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MONEY BOX LIVE

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DUGGLEBY: Good afternoon. Big money divorces and celebrity splits are rarely far from the headlines with talks of settlements worth millions of pounds. So what, you might say; those involved can afford to pay. And yet it's often these big money divorces which test and define important legal principles such as the Lords' ruling which established that domestic and financial contributions are of equal value and that conduct, including adultery, is not relevant in deciding what is a fair financial settlement. Another appeal currently being considered by the Lords is whether a prenuptial agreement, which is not legally binding, can in certain circumstances be enforced. In the vast majority of cases, of course there aren't enough assets or income to support both partners and their children and possibly children from a second marriage or cohabitation. There can be complications over pension funds and mortgages. With recession looming, many families are facing financial hardship. What happens if one or perhaps both partners lose their jobs or there's the danger of the family home being repossessed? Then there's the thorny issue of child support, custody and access. The Child Support Agency has now given way to the Child Maintenance and Enforcement Commission, and from 27th October compulsion to use the CSA ended. I couldn't begin to explain what this means in practice, but I know someone who can and she's on the panel this afternoon. All this of course begs the question of whether the partners are married or in a civil partnership. One in six couples in the UK cohabit, and this number is set to increase. In law, there is no such thing as a common law marriage, although the Family Law of Scotland Act does address the issue of financial provision for cohabiting partners north of the border. As

you can see, there's a lot of ground to cover; and if you're in the process of separating, already divorced or in dispute over the settlement, you can call Money Box Live on 03700 100 444 and talk to my guests. Maggie Rae is a partner with solicitors Clintons; Dani Glover is Director of Pensions and Financial Planning at Smith and Williamson; Rachel Hadwen is a benefits adviser from Working Families; and we have Scottish expertise from our Glasgow studio in the person of John Fotheringham, a family lawyer with Fyfe Ireland. Carolyn in Yeovil, you've got the first call.

CAROLYN: Yes, hi Vincent. Okay, my first question really is that my husband and I are divorcing after 16 years of marriage and I really want to try and get the divorce done as quickly and as inexpensively as possible. He has a job, a very well paid job; I don't work at all. We're not in dispute with each other over what we've agreed to, how we've agreed the split, but I just would like to know how I actually go about it. For example, how would we transfer 50% of his pension fund to me?

DUGGLEBY: Okay, well let's just start with the basics. You say you've just been doing this informally, no lawyers involved?

CAROLYN: I've seen lawyers. I've had two one hour sessions with lawyers, which has already cost me you know £500 because they charge such a lot.

DUGGLEBY: Yuh, but did you present a case to these lawyers? And your husband or you're ...

CAROLYN: He's my husband.

DUGGLEBY: Is he separately represented?

CAROLYN: No, he's not seen anybody. Although he's the one that's met somebody and really wants to start the divorce proceedings, I think he just doesn't know where to start. And he can't really afford to go to a lawyer. Money is very, very tight at the

moment.

DUGGLEBY: Okay, well I'm going to stop you there because I think I'm going to turn to Maggie and say I can foresee some complications, to say the least, here.

CAROLYN: Yeah.

RAE: Well, Carolyn, it's very good to try and resolve these things between yourselves amicably, but the fact of the matter is that you will almost certainly need to get a court order. For example, you asked about the pension. You can't share your husband's pension except by means of a court order made in divorce or nullity proceedings. So ...

CAROLYN: You couldn't just ask the pension people?

DUGGLEBY: No.

RAE: No. Absolutely not, I'm afraid.

CAROLYN: Okay.

RAE: And there are other tax consequences of transfers of assets, which you may not appreciate. So I'm afraid you do need to get some legal advice. I think the thing to do is to try and find a lawyer who's specialist and effective and cost effective, and if you contact Resolutions, Solicitors Family Law Association, they have a list of good solicitors in your area who are specialists and that means they'll be able to work faster generally.

DUGGLEBY: I mean essentially you want sort of some mediation here to sort of formalise what they've agreed and not charge too much for doing it.

RAE: Exactly, but you still at the end of the day need the court order and that will

usually need a lawyer to draft it.

