

Orders concerning the Family Home

Whether owned by one or both parties, the family home is, for the majority of cases, the largest asset in financial proceedings. As a result, it is an excellent place to start when considering what settlement a client should propose or accept. The priority for the court is to provide a suitable home for the children of the family and the spouse with care of the children as well as a home for the other spouse. Unless acting for wealthy clients, the central question to resolving the case is to use the family home to make an order which houses both parties adequately. This podcast will explain the orders available to the court when dealing with the family home.

First of all, it is important to understand the terminology used. 'Equity' refers to the amount of money left over once a house is sold and any mortgage paid off. The equity in a home will be the amount of money used by the court to guide their decisions in a case.

For example:

I sell my house for £200,000. I had a mortgage for £175,000 outstanding and so there will be £25,000 equity in the house. In fact, there may be less as there will be costs associated with the sale including estate agent fees, legal fees, and disbursements. This will reduce the equity and so should be taken into account.

The most common orders made include:

- the immediate sale of the property and division of proceeds
- the sale of the house is postponed with the proceeds to be divided on sale
- transfer of the home into the sole name of one spouse with a charge in favour of one spouse or immediate payment of a lump sum in compensation
- a Mesher or Martin Order.

Let's deal with them one at a time.

Firstly, let's have a look at the sale of the home and the division of sale proceeds.

Under s24A Matrimonial Causes Act 1973, where the court makes an order for a lump sum, a secured periodical payments order or a property adjustment order, on making that order or at any time afterwards, the court may make an order for sale of property specified in the order to which either or both parties have a beneficial interest.

An order for sale can include an order to make a payment out of the proceeds to one of the parties.

An immediate sale may be appropriate in a number of circumstances.

If the clients are lucky, there is sufficient equity in the family home to be divided to provide both parties with the means to purchase an adequate new home. There may not be the ability to buy a home of the same size or standard as the previous family home.

In the more common position where one party has already obtained alternative accommodation and the house proceeds are used to allow the other spouse to purchase a new property, the remainder of the proceeds can be given to the spouse with accommodation as a lump sum. This can be used as a savings 'cushion' or as a way of reducing the mortgage.

Sadly if there is insufficient money to pay the existing mortgage and outgoings on the family home, there may be no alternative to the sale of the home if it is at risk of repossession. The proceeds of the sale can be divided between the parties, although the capital limit for certain welfare benefits must be remembered. Parties may have to seek local authority housing or housing association accommodation or private rented accommodation. If the parties have a good job or income, they could use the sale proceeds as a deposit for a new property.

Secondly, let us examine the position where the home is transferred into one spouse's sole name. There are some situations where the court may transfer the house into one spouse's sole name.

Most commonly, transfer of the family home is used where the family home is the only asset and the parent with care of the children requires the property as security. This is not the only situation where the court will order a transfer and the court takes into account all the circumstances of the case. For instance in **Jones v Jones [1976]** the husband's assault on the wife reduced her capacity to work. The husband's conduct and the wife's inability to work lead the court to transfer the house to the wife.

There are a number of variations on a transfer including where one spouse has the family home transferred to them and the other spouse has a lump sum payment as compensation for the loss of their interest in the family home. This depends on the assets and the ability of the court to find a lump sum payment from the assets. It may also be used as an offset if the other person has a large pension.

Alternatively, the property can be transferred outright to one spouse with no lump sum payable and without any charge on the home

If the house is sold, there may be insufficient sale proceeds for one party to be compensated for the loss of the home. Instead of a lump sum, the spouse may receive a larger share of any pension provision or reduced or nil periodical payments. The mortgage will be transferred to the occupying spouse but it should not be assumed that this will happen automatically; the mortgage lender must agree to this. The transferring spouse is released from the commitment of the mortgage and is free to obtain one for a new property.

One of the problems associated with transferring the family home is whether the mortgagor will consent to the transfer of the mortgage and whether the transferee can afford to take it on. One party may be willing to transfer a property to their former spouse or civil partner but if there is a mortgage, the bank or building society must agree to the mortgage being transferred too. It may also be the case that the transferee cannot afford to pay the mortgage without the assistance of the transferor. This may leave one party in the position of not being the owner of a property but still being responsible for a mortgage. This would be a difficult position for the transferee if their former spouse defaulted on the mortgage, as liability is joint and several.

This may seem a draconian measure to leave one spouse without any share of the family home but it may be necessary to house a more vulnerable party. Alternatively, one spouse may have a high wage or excellent capacity to earn enough to provide a home for them whilst paying periodical payments – it will be a question of balancing the assets available against the needs of the parties and the overall requirement of fairness. There are some options open to the court where the spouse not living in the home retains a beneficial interest.

Thirdly, where there is a charge placed on the property.

A charge is where the family home transferred with the transferring spouse for a proportion of the sale proceeds realizable when the house is sold or on a specified event e.g. the spouse begins to cohabit.

This type of order is suitable for a transferring party who is able to wait for their share and the level of the charge should be carefully considered as whether or not the money is required to pay for a new home or whether it is simply a lump sum to compensate the transferring party for the loss of the asset.

This type of order operates in a similar way to a Mesher order (discussed in a moment), although the two are not identical orders. With a charge, one person owns the entire property with a charge against it. With Mesher orders, the ownership is held by both parties.

Finally, Mesher and Martin orders – these are common in practice and it is important to understand how they work.

If the court wishes to preserve both parties' interest in the family home but cannot immediately order a sale, a 'Mesher order' may be suitable. A 'Mesher' order is named after the case of **Mesher v Mesher and Hall [1980]**.

A Mesher order is one where the family home continues to be held by both parties as trustees of land. The type of trust that is found in most Mesher orders are where one party has the sole right to occupy the property until sale; the sale is triggered upon a particular event e.g. the occupying spouse dies, remarries, cohabits for more than six months, voluntarily sells the property or the youngest child of the marriage attains a certain age and upon sale, the net proceeds of the sale (after redeeming the mortgage and paying sale costs) are divided according to proportions agreed at the time of the order.

The advantage of a Mesher order is that it allows the preservation of a family home with one party retaining an interest and gives one party a future capital interest in the property. For a while, Mesher orders became unfashionable as the Court of Appeal found in **Martin v Martin [1978]** and **Hanlon v Hanlon [1978]**. Their criticism was that Mesher orders store up trouble for the future and Mesher orders do have some disadvantages. Children may require a home for longer than is allowed for in the order, the home may have decreased in value over the period of trust, leaving parties unable to buy a property, or a spouse may enter the property market in their fifties without a sufficient earning capacity and this can leave an enormous gap between order and the non- occupying spouse receiving their capital interest. However, as property prices rose throughout the early 'noughties', these orders have been used increasingly to achieve equality between the spouses, even if one spouse may have to wait for a capital sum.

A similar type of order is the Martin order from the case of **Martin v Martin [1978]**. This order allows a spouse to occupy the family home until death or remarriage and the sale is postponed until then. It is a very unusual order which is not commonly used but will protect an older, financially vulnerable spouse with no earning capacity.

When considering how to start to divide money and property, a good place to start is by considering the various options for dealing with the family home. Think carefully about the parties' situations, including whether they can afford to pay a mortgage, whether children of the family require a home, and how all parties will afford to pay the bills. When you have decided which order is the most suitable for your client, hopefully all of the rest of the orders will fall into place!