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MONEY BOX LIVE

Presenter: VINCENT DUGGLEBY

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DUGGLEBY: Good afternoon. When you're faced with separation or divorce, money problems are often the root cause of the disputes. With little growth in the economy and rising unemployment, the pressure on the family budget can put an intolerable strain on relationships. If the worst comes to the worst, there's rarely enough money to go round as the arguments start over child maintenance, who gets the house, what happens to the mortgage, and there's the question of splitting pension rights and what state benefits are available. And what about those couples who start off in broad agreement, but then find their financial circumstances have worsened so the original order cannot be maintained? In fact the number of divorces has been falling for the last 6 years and is now at the lowest level since 1974. Admittedly there's been a big jump in the dissolution of civil partnerships, but we're still only talking about a few hundred in total. On the other hand, those who choose cohabitation need to be aware of the legal consequences, highlighted by a case decided in the Supreme Court today concerning the ownership of property. We'll deal with that a bit later. So if you'd like some advice on that or any other financial issue in marital breakdown, you can call Money Box Live on 03700 100 444 and talk to my guests: two lawyers, Janet Tresman from Newman Law; and John Fotheringham from Lindsays Solicitors in Scotland - which, as you probably know, has a different legal system. Dani Glover is Director of Personal Financial Planning at Smith & Williamson; and Julie Mitchell is a benefits expert with Gingerbread, which helps single parent families. And our first call is from Carl in Kent. Carl?

CARL: Oh hi. Hello, good afternoon to you.

DUGGLEBY: Good afternoon.

CARL: My situation is I got married in the early 90s and in the year of 2000 we decided that we were going to separate. Sorry, I should say in 96 we bought a property together, my wife and I. I made the payments on that mortgage until 2000 when we decided we couldn't continue together and we went our separate ways. I've completely lost touch with my partner and we didn't commence any kind of divorce proceedings at the time, and only recently, last year, I discovered through the local court that a divorce has been ... *(mobile phone breaks up)*

DUGGLEBY: Carl, you're breaking up badly. We've got only so far I think to 2000. Where is the point coming in that you're trying to clarify with us?

CARL: Okay, well basically the divorce came through in 2008, but I'm wondering where I stand in terms of my property which we have jointly together?

DUGGLEBY: So you still jointly own a property? It wasn't separated. You just remain 50-50 owners of the property, but it was taken into consideration in the divorce settlement?

CARL: Well the divorce settlement was done in my absence.

DUGGLEBY: Right. But you must have been served with you know what the agreement was?

CARL: I haven't, no. I've just gone down to the local county court and ...

DUGGLEBY: *(over)* So you don't know what the terms of the divorce were? You didn't know about the divorce? I'm not sure ... I don't know ... I mean can you see any reason for this, Janet?

TRESMAN: Well probably because, Carl, you might have disappeared and she didn't know where to find you or she could prove to the court she didn't know where to find you and a decree was ordered. But was there actually a property order made? *(silence)* I don't think he knows. He's gone.

DUGGLEBY: I think Carl has disa...

CARL: All I have is a copy ...

DUGGLEBY: *(over)* Carl, look I think I'm going to have to stop this call. The line is impossible and we can't hear the points you're trying to make. So I'm going to reluctantly and with apologies move onto Carol in Cardigan. Hello Carol?

CAROL: Sorry ... hi, good afternoon.

DUGGLEBY: Your call.

CAROL: You want me to ask my question?

DUGGLEBY: I would like you to do so.

CAROL: Okay. I've been with my partner for 28 years and he's told me he wants to separate now. He's had enough of the relationship. He owns the house we live in. We've never been married. We don't have children. But I've always been the one that's earned the income in the family, so I wonder where I might stand?

DUGGLEBY: Right, so this is what we know, Janet, as a cohabitation question. And the usual sort of situation is that they don't have many rights at all, do they?

TRESMAN: Well it's one of those myths and legends that after 7 years ... I've had so many clients come in through the door and say, "Well I'm a common-law wife. I've been with him for 7 years", but it makes no difference. You don't have the rights

of a spouse, unfortunately. So this is where we're going to have to think about the very complex area of constructive and trust law, and in fact the hearing or the judgement given this morning in the supreme court didn't deal with properties that were purchased in joint names.