DUGGLEBY: I want to bring all the panel in on this one. Dani, this question of assets. I mean again assets are changing in value so much at the moment and an asset could be worth far less. I mean a home, for example, could be worth far less than they think it is.

GLOVER: Yes, the asset valuation in the morning could be very different from the asset valuation even that very same day. And certainly for a pension, it depends on the type of pension scheme. Some will vary in value far more than others, so it's worth seeking some advice as to the suitability of the type of transfer of 50% of that particular asset.

DUGGLEBY: I'm sort of concerned about this 50% because 50% is 50% of what? I mean you might have some assets that you think should be split evenly, but in fact they're not like with like at all.

GLOVER: And added to that, with pensions we have this issue about is a pension a capital asset or is it an income producing asset? So what are we trying to achieve? Is it 50% of the capital value or 50% of the income that it can generate?

DUGGLEBY: And I mean from the point of view of Working Families ... I mean are there children involved in this, Carolyn? Hello, Carolyn?

CAROLYN: It's just ... No, it's just my husband and I.

DUGGLEBY: It's just you. I'll assume, for the sake of argument, that if there were children again this raises the question of how the benefit system works, Dani?

HADWEN: Yes, it would.

DUGGLEBY: Sorry, I beg your pardon - Rachel.

HADWEN: Yeah, it would because one of the things that you would need to raise with whoever you saw for advice would be well what is my situation - am I working, am I going to need to claim benefits; and if I claim benefits, how is any maintenance or pension agreement in the future going to affect those benefits? So you do have to take that into account.

CAROLYN: I think the problem I've got is that every time I go to a lawyer, I have a whole set of questions like that and the person that I really need to be with me is my husband because he would also be able to discuss this fully, but no lawyer that I've yet been to will see us both together.

DUGGLEBY: John, can you comment on that in general principles?

FOTHERINGHAM: Yes, I think one thing you would also need apart from legal advice is independent financial advice as well because a solicitor will not be able to advise you about the details of your future pension provision. So you need that as well, and the solicitor will certainly be wanting to have that even if you don't specifically ask for it. What you may also want to consider, and it may not be appropriate for your case, is not only mediation but also a collaborative law system whereby the lawyers get together and try to work a solution which is best for both of you without second guessing the court.

DUGGLEBY: We have actually a similar question to yours, Carolyn, from another listener and she says they separated earlier this year and they managed to get through the trauma of that and they want a civilised circumstance. And they have actually worked out - apparently all themselves - they worked out all the separation of assets, and they think they can go, or they *hope* they can go straight to court and get the judge to kind of agree it without any lawyers. Is that possible?

RAE: Well you're not obliged to hire lawyers and many people do act in person, as we call it. Increasingly so because public funding for legal costs on divorce is now very limited indeed and many people simply can't afford lawyers. And the court should be in a position to help you to draft an order in the proper form, but we're still

back to this question that Dani raised of getting advice as to the appropriate way of dividing the assets, and indeed the point that Rachel made about advice on benefits, and the court can't give *that* advice.

DUGGLEBY: Right, we must move on, interesting as that subject is, to Karen in Leicester.

KAREN: Ah, hello. I'm in some ways quite similar to the previous lady. I was married for 17 years. I separated about 3 years ago now and over the last 3 years I've been to Relate, mediation, various things to get to a point where probably March this year my husband and I, we agreed the details. The order of consent was drawn up and at the time I was employed, fully employed, and my house was worth a lot more. And we came to an agreement whereby he didn't really want me to take his pension in any sense and I do work, so we agreed a sum of money in the equity of the house would come to me to cover that side of the pension. So this has continued for a while. He's taken quite a long time to sign this off and even though we are quite amicable, he tends to make things quite difficult as we go through these things. But what's happened to me recently is my employer started talking to me about changing my employment terms back in March, April of this year. I informed my solicitor and as the order of consent went through, I'm now facing redundancy, which I informed my solicitor when that became clear that was going to be the case. At the same time, literally within a couple of days, the order of consent was put forward to a judge and was signed off. So I'm now in a situation where potentially I'm unemployed, I will not be able to get a mortgage, I have to sell my house under the order of consent. Technically that's going to make me homeless or I have to go into rented accommodation.

