in value or one party was to earn much less etc)

This situation came before the High Court on two occasions recently and the courts have taken the view that unless the change that has occurred makes the previous terms impossible to comply with they will be very reluctant to alter what was intended to be the final settlement.

CRITERIA TO ALTER

If a party is looking to re-visit their settlement, as well as the above, they will have to show the court that:

- New events have taken place since the previous court order was made;
- These new events happened relatively soon after the previous order;
- They have not delayed in making their application to alter the old terms;
- No other party who may have an interest in any of the assets involved will be negatively affected if a change to the order is made.

Recent cases provide those who have entered into Judicial Separations and Divorces some certainty, in that the terms which result will seem to stand unless there are exceptional circumstances which would make it unjust and unfair for them to remain.

IF YOU HAVE REACHED AGREEMENT ON SEPARATION AND LATER APPLY FOR A DIVORCE CAN THE INITIAL AGREEMENT BE CHANGED?

This is interesting as it was the subject of a landmark Supreme Court decision in 2012 in the case of G v G

Prior to the decision in ***YG. v NG.,*** the law was governed by the principles set out by the Supreme Court in **T. v T. [2002] 3 IR 334** and certain of the principles of that case still remain the law despite the decision in ***G. v G***.

- The date of the trial will remain the date of the valuation of the assets. In other words the argument that it should be difference dates e.g. date of separation/ acquisition has not been revived;

- There was no change on the issue of the consideration of the "*conduct*" of the parties. It remains that such must be "*gross and obvious*" to be taken into account. In the present case, nothing arises that remotely comes within this definition;

- This would be considered an "*ample resources"* case due to its value;

- The Supreme Court held that there should be no discrimination e.g. by being a stay at home mother and this remains, although I believe from my experience recently that the Courts now enquire more robustly into the availability of work for spouses;

- Irish law did not follow the English law in applying the principle of "Equality" between spouses. The standard to be followed is that laid down as regards "*proper provision"* being made for each of the spouses and children.

- The trial judge has a wide discretion This remains the same and is to some extent repeated in the recent decision;

- Each case depends on its particular circumstances.

- *"Certainty and Finality"* in family law proceedings remain appropriate aspirations and indeed have been more emphasized in the recent Judgement.

- One matter which was not touched upon in ***YG. v NG***. save by implication and remains crucial is the issue of the percentages to be awarded to parties in respect of the division of assets. In **T. v T.** several of the Supreme Court judges, including the then Chief Justice, considered the standard of spouses' rights under the Succession Act to be a useful *"yardstick"* or *"benchmark"*. In the event they awarded Mrs. T. *37.5%* in a "second bite case" in an application for ancillary relief in a divorce application post a deed of separation.

- In various High Court decisions following **T. v T.**, the percentages varied widely, tending towards the more generous. This was, of course in "*Celtic tiger*" times. In fairness, the less the value of the assets, the greater the percentage was likely to be for a non-owning wife as the overall value of a case would then be less.

IMPLICATIONS OF *G. V G:*

There are a number of matters decided in this case, the most relevant of which appear to me to be the following.

- The first and most important matter is that a Settlement with a "*full and final settlement"* clause whether by Deed or Consent can only be varied in the most acute circumstances of change;

- Secondly, "*second bite cases*" brought because there is an increase in the other spouse's value are effectively ruled out.

- A "*clean break*" between spouses is not a right in Irish law but <u>is</u> a legitimate aspiration.

- Substantial change (as in illness) needs to exist to justify an application for further provision. If there is no change, there is no new provision.

- While ***G. v G*** was a divorce case post a deed of separation, the Court made a general observation as regards inherited assets relevant to cases first before the courts. It stated at page 13 point (xv):-

"Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on circumstances. In one case, where a couple has worked a farm together, which the husband had inherited, the wife on separation sought 50%, however, the order given by a court was 75% to the husband and 25% to the wife. This is a precedent to illustrate an approach, but the circumstances of each case should be considered specifically."

The decision in ***G. v G*** has had major implications in marital family law. It now means a resolution of marital differences can be reached in full and final settlement without fear of further review for the sake of it. Further "second bite" cases are ruled out unless very specific changes in circumstances exist which does not include an increase in wealth *per se.* The terms of applying for further financial relief in changed circumstances are set out in narrowly and are difficult to achieve. The Court observed that it is not there to "*redistribute wealth"*

As regards the percentages of division, ***G. v G*** will clearly have a sobering effect. In cases post **T. v T.** , the "yardstick" was followed with variations up or down depending on value and circumstances.

IS IT POSSIBLE TO PROTECT YOUR ASSETS IN A SEPARATION OR DIVORCE?

One of the ways people can try to do this is by having a pre nuptial agreement setting out how the parties will divide their assets and deal with their finance upon Divorce or Judicial Separation

While an Irish couple is not prevented from signing a pre-nuptial agreement in Ireland, the Irish courts are not obliged to enforce such agreements if the couple's relationship later breaks down.

It is a rather a grey area and it remains to be decided as to what impact these agreements have where the parties separate.

While these agreements are not illegal our constitution places great value on the institution of marriage, so some would argue that you cannot enter into an agreement which envisages the break up of the marriage as it is contrary to the whole concept of marriage. Essentially, by drawing up a pre-nuptial agreement a couple is preparing for the future break up before the marriage even begins!

FOR MORE INFORMATION

Tel: 052- 612 43 44

Address: Jervis House,
Parnell Street,
Clonmel,
Co Tipperary

Email: info@lynchsolicitors.ie

Website: www.lynchsolicitors.ie

www.twitter.com/LynchSolicitors

www.facebook.com/LynchSolicitors

www.linkedin.com/company

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