CAROL: It wasn't in joint names.

TRESMAN: Exactly.

DUGGLEBY: No, it's in his name alone.

TRESMAN: So you're going to have to make an application based on your contribution over the years, I'm afraid, and you may not come out with very much at all.

DUGGLEBY: But if you were living in Scotland, John, you've got that sorted, haven't you?

FOTHERINGHAM: Well not entirely sorted, but certainly do have a statute that covers cohabitation. What the court would then look at is to balance the advantages and economic disadvantages of the parties over the period of their cohabitation to carry out some kind of rebalancing exercise. It's not as sound and not as big as a divorce case and is not intended to be a divorce case, but it certainly seems to work an awful lot better than the common law remedies that preceded it in Scotland and the common law remedies that they have south of the border at the moment.

DUGGLEBY: I mean the message coming through from this is that the parties in Carol's case should have got the property into joint names from the word go and would that not have solved things? I mean that would have made it very clear.

TRESMAN: Well of course, but in those days you know the female cohabitee didn't have the equality or acknowledged equality that the male cohabitee would have had.

DUGGLEBY: And the other thing of course, Carol, is have you got assets or means of your own?

CAROL: No, no, but I've always been the one that's done the income. I've always earned the money.

DUGGLEBY: Oh you've earned the money, so you can manage to support yourself. Are your children grown up, or ...

CAROL: I've no children.

DUGGLEBY: No children. Okay, right, well that ...

TRESMAN: Did you make any contribution to the house like paying for an extension or ...

CAROL: No nothing, no.

TRESMAN: Just the income expenses?

CAROL: Just I've kept him really all these years.

DUGGLEBY: Just to broaden it out, Carol - not your specific case, but I'd like to bring in Julie. I mean suppose there were young children involved here. Is there a difference between the way they're dealt with in a marriage that's broken up and in cohabitation, or is it exactly the same; is there just no difference at all in terms of the amount of money that's claimed or benefits that can be claimed?

MITCHELL: Well it depends on the age of the children, but if there were young children certainly she may have been in a position where she can start claiming benefits for the first time, especially if she has always been supported by her ex-partner throughout their relationship. But in this instance, on Gingerbread's

helpline we come across people who do still believe in the myth of the common-law wife, unfortunately; expect them to have rights, to have a say about the assets. And we come across people who are literally out on their ears with their children, unfortunately, having to claim housing benefit and renting elsewhere and starting from scratch.

TRESMAN: Not if they came to me because if they have minor children, then they'll be making an application under Schedule I of the Children Act where they can make an application for accommodation for the remainder of their minority.

MITCHELL: (*over*) The difficulty with that is them accessing legal help to do that.

TRESMAN: Quite.

MITCHELL: And we do come across and we do advise on the Children's Act, but it's incredibly hard for people on no income or low incomes to be able to access solicitors' help to take that forward.

TRESMAN: And of course the government are proposing that legal aid is no longer

MITCHELL: Absolutely.

TRESMAN: ... or public funding no longer available for those sort of applications. It is now, but we think that it will go next year.

DUGGLEBY: We've got several emails concerning the separation of assets, which again they may be different in Scotland. But this is typical of the question. They bought a house in joint names in 1999. She paid the deposit. Subsequently he paid the mortgage and balance of council tax and she paid the bills and so on. This is a kind of normal marital relationship, a normal marital splitting of financial responsibilities. And the question is quite simple. She says, 'If we separated, do we assume at the start

a 50-50 split of everything we've got?' Is that the general principle? John?

FOTHERINGHAM: In Scotland, yes. What we ask for is a fair division of all the matrimonial property. And fair sharing means equal sharing, and this is a very good reason why not. Now you say that she paid the deposit.

DUGGLEBY: Yes she did.

FOTHERINGHAM: If the deposit were a very large proportion of the net matrimonial assets, as they would now be defined, then a fair sharing would be ... an equal sharing would be unfair because it would have to take into account the money she put in at the start.

DUGGLEBY: Right.

FOTHERINGHAM: Generally speaking though, fair means equal. The big difference between Scotland and England there is we define matrimonial property very differently in Scotland to the way they do in England.