DUGGLEBY: Okay, I'm going to interrupt you there because we've got the picture. Essentially the circumstances have changed right slap bang in the middle of this ...

KAREN: Yes.

DUGGLEBY: ... yeah. And this is an issue that I know Maggie you've got ... You

said before the programme started, you've got a pile of cases very similar.

RAE: Yes, we have. This is very new territory for all of us, I think. Many settlements that were negotiated just maybe a couple or 3 months ago are now no longer applicable and they wouldn't be negotiated in the same terms now because of the value of property or, as in your case Karen, your employment position. The question is do you go back to court to try and vary the agreed order? The answer is it is very, very difficult. Historically, the courts have not wanted to do this and I for one don't know how the courts are going to view these situations. What I do think is that trying to go back to court to get it varied is a very expensive, time consuming lottery, frankly. I think the best thing to do is for your solicitor and the solicitor on the other side to have some sensible, creative, constructive discussions. And I have found that this is a more sensible way of proceeding than trying to vary orders.

DUGGLEBY: John, your comment?

FOTHERINGHAM: Yes, one thing that occurred to me there was that you said your circumstances had changed radically before the order was granted.

KAREN: Yes.

FOTHERINGHAM: Well you may have to speak to your solicitor, possibly through another solicitor, as to why he let that order go through to the judge when he knew that your circumstances had changed.

KAREN: That's interesting because he suspects I should be talking to an employment lawyer about my employer's situation. I don't know, it kind of feels a bit like to me buying a new suit from a shop, putting it into a drycleaner's and then suddenly the suit comes out crumpled. The shop says it's the drycleaner's and the drycleaner's says it's the shop.

DUGGLEBY: Yeah. Well that's as may be. You're frowning, Dani. What's your

comment on this?

GLOVER: Just that point that Karen was made redundant before the court order was why I was frowning.

DUGGLEBY: Right.

GLOVER: And I think, Karen, you said you'd told your solicitor?

KAREN: Yes, I did.

DUGGLEBY: There is an issue too, Rachel, about this question of loss of income because that will trigger benefits I mean in most cases and that's an issue in divorce.

HADWEN: Yes it is, although it very much depends on Karen's situation. Is she a single parent? Is she going to sign on for jobseeker's allowance or claim income support as a single parent of young children? And depending on what benefits she claims ...

DUGGLEBY: That could be brought into a settlement?

HADWEN: Not exactly, no. It's the maintenance has a knock-on effect on how much benefit she gets. Again it depends on the benefit very much. Whereas if she finds another job, it's not so much of an issue. But this is the kind of advice that she perhaps needs and she'll probably need to speak to more than one person - Working Families about the employment and the benefit side; speak to her solicitor.

DUGGLEBY: A couple of quick emails. Now this one is from John and he says that his son's going through a divorce and has offered his wife a large sum of money to vacate the family home and set up a new one. In other words, he's effectively said look I'll buy you another home. I think he wants to keep this home. Now if there is dispute over who stays in the home, is there any obvious ruling that can be made by

the judge if they both want it?

RAE: No because both parties have a right to live in the matrimonial home, as it's often called. So if they can't agree, then the court would have to decide.

DUGGLEBY: Right. So there's no assumption that the wife with the care of the children automatically gets the home if the husband's offered to re-house her?

RAE: No.

FOTHERINGHAM: No.

DUGGLEBY: No, okay. Well that's the answer to that one. And then there's another one here from Chris and he's in Kent and he says: '50-50 split is what my wife wants. I'm not in principle against that, but I did own two properties before I married her to which she's made no financial contribution or anything else. Is she really entitled to have 50% of these assets which were acquired before the marriage took place?' Now I do know that there is a difference between England and Scotland, so I'm going to start with you, a quick word from you, Maggie, before I go to John to say what the position in Scotland is.

RAE: The starting point after a long marriage in England and Wales now will be 50-50 division of the assets. Now pre-acquired assets, or indeed assets acquired post-separation, are not normally ring fenced in England and Wales unless the family is so rich that they have much more in the way of resources than their needs require. The McCartney case is perhaps that sort of example. By far and away most cases in this country are needs driven, and that means that the pre-acquired assets are unlikely to be ring fenced.

