

Financial Disclosure on Divorce Self Help - Beware

Where a financial settlement is to be negotiated following the commencement of divorce or civil partnership dissolution proceedings, each party to the marriage has a duty to provide the other party with “*full, frank and clear disclosure*” of all their “*financial and other relevant circumstances*”.

Many people who enter the divorce or dissolution process are concerned that their estranged spouse will seek to conceal all or some of their financial and other relevant circumstances in an attempt to reduce, or hide, their apparent wealth and thus the amount that they will ultimately have to pay to the other spouse in the financial settlement. They therefore seek to pre-empt their estranged spouse by engaging in an exercise of “*self help*” i.e. taking steps themselves to establish the extent of the wealth or location of the assets of their spouse.

Self help prior to 4 August 2010

Historically, it was permissible (provided no force was used and no law broken) for one party to a divorce or dissolution to help their case by accessing documents belonging to the other party, e.g. by rummaging through unlocked cupboards and, provided the originals of the documents were returned to the owner, to take copies of those documents and raise questions about the matters contained within the documents within the financial negotiations. This process was traditionally governed by, what was termed in the legal profession as the “*Hilderbrand Rules*”.

Self Help post 4 August 2010

On 4th August 2010 and in the case of *Tchenguiz v Imerman: Imerman v Imerman [2010] EWCA Civ 908*, the Court of Appeal ruled that there the so-called Hilderbrand Rules have no legal basis and that self help is “*illegal*” and in certain circumstances, a criminal offence. Accordingly, a spouse is not entitled to access the confidential documents of the other spouse even if they are concerned that the other spouse has not, or does not intend to provide full disclosure of their financial and other relevant circumstances.

The Court of Appeal’s judgment included the following points:

1. A person who accesses the confidential documents of another by reading, making, retaining or supplying to another person a copy of that document, or uses the information contained within that document commits an actionable breach of confidence.

2. A right of confidence exists between a husband and wife as if they were unconnected persons and therefore a spouse will commit a “*breach of confidence*” if they access the other spouse’s confidential documents without that spouse’s consent.
3. Confidence can be lost between a husband and wife if a document is left lying around the house and is easily accessible, or if the information contained within that document has been shared with the other spouse. However, certain types of documents (e.g. a spouse’s private diary) remain confidential, even if easily accessible.
4. In certain circumstances, accessing the confidential documents of the other spouse could be a criminal offence, e.g. tapping into the other spouse’s computer.
5. If documents and/or information is obtained illegally, the court will find against the person who engaged in the self help and will require that person to return the documents and/or information to the other party without retaining copies. In addition, the court is entitled to refuse to admit within the financial proceedings any information obtained as a consequence of the self help, even if its failure to do so will prejudice the party who engaged in the self help.
6. A spouse is not obliged to provide details of their financial circumstances to the other spouse until ordered by a court to do so. Accordingly, it is unacceptable for a spouse to take the law into their own hands before this obligation arises so as to be able to obtain a premature advantage.

Alternatives to self help

Although self help is now forbidden, a spouse who does not think that the other spouse has given, or will give, full disclosure of their financial circumstances has access to a number of legal remedies upon which they can rely in order to protect their position. These include the following:

1. Where a spouse is concerned that the other spouse is about to dispose of their assets with a view to defeating the first spouse’s financial claims, asking the court to freeze the other spouse’s assets and/or to set aside any financial transaction which might have been made by that spouse to reduce their wealth;
2. In extreme cases (and where the wealth of the parties justifies such an application) asking the court to make an order that the other party’s documents and information be seized and searched;
3. Asking the court to order a third party to come to court (for example a company secretary, or trustee) to produce to the court documents and/or information relevant to the other spouse’s financial circumstances.

Less severe remedies include:

1. Asking a bank to produce copies of joint bank account statements;
2. Analysing bank statements and asking questions about unexplained entries;
3. Seeking company information from Companies House and other information from public sources;

4. Obtaining copies of property title documents from the Land Registry; and
5. Asking detailed financial questions of your spouse.

At the end of the day, if the court concludes that a spouse is wealthier than they have disclosed (for example because their lifestyle does not match the financial information they have provided), then the court can infer a certain wealth and will take this inference into account when making a financial award to the other spouse.

Conclusion

Unless you can prove that a document is not confidential, as between you and your spouse, engaging in self help in order to discover more about your spouse's financial circumstances is not permitted in law and could result in you receiving a criminal record and/or an order that you pay some or all of your spouse's legal costs within the financial proceedings. In addition, it could result in the court refusing to admit as evidence any of the matters you have discovered from the illegally obtained documents.

If you are concerned about any of the issues contained in this briefing, then please contact us and we would be happy to advise you.

For more information please contact:

Camilla Thornton

Partner

020 7440 4844

Camilla.Thornton@russell-cooke.co.uk

This material does not give a full statement of the law. It is intended for guidance only and is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by Russell-Cooke LLP.
© Russell-Cooke LLP

August 2010.