DUGGLEBY: Quite a lot of the questions do distinguish between the house that is owned by the two partners and other assets. And I get the impression that they don't sort of quite equate, Janet, the fact that the whole lot is taken into consideration, so one party might well get 75% of the house but it would be offset by other available assets, of course including the important financial ...

TRESMAN: *(over)* I'm afraid that's right, and I think that the couple involved separately would find it very hard to acknowledge that their pension that they've gone off early in the morning to earn through their work would actually be up for an equal division on separation. And of course one doesn't start a marriage talking about that sort of thing ...

DUGGLEBY: No.

TRESMAN: ... although one does nowadays because of the prenuptial situation.

DUGGLEBY: You mentioned the pension, which is interesting because Martin in Sussex has emailed us. They've more or less agreed their split of assets, although he's not terribly happy about it because, he says, although everything's gone 50-50, he had actually been contributing into his pension for 15 years before the marriage started. They were married for 25 years, but 15 years before that he'd built up his own pension pot. Now in this case, Dani, it's a pension splitting exercise, but he doesn't think it's very fair.

GLOVER: The pension is included in the list of matrimonial assets and I'm afraid that's back to a family law issue. The lawyers decide on how the assets are split.

DUGGLEBY: But ultimately what matters in a pension of course is if it's a 50-50 split of the pension, they're going to get half the income. It's not a capital asset. It's just the right to the income from the annuity.

GLOVER: They might not even get half the income each because it depends on the type of pension that is split. Some pensions if they're split can give you roughly half the income each. Other pensions when they're split can be very unequal in what they produce.

DUGGLEBY: And then of course there's the option of taking the lump sum as well, which then presumably ... Does each partner have the right in a pension split to choose whether to take the lump sum?

GLOVER: It depends. If the pension has already paid out the lump sum, on splitting there is no further lump sum to be paid.

DUGGLEBY: Right. But if not?

GLOVER: But if not, each party is entitled to ...

DUGGLEBY: (*over*) And yet again I bring in John because this 15 years, I suspect Martin might have a point if he was in Scotland?

FOTHERINGHAM: Yes he would indeed in Scotland because that part of the pension interest which accrued before the marriage - never mind the cohabitation but before the marriage - is left out of account in calculating the net matrimonial property. That's just one of the several examples whereby we can say that the matrimonial property is defined and calculated very differently on either side of the border. The terminology is misleadingly similar, but substantively the laws are very different.

DUGGLEBY: Okay, we'll move on now to a call from Derek in Bexhill. Derek?

DEREK: Hello.

DUGGLEBY: Your call.

DEREK: Hello there. I need to ask your advice really. I've been married for 24 years, I have five children, bought a house in joint names. My wife left me in May 2010 to go and live in Australia and left me with three children living at home and two children living out of home. With a mortgage of £80,000 on the property, we had an endowment policy that matured in June 2011 for £64,000, and going through with my wife she wants £55,000 of the £64,000 because she wants to have her independence. She hasn't paid me any money for the children at all and hasn't offered any. I've offered her half of the endowment, £32,000 each, so I can actually reduce my monthly payments on the mortgage and keep them affordable, and she wants me to sell the house. Can I ask you, in your opinion, what might she be entitled to?

DUGGLEBY: Well who'd like to start off with the question of the house? Can we ...

GLOVER: It's probably a family law question.

DUGGLEBY: Janet?

TRESMAN: Well she'd have to apply. If you didn't want to sell the house, Derek, then she'd have to make an application to sell the house in divorce proceedings. And I think that the judge would take into account her contribution, since it's not been such a long departure, but the fact that you still need the property to accommodate the three children; and she may be very disappointed that the order for the sale of a house might not have happened until those children have ceased their dependency. And then the division may start from a 50-50 basis, but her share might be reduced from lack of contribution, and the court take into account several different factors such as childcare and actual contribution to the mortgage or the expenses on the property or maintaining it.

DUGGLEBY: I mean you're looking ... How old are the children, Derek?

DEREK: Well my youngest is 9 and then we go 16, 18.

DUGGLEBY: Right. But they're in full time education presumably?

DEREK: Yes.

TRESMAN: So you're looking at maybe up to 9 years.

DUGGLEBY: Yeah. Any comment from you then, Julie, about the sort of things that Derek might be able to do in terms of ...