DUGGLEBY: Okay. But different in Scotland, John?

FOTHERINGHAM: Very different indeed. Over dividing assets here, the provision

is that you divide them fairly and fair sharing is equal sharing unless there's a good reason why not. But the assets which you count are those which accrue between the marriage and the end of the cohabitation. There is one important exception there; that if the matrimonial home was purchased by one of the parties in his own name but with a view to living in it as a family with the other party, then that is included as matrimonial property even though it was accrued before the date of the marriage.

DUGGLEBY: This is probably an extremely stupid question, John, but I'll put it. Now Chris is writing to us from Kent, so obviously he's living in England, and I suppose he'll probably say well can I move to Scotland and get the benefit of Scottish law on divorce? Or is that just a silly question?

FOTHERINGHAM: It's not so daft, but he's a bit late, I'm afraid. *(laughter)*

DUGGLEBY: Right, but if he had anticipated this and if it really was a big issue, at what point can you ... Well what happens if you are in the process of moving in the normal course of events? I mean is it a year or is it the fact you've got a house or what?

FOTHERINGHAM: We take it as you're domiciled in Scotland. Now that's no particular set period. But if there is a dispute as to jurisdiction between Scotland and England - and as we've been discussing even before the programme, there's such a huge disparity between Scots and English matrimonial law that either party would be much better in one or other jurisdiction - you would then prefer the jurisdiction where the parties last lived together if either country *could* have jurisdiction. In some cases it's only one country that could have jurisdiction, but if there's a choice then that will be your major criterion - where's the central gravity of the marriage?

DUGGLEBY: Okay. Now then, David, thanks for being so patient. Your call.

DAVID: Yes, my son and his girlfriend bought a house for £210,000 two years ago in January and they put in £20,000 each and the rest was paid by a joint mortgage. The relationship has busted up, though they're still sharing the house. Neither of them can

afford to buy the other party out, so it looks as if I'm going to have to buy the young lady out. Prices of course have plummeted and I'm wondering really what you think would be a fair offer for me to make to the young lady to persuade her to ...?

DUGGLEBY: Dani Glover?

GLOVER: Well I think you need to get a valuation of the property and ...

DAVID: We've had one and I think we were told it had gone down at least £30,000.

GLOVER: In that case, you ask about a fair value. A fair value would be the purchase price less £30,000.

DAVID: Remembering that you know most of it is still in the form of a mortgage, so that means she would get ... we would offer her £5,000. I don't think she's going to accept that. *(laughs)*

GLOVER: I think the issue is she needs to consider, in fact all parties need to consider the valuation currently of that asset and whether she's selling it indeed to yourself, David, or on the open market, what is the valuation that she would be given? If she cannot sell the property, then I'm sure your offer suddenly looks rather attractive.

DUGGLEBY: I mean this is the issue, isn't it? I mean it's one thing to say it's worth it, but who is going to pay whatever the valuation is? There's not necessarily a correlation between what somebody's prepared to pay and what somebody thinks it is worth.

GLOVER: Especially as we've seen with houses. That's why the market ...

DUGGLEBY: And the availability of mortgages. That's the other thing. I mean if there's money available to pay the mortgage, then that's good.

GLOVER: Absolutely right.

RAE: In some of these cases, it may be better for the couple to sit down and say well let's rent the property out for the time being and let's both get alternative rented accommodation until the value of the property we've bought together comes up to a reasonable sort of price.

DAVID: I think they have considered that, but I think ... In fact I think they made enquiries and were told that the rent that they would be able to get wouldn't ...

RAE: Wouldn't cover the mortgage.

DAVID: sort of cover even the mortgage.

DUGGLEBY: I mean I suppose we'll have to call it off there because this is actually a cohabitation, so strictly speaking we're dealing with couples who have legal ties to each other rather than people of course who will have to in the end make the best of things. As we should say, there is no protection if it's just a cohabitation. It has to be an agreement. Except of course in Scotland.

FOTHERINGHAM: Except for Scotland.

