

Divorce – how to resolve ownership of the family home

Dealing with the family home in the context of a divorce can be a complex and emotionally charged process. This issue is made more difficult by the fact that there is no standard split of assets. Indeed, English law provides several options for handling the family home depending on the circumstances of the divorce and the wishes of the parties involved. Here are some common ways to deal with the family home.

Options:

Divorcing couples are faced with three main options: to sell the property and split the proceeds; share the house; or one party buys the share of the other spouse. This last option is termed a transfer of the property.

1. Sale of the Property:

When the property was acquired by both parties on the basis of a 50-50 split, the most straightforward option is to sell the family home and divide the proceeds between the spouses. This is often done when neither party wishes to retain the property or when financial considerations make it the most practical choice. The court can order the sale if necessary.

a) In some cases, the court may order a deferred sale of the property. This means that one spouse can remain in the family home for a specified period, after which the property will be sold and the proceeds divided.

b) Mesher or Martin Orders are court orders that can be used to delay the sale of the family home until certain conditions are met, such as the youngest child reaching a certain age, the death of the occupier, or the occurrence of specific events such as remarriage. Mesher and Martin orders are less common than they once were, but they can still be used in certain situations.

2. Transfer of the Property:

One spouse may wish to keep the family home, while the other spouse can agree to transfer their share of the property to the remaining spouse. This transfer can be made by a court order or through a voluntary agreement.

3. Share the Property:

Some divorcing couples might agree to share the property until the divorce is finalised or a court order is granted.

4. Other options:

a) Transfer part of the value of the property while keeping a stake or interest in the home. If the house is subsequently sold, then the person will receive a percentage of its value.

b) Pension Offset: In some cases, one spouse may agree to transfer their share of the family home in exchange for a greater share of the other spouse's pension assets. This can be a way to achieve a fair division of assets when one spouse has a more substantial pension.

Who gets to stay in the family home during the process?

There is no straightforward answer to this question, as it depends on a variety of factors, including whether the home is rented or owned, if there are children involved, or whether there is a pre-existing agreement between the parties.

Generally speaking:

Owned properties

- If the property was jointly acquired, then both partners have 'home rights' to stay in or return to the family home until a permanent order or financial settlement is made.
- If the property is owned by one partner only, the other may still have a right to occupy the property under the Family Law Act 1996 if they are married or in a civil partnership. If the partners were only cohabiting, then the conditions are set out in the Trusts of Land and Appointment of Trustees Act 1996.

Rented properties

- If the partners are joint tenants or tenants in common, they both have a right to occupy the property until the tenancy ends or is transferred to one of them.
- If the tenancy is only in one partner's name, then the other may still have a right to occupy the property based on the Family Law Act 1996 if they are married or in a civil partnership under the auspices of the Housing Act 1988.

a) Occupation Orders: In cases where one spouse refuses to leave the family home, an occupation order can be sought to determine who has the right to live in the property. These orders are typically temporary and aim to ensure the safety and well-being of both parties.

With children

- Courts usually prioritise the welfare and best interests of the children when deciding who should stay in the family home. Often it is the primary carer who will be allowed to stay until the children reach a certain age or finish their education.

Does moving out affect my rights?

Even if a partner moves out, it does not necessarily count against them. However, if the house is mortgaged in both names, the partner who moved out should ensure that his or her part of the mortgage is paid.

Splitting the house without going to court

In deciding the split of the family home, the court will need to be involved in some capacity. Even if the parties could obtain a consent order without the court, then the order could be easily broken if the other party changes his or her mind. Indeed, the court would have no powers to enforce the agreement.

A property settlement agreement has three key stages:

- Informal or mediated negotiation.
- Agreement signed by both parties.
- Ensuring that the settlement is legally binding and enforceable as it needs to be turned into a consent order.

How is it divided?

There is no one-size-fits-all approach. The following information is general and will be affected by any agreement between the parties, such as prenuptial and postnuptial agreement or court orders in place, such as an occupation order or non-molestation order.

Divorce with children

In any proceedings, the interests and welfare of any children are the first concern. However, the fact that a partner is the primary carer of the child does not make them automatically entitled to remain in the family home. If the partners cannot agree, the court will give priority to the children's needs and welfare in relation to their living arrangements. The involvement of children can be the deciding factor in some cases when it comes to whether the family home is to be sold, although again this is all circumstantial as the court could defer the sale of property until a specific event happens. This is called the Mesher order. The sale could even be deferred if the primary carer is unable to afford another property.

Thus there are no hard and fast rules and so good legal advice is crucial. Often one spouse will keep the home and the other will gain more of the other remaining assets to balance things out.

Divorce without children

When there are no children involved and the parties do not reach an agreement, the courts usually take into consideration the contribution to the property, other financial resources, the needs of both parties, their future prospects, and their respective conduct during the preceding marriage or partnership. Depending on the circumstances, the court might not split the house equally, but will rather tend to divide the property in such a way that reflects the personal financial situation of every individual involved. The court will take similar considerations if the home is owned by one of the partners only, as the other partner may still have a claim to a share of its value under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004.

If one of the partners is unwilling to sell a jointly owned property, the party wanting to sell could petition the court to obtain an order for sale. The ultimate decision will be left to the court. Similarly, if the partners want to keep the family home but cannot agree on to whom the property should be transferred, the court will decide after taking into consideration a variety of factors.

We can help...



It is essential to seek legal advice when dealing with the family home in a divorce, as the specific circumstances of your case can greatly affect the outcome. Mediation and negotiation can help to reach an agreement outside of court, a strategy that can be less adversarial and costly. As there is no 'one-size-fits-all' approach when it comes to what happens to the family home following divorce, obtaining carefully tailored legal advice is essential to ensure that you do not lose out, so please get in touch.

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