MITCHELL: (*over*) Well certainly single fathers may need to bear in mind out there when they separate that they ensure that they claim all the benefits they're entitled to, and often fathers are not the ones claiming the child benefit and so you may need to ensure that that goes straight into your name. And then you may suddenly become entitled to a whole array of different benefits like child tax credit, working tax credit, help with your childcare costs. And in this instance also you're entitled to child maintenance from your ex-wife. It's not just fathers that pay that, of course.

TRESMAN: Right, yeah.

MITCHELL: And with three dependent children, you're likely to be entitled to 25% of her take home pay. So it's really important to ensure you get that because that can really help you stay in the home. And in this instance, Derek, you're probably wanting to stay in the home, is that right, until at least the children are all 18, 19 or finished education?

DEREK: Well I'd like the opportunity to be able to stay in the home if I choose. But the problem is because she's living in Australia - she went out there as a 47 year old - she's had to go out on a visitor's passport or a visitor's visa. She can't work out there, so she can't earn any money.

MITCHELL: I see. I mean certainly child maintenance is only valuable if the other party is working, and if she's not working unfortunately there's nothing to replace it. But certainly any time she works, it's important to pursue it. And often, unfortunately, people do try to avoid maintenance by leaving the country or leaving their job, and the Child Support Agency in this country doesn't have jurisdiction outside of the UK and the family law courts are expensive to use if you wish to pursue them in another country of course.

DUGGLEBY: Okay, well, Derek, thanks for that call, and we'll move on now to Ian in the Wirral. Ian?

IAN: Hi.

DUGGLEBY: Your call.

IAN: Hi. I'm a bit different, the flipside of one of your previous callers. I've split up with a partner after cohabiting for approximately 10 years.

DUGGLEBY: Yes.

IAN: The house is in my name and my name only as I bought it before we met.

DUGGLEBY: Like the previous question we mentioned, yeah.

IAN: Yeah. But I've left the property and she's still living there with our children.

DUGGLEBY: You own the property, but she's living there - obviously with your consent?

IAN: Yes.

DUGGLEBY: And do you have a problem with that?

IAN: Not as such, but I'd like to know what's going to happen when we do come to sell it when the children are old enough to leave.

DUGGLEBY: Well can we just elaborate on the legal side of it. Are you happy, Janet, that Ian has just said to his partner you can live there? Should there be some legal agreement?

TRESMAN: I think this is going to be known as the Kernott and Jones moment, Ian, because that was the name of the case...

DUGGLEBY: *(over)* That's the case decided this morning.

TRESMAN: ... in which judgement was given this morning. And although this property was not bought in your joint names, presumably when your partner moved in with you and you had children, your intention in relation to the use of that property was as a family home?

IAN: Yes.

TRESMAN: And also on leaving the property - which is what happened in the case referred to this morning and in the previous case on which the principles were started, Stack and Dowden - the court found there was a change of intention as to the use of the property, and it could be that they would impute an intention that you had that the house should be used for your partner and the children and that might endow her with an interest in the property. It is very complicated. It's more complicated because it's not in your joint names, and I really do feel that you should come to an agreement with independent legal advice, each of you, so that you can stop a situation where a judge some years down the line when the children have ceased their dependency starts imputing intentions to you.

IAN: Yeah. That's difficult because the relationship has broken down un-amicably.

TRESMAN: Well it may have some time to get amicable again. You're still parents and you will probably be agreeing in the near future. It probably still hurts at the moment.

DUGGLEBY: John, what's your reaction to the court ruling this morning?

FOTHERINGHAM: I haven't seen it, I must be honest with you. I was away this morning.

DUGGLEBY: Ah!

FOTHERINGHAM: However what I can say is that if this gentleman had have been in Scotland, the position would be entirely different. The partner would have absolutely no right to the house at all, nor to any right to the transfer of it, nor for any part of the value of it. She would have no claim on cohabitation unless she could show that she'd had economic disadvantage; and if he has been earning and she has not, it may be difficult to show that she has had economic disadvantage in his interest, unless of course she's given up a career to look after the children. That might be different.

DUGGLEBY: Indeed. Right ...