DUGGLEBY: Yes. John is going to come in and say in these circumstances of course the same would apply as if they were married.

FOTHERINGHAM: No, indeed there's no capital claim for the house.

DUGGLEBY: Ah, no capital, right.

FOTHERINGHAM: No, indeed. It would be an income claim based on what either party thought they had lost in terms of economic advantage and disadvantage balanced against the other party's economic advantage and disadvantage in the

interest of the family over the course of the cohabitation. But even in Scotland, there would be no claim by either party for the house itself except that neither party in Scotland could be compelled to be an owner in common, so if either wanted the house to be sold could apply for an action of division in sale and then bid in the market for the house.

RAE: Well that could happen in England. And it seems from what David has said that the couple are joint owners of this property, which means that whether they're married or not, they've both got a legal claim on it.

DUGGLEBY: Okay, Mary in Greater London, Muswell Hill, your call.

MARY: Oh hi. I've been separated from my husband for four and a half years, but we haven't ever got round to getting divorced. We have three children and I'm just wondering ... I'm actually living with the children in the marital home, although my husband has now bought himself another house which he lives in. What I want to know is am I you know leaving myself open, making myself more vulnerable in any way by not actually getting divorced? He doesn't seem to want to. We started the process and then he just stopped and he stopped replying to any of the solicitors' letters because he says he doesn't want to spend the money. The situation as we have it actually works quite well for both of us and it's fairly amicable.

DUGGLEBY: So he's paying maintenance for the children?

MARY: Yeah, he's paying a fair amount of maintenance. You know the situation is fine other than we're not actually divorced and I'm just concerned that I could be vulnerable you know to any ... You know suppose he ...

DUGGLEBY: I think probably we can draw our own conclusions. I mean the fact is ... Has he got another relationship going?

MARY: No.

DUGGLEBY: Well that's probably the big danger. But I want to first of all bring in Rachel just to clarify what the position is over the children and what benefits you're entitled to and that sort of thing because that's quite important, custody.

HADWEN: Well I suppose the answer is that from a benefits and tax credits point of view you're getting some maintenance. It is maintenance for the children and it doesn't make a huge amount of difference whether it's via child support or via the court. But what I would say is the problem that you've got is that if your husband defaults, if he stops paying, you can't enforce it. And that's the big problem and that's why you might want to consider either pushing for divorce or, because you don't have a court order, you are someone who could go to CMEC.

MARY: I mean I'm not really worried that he'll stop paying, at all. What I would be more concerned about was supposing something happened to him financially. You know the house I'm living in now is in both of our names and we're legally still married. You know ...

DUGGLEBY: Has he got a job, for example, with a very large death in service benefit?

MARY: Sorry?

DUGGLEBY: Has he got a job which has a very large death in service benefit payable to you as the wife, for example?

MARY: Yeah, he does.

DUGGLEBY: Well you know that's again quite important. I just bring that up, but ...

GLOVER: That's a really interesting point because remember death in service, you can nominate whoever you like. Obviously the trustees have to take into account the

letter of wishes from the particular person. And again many pension schemes now, depending on the type of pension scheme, because you don't live together if anything were to happen to your husband you might not qualify as a spouse to receive those benefits. Therefore, to me, from where I sit, where you are vulnerable is certainly on pension benefits, death in service and also state benefits once you reach retirement age.

RAE: And I think what you haven't got here is any certainty and closure on this. He's got his own home now, but he still owns half of yours, and the fact is that until this is sorted out through a final order in the courts, this can be re-opened, this issue can be opened at any time.

DUGGLEBY: So the advice is?

GLOVER: Go for it.

DUGGLEBY: Okay, right. An email from Rachel in Oxford. She says, 'I was divorced a year ago and have a court order specifying child maintenance that my ex-husband agreed to pay by standing order monthly, but every month I struggle to get him to pay and he's so far failed to set up that standing order. He's remarried and is expecting another child. Now he says that he wants to renegotiate the maintenance. Can he do this and what shall I do?' Maggie?

RAE: He can renegotiate the maintenance, but I'm just looking at Rachel wondering whether this isn't in fact something that can be dealt with now through CMEC?

DUGGLEBY: Okay.

