

Dividing Property on Divorce

The way in which property is divided at the time of a divorce is not fixed by some formula. The *Family Law Act* simply states that the Family Court is required to "make such order as it thinks fit altering the interests of the parties in property."

The manner in which the Court applies its principles was best set out in the Judgement of the Appeal Division of the Family Court in *Pastrikos' Case* as follows:-

"Under the *Family Law Act* the Court has to embark on a dual exercise."

The first part of the exercise is to determine the nature and, so far as possible, the value of the property of the parties in issue in the case. Then the Court proceeds to make some assessment of the extent of each parties' contribution to those assets, being financial contribution, non-financial contribution, and contribution towards the welfare of the family. This assessment is sometimes quantified in terms of percentages or values. However it is expressed, the assessment is an important part of the exercise. It is not necessary that the Husband's or Wife's contribution be tied down to a specific asset; it may be assessed as a general contribution to the property of the parties to the marriage.

The second part of the exercise is to consider the financial resources, means and needs of the parties to the marriage and the other matters set out in maintenance provisions of the *Family Law Act* so far as they are relevant.

These matters are:

1. The age and health of each of the parties to the marriage.
2. The income, property and financial resources of each party to the marriage and their physical and mental capacity for paid employment.
3. Whether either party to the marriage has the care of a child under 18 years.

4. The commitments of each party to the marriage to support themselves and a child or other person that they have a duty or responsibility to maintain.
5. The eligibility of either party to the marriage for a pension or superannuation benefit.
6. The standard at which the parties lived during the marriage.
7. The extent to which the payment of maintenance would increase the earning capacity of that party by enabling him or her to undertake a course of education or training or to establish a business.
8. The extent to which one party of the marriage has contributed to the income, earning capacity, property and financial resources of the other.
9. The length of the marriage and the extent to which it has affected the earning capacity of the party who seeks payment of maintenance.
10. The need to protect either spouse's role as a parent.
11. If either party to the marriage is living with someone else, the financial circumstances of this arrangement.
12. The Child Support payments that a party to the marriage has provided or is to provide.
13. Any fact or circumstance which in the opinion of the Court is required to be taken into account by the justice of the case.

There is obviously a difference between those cases where the applicant can establish that he or she is entitled to be paid maintenance by the other party and to other cases. Where maintenance is entitled to be paid then the maintenance component may prove to be a large factor in the matrimonial property order. If it is not payable, the factors relevant under the maintenance provisions will be of less significance, Without excluding other significant facts from consideration any difference between the financial resources of the parties to the marriage and the obligation of either of them to provide a home for the children may make it just and equitable for the Court to increase the share of the party beyond that amount which would be justified solely by the contributions of that party to the property.

Although the exercise is a dual one, it has only one result. Nevertheless, that result reflects each parties contribution to the property, each parties needs for maintenance, or a combination of both factors.”

Since *Pastrikos' Case* in most matrimonial property judgments the Family Court does express each parties' contribution to the property on a percentage basis and then adjusts this percentage having regard to the maintenance factors of the case.