FOTHERINGHAM: Just to give a rider to that, Ian mentioned that the house was bought in his name before they met. If that had been the case and they had married, that house would never become matrimonial property no matter how long they had been married if he'd bought it before they met.

DUGGLEBY: Oh. Well of course he could have obviously given her half by making her a joint owner.

FOTHERINGHAM: He could have done that, but if he'd never got round to that it remains in his name.

DUGGLEBY: So the message is make sure that if you're in that situation in Scotland, then make sure that you ...

GLOVER: Ask for half the house.

DUGGLEBY: ... as a condition of marriage get the joint ownership papers signed straightaway.

TRESMAN: Can I just add one more thing - that the children of course have a right under the Children Act Schedule I to apply for the use of the house as their accommodation as well, Ian. So lots of things to think about there.

DUGGLEBY: Indeed.

FOTHERINGHAM: The Children Act doesn't apply in Scotland.

DUGGLEBY: Right. Mary in Bristol, you've got the next one.

MARY: Oh good afternoon.

DUGGLEBY: Good afternoon.

MARY: Hi. I'm just really feeling quite stressed. My husband's about to leave actually and it's all a bit of a shock and I've just got no idea you know what's in store financially. We would have been married 30 years next year. We're both 53. We've got two sons at university. The main home is the house, but away in term-time, and I'm just a little bit worried you know what on earth happens with bills and the house.

DUGGLEBY: Yes, Mary, we're all very sympathetic in this situation because you know it must be a terrible shock. Just one question. You've got two sons at university, so they are still in education ...

MARY: They are, yeah.

DUGGLEBY: ... and therefore are still I think, Janet, that means they are dependents, are they?

TRESMAN: Yes-ish, but they have grants and things like that. Loans.

DUGGLEBY: Right. But I mean here you are. Somebody like Mary comes through your door.

TRESMAN: Yes every day.

DUGGLEBY: I mean you don't hit them with a barrage of financial advice on day one. You try and sort of unravel the problems maybe?

TRESMAN: Absolutely and I would start saying to Mary look, this is a tremendous shock. You know he's obviously been thinking about this for some time and we need to consider all the options available to you at the present time, but I don't want to you know completely overawe you with them. And so she's going to need to probably get some counselling and some help to come to terms with it because it's very difficult

when all this is happening and being bombarded. But there's of course divorce options, there's of course mediation, there's of course dealing with this in a collaborative way.

MARY: Yeah, I think because he's threatened a few times, I think this is the time that it's going to happen and I just wondered how ... Is the house likely to be split 50-50 or would I get maybe a bigger percentage because I don't earn as much?

DUGGLEBY: The problem here, Dani, is again, as we mentioned earlier, it's the total assets of the marriage and we don't know, unless you literally do an inventory, who owns the house, who owns the car, who owns the pension. There's all sorts of assets. I mean a marriage of 30 years accumulates a huge number of assets which you probably don't even think about.

MITCHELL: It's difficult here for Mary. I mean she said this has been mooted maybe in the past, unfortunately, and the situation could have been quite different if the children were still dependent. They're not quite dependent when they're at university, certainly not for benefit purposes, and also potentially when it comes to the Children's Act, I understand. And so she may have been in a position to have kept the home and stay in the home and the assets would have been divided not quite 50-50, but maybe more than 50% given to her as the main carer for the children, so unfortunately the timing here is quite difficult for you, Mary.

GLOVER: But also, Vincent, your point being that all the matrimonial assets are added together and divided accordingly, and it may be that the matrimonial home is offset against other assets. But I can understand and sympathise why Mary is concentrating on the home.

DUGGLEBY: The home. Well yes it's the biggest and most important asset and it still is a family home with two sons.

MITCHELL: Most single parents want to stay in the home and often they would waive their rights to the other assets, the pension sharing, in order to keep that home.

And often they're unaware that they have a right to stay in the home and can actually afford to stay in the home.

DUGGLEBY: I mean I'm no expert on the finer points of divorce, but I would say if you can possibly keep it amicable, if you can possibly you know just treat things calmly. And if the inevitable happens and you are splitting up, you know recriminations are all too tempting, but the hard facts I think, Dani, are that you've just got to sit down and say, "Well you know it's very important to me for example I stay in the house. What do you think? Or you know have you got ..."

GLOVER: Absolutely.