HADWEN: Well she said it was a year ago, the court order?

DUGGLEBY: Yes - a year ago, the court order.

HADWEN: If it's a year ago, she could potentially sneak in an application to CMEC now - they would have jurisdiction because the court order is more than a year old - and see how that works out. In terms of enforcement, CMEC say that they're going to enforce more readily, more quickly, going to make deduction from earnings as a first method of getting payment. We've yet to really see the proof of that.

DUGGLEBY: The fact of course here is that the husband's got another child on the way, which effectively reduces his means.

FOTHERINGHAM: Well that effectively is right and you may find that he himself sneaks in an application to CMEC because once the agreement's been going for 12 months either party, either party can apply to CMEC and demand a maintenance calculation which then removes the elementary or the maintenance element of any agreement or court order you've had before.

DUGGLEBY: Steve in Oldbury, you've got a question on child maintenance?

STEVE: Yes. It's something that happened to me quite some time ago now, but it may I think still be of great relevance to fathers when coming to try to make some agreement on arrangements over children. The question really is what criteria are applied by the new commission for determining the 'parent with care' and have those criteria now removed the anomaly under the CSA that children who live with their father may be penalised for doing so?

DUGGLEBY: Rachel?

HADWEN: Well the answer is that no, it hasn't really changed. There's still a problem if you have an equal shared care situation - somebody's got to be the parent with care; somebody else has got to be the non-resident parent. And you've also got ... some of the definition of shared care's got to be at least 104 nights per year. So it can disadvantage. I don't think you should therefore decide *not* to have a shared care situation, but you need to look at it to decide how many nights it's going to be, what reduction in maintenance that will therefore give you.

DUGGLEBY: Okay, one more question, I think - if you'll make it as brief as you can, Margaret in Hexham? Hello, Margaret?

MARGARET: Hello.

DUGGLEBY: If you can make your question quick because we're right at the end of the programme.

MARGARET: Oh right. I am actually divorced and have been for 9 years and part of my court order was that I would get a share of my ex-husband's pension when he retired. There were two provisos in the court order - one, he must notify the pension company of the arrangement; and, two, that he would pay me a third of the lump sum, plus a third of the pension payable when he retired. I'm not in contact with him now and he will be 65 next year. I have every reason to believe that he won't follow this through and I don't particularly want to go and see a solicitor and start costly ... going down that road.

DUGGLEBY: Margaret, I'm going to have to interrupt you because we've got very little time to answer it.

MARGARET: Oh right.

DUGGLEBY: The answer I think lies in the hands of the insurance company.

RAE: This is what's called an attachment or earmarking order made before pension sharing and there are complicated and comprehensive rules, which mean that you should be in touch with the pension company. They should have been served with the order when it was made. You must keep them notified of where you live and they have obligations to pay you as and when he retires. One final little danger you've got here though is the income post-retirement will cease when he dies and you may want to look at that again if he's got other assets to see if you can make a claim on those assets to protect you in that situation.

DUGGLEBY: Okay, we've had lots of calls in saying we should make much more of the mediation system and I think we're all agreed that, yes, by all means go for it.

RAE: Absolutely, absolutely.

DUGGLEBY: I'm sure, John, you'd agree that that's the first port of call?

FOTHERINGHAM: Absolutely, yes.

DUGGLEBY: It will save money. But, on the other hand, if you fall out and you can't agree on anything, unfortunately the lawyers will have to get involved because mediation can only go so far.

RAE: Well lawyers mediate and of course they do negotiation through the new collaborative process and ordinary negotiations as well all the time.

DUGGLEBY: But we're certainly great advocates of family mediation wherever that's possible. We've run out of time, I'm afraid. Rachel Hadwen from Working Families has been with me; Maggie Rae from Clintons; Dani Glover from Smith and Williamson; John Fotheringham from Fyfe Ireland. He's been in Scotland dealing with that aspect of it. And if you'd like any details of what we've raised in the programme, Radio 4 information line - 0800 044 044 - or the website, bbc.co.uk/moneybox. Paul Lewis will be here on Saturday and I'll be back same time next Monday afternoon to take your calls on investment on Money Box Live.