DUGGLEBY: These are the sorts of practical issues. Now you can do that, I think, without necessarily involving a solicitor or ...

GLOVER: An expensive lawyer. Well a good start is to list out the matrimonial assets and it's often the case that in any relationship one party deals with the finances, so it's often one party finds it quite ...

DUGGLEBY: (*over*) Generally the husband.

GLOVER: And so the wife finds it quite difficult to understand.

TRESMAN: Well in fact us family law specialists are just what it says on the can. We do understand and appreciate where you're coming from, Mary, and there are lots of options to you and available for you. I suggest that you go to my organisation's website. That's Resolution - First For Family Law, and you'll find a lot of information there and also they will help you to find a solicitor in your area and other agencies as well, including counsellors. I know Bristol is packed full with some very good help for you and I wish you well.

DUGGLEBY: We all do, I'm sure Mary. Now a quick call from Simon in Oldham.

Simon, you're a Scottish question, I think.

SIMON: Yes, when does Scottish law actually apply? I mean I have a British passport. I live in England, but the in-laws live in Scotland. You know it's a key retirement place. What does apply where I was married?

DUGGLEBY: So you were married in Scotland and you have lived in Scotland?

SIMON: No, no, I was married in Prague as it happens. It's complicated.

DUGGLEBY: Married in Prague, lived in Scot... Born in Scotland?

SIMON: No, born in England.

DUGGLEBY: Right. But in-laws live in Scotland, so your wife was born in Scotland?

SIMON: No, she was born in Prague. In-laws live there. But you know I could see myself living in Scotland quite easily.

FOTHERINGHAM: Right, well where did you last live with your wife?

SIMON: England.

FOTHERINGHAM: Right. In that case almost certainly English law is going to apply. The rules of jurisdiction are quite complicated, but if you have not lived together with your wife in Scotland and neither of you is Scots, the Scots law is not going to apply, I regret, because the subtext of your question would appear to be that you recognise that Scots law is going to be better for you. If you didn't live with your wife in Scotland at all, then Scots law is not going to apply even if her parents live there, I'm afraid.

DUGGLEBY: And a very quick final question from Katie in London. Katie, if you can make it brief.

KATIE: Hello there, yes. Basically my marriage broke down 2 years ago. The absolute's due to be applied for on 19th November. Basically we sold the house. We paid basically most of the debt in my husband's name on the basis that he wasn't going to touch my pension, and I've found out in the last week or two that he's actually going for 50% of my pension on the basis that most of his assets have been repaid in his name and I've not really got anything to show for. I just wanted to know where I stand really. Will a judge sort of award in his favour?

DUGGLEBY: Well hang on a minute. You've got your decree nisi and you haven't got the financial settlements sorted out?

KATIE: No because basically we did it all ourselves thinking absolutely everything was sorted and then he said that he would not ...

DUGGLEBY: So he's changed his mind?

KATIE: Yes, absolutely, in terms of my pension.

DUGGLEBY: What's the position there Janet, briefly?

TRESMAN: Well again this is up for negotiation and if you've already divided some of the assets and he's taken that agreement on the basis he's not going to touch your pension, then that can be referred to. The fact is that all the assets will be taken into account and all the factors applied as to what is a fair and reasonable outcome for you both.

GLOVER: Who's your pension with?

KATIE: It's with my company, a corporate bank - non-contributory, large corporate

bank.

GLOVER: Final salary scheme?

KATIE: It was. It's just stopped being final salary in the last 12 months, so the cash equivalent is quite ... yeah, he won't do too badly out of it if he gets 50%.

GLOVER: But it's always a pity to lose a defined benefit scheme.

KATIE: Absolutely, yes.

DUGGLEBY: I'm sorry, we've got to wrap it up there, but pension splitting is quite a complicated thing. I haven't got time to go to John to check whether the position is that in Scotland, but there is always our website you can turn to for further information and indeed to comment on any other points we've raised in the programme. That's bbc.co.uk/moneybox. Paul Lewis will be here at noon on Saturday and he'll be here taking your calls ... He won't be here in fact taking your calls next Wednesday afternoon, but the subject is student finance and Paul will be broadcasting from Harrogate Grammar School Academy in Yorkshire. Bye for now.