

# Should I stay or should I go?

*James Carroll and Juliet McDermott discuss interim occupation of the family home pending divorce*



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**'Some clients facing divorce may not be aware at the outset of proceedings of their basic rights to live in their home or how the property is held and will therefore need to be advised on their rights and entitlements.'**

Commonly, when facing a divorce, the biggest asset will be the family home. Both parties will need to decide what is going to happen to the family home in the longer term. This will require consideration of their respective financial circumstances, including incomes, and if appropriate the needs of any children. Before the divorce becomes final, parties will have to consider who occupies the family home in the interim and how it will be financed. This can include a myriad of considerations including who pays for the mortgage, outgoings such as home contents and buildings insurance, mortgage payment insurance, council tax, and utility bills. Parties will also need to consider the upkeep of the property, maintenance, decorations and other works. These considerations may be crucial in determining who should stay in the family home since it may be the case that one person staying alone cannot afford to do so. In this case the question of interim maintenance arrangements and perhaps benefits entitlements also needs to be considered.

Some clients may not even be aware at the outset of proceedings of their basic rights to live in their home or how the property is held and will therefore need to be advised on their rights and entitlements. Leaving the home will also of course impact where there are children, as the departing spouse will no longer be involved in the day to day care of the children, which will lead to a fundamental alteration of the status quo. This needs to be balanced with the potential conflict that the child(ren) may be exposed to if both spouses remain in the property.

There are several important questions to be asked. Who has the right to stay in the family home? How can these rights be protected? Who should be responsible for outgoings on the family home? Who has responsibility for repairs and maintenance? What happens to the parties' joint bank accounts? How can the mortgage be paid? What other factors should clients bear in mind? The below sets out some of the considerations parties ought to bear in mind, and some of their respective rights and obligations when occupying the family home prior to finalisation of their divorce.

## **Right of occupation**

The obvious starting point is that each party has a right to occupy the family home while the marriage subsists. This is both a personal and a proprietary right under s30 Part IV Family Law Act 1996 (FLA 1996). Section 30 gives either spouse the right not to be evicted or excluded from the property except by an occupation order under s33-38 FLA 1996. Both spouses have a right to enter and to occupy the property until decree absolute, unless the court orders otherwise under an occupation order. Where the property is in the sole name of only one spouse, an application should be made to register the other spouse's home rights. Home rights do not create an interest in the property however, their purpose is solely to protect rights of occupation. It will also bind subsequent buyers and lenders. They also expire on decree absolute, and so if financial settlement has not been reached by the time of granting decree absolute,

an application ought to be made under s33(5) FLA 1996 to extend the rights beyond this time. Such an application should be made before decree absolute is granted. To lodge a home right a notice on Form HR1 has to be registered with the Land Registry, and does not need the owning spouse's consent to do so despite the fact that it is known as an 'agreed notice'. No fee is payable. The Land Registry will then notify the owner of the notice, usually within a week. Land Registry Practice Guide 19 can provide more detailed information.

Under s33 of the FLA 1996, the court can make an occupation order to direct that one person can remain in the property to the exclusion of the other party. The provisions of s33 of the FLA 1996 apply where one person is entitled to occupy a dwelling house through a beneficial interest or estate, or where they have matrimonial home rights, and the property is or was (or was intended to be) their home and the home of the other party. Such an order may be made for a specified period, until the occurrence of a specified event, or until further order.

Section 33(6) lists factors that the court must have regard to in exercising its powers under s33. These must be considered by the court in each case. They include:

- the housing needs and housing resources of each of the parties and of any relevant child;
- the financial resources of each of the parties;
- the likely effect of any order, or of any decision by the court not to make such an order, on the health, safety or well-being of the parties and of any relevant child; and
- the conduct of the parties in relation to each other and otherwise.

The court must carry out the 'balance of harm' test in s33(7) which provides that if the applicant or any child is likely to suffer significant harm caused by the respondent if an order is not made, then the court shall make an order

unless the respondent (or any child) will also suffer significant harm and that harm is greater than or as great as the harm caused by the respondent to the applicant or a child if an order is made.

It should be noted that the last point relating to conduct was remarked upon by the Law Commission since:

a requirement to decide upon occupation of the family home on the basis (at least in part) of fault, thus encouraging parties to make allegations about behaviour, sits uneasily with the general trend in matrimonial law towards reducing

affected by the second. Therefore the mortgage lender should be notified of the restriction and the possible dispute as soon as possible.

### Inheritance considerations

If held as tenants in common, and in the event of either party dying, their share in the property will pass in accordance with the terms of their will or under the rules of intestacy if they have no will. Clients therefore ought to consider making or revising their wills accordingly. If one party dies intestate prior to decree absolute, the spouse will inherit by default. If joint tenants, clients will of course

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the need for recrimination and fault finding... with a view to enhancing the possibility of agreement or event reconciliation between the parties. (*Family Law: Domestic Violence and Occupation of the Family home* (1992) (Law Com no 207) at para 4.23).

Whilst conduct is a factor, it is only one of the factors to be taken into account when the court is deciding whether or not to grant an occupation order.

### Ownership of the property

It is essential from the outset to obtain office copy entries from the land registry in order to confirm how the property is owned, even if there is no dispute as to occupancy. The office copy entries will also establish whether the property is held as joint tenants or as tenants in common. If the property is held jointly, neither party can deal with it without the other's consent. However, it is important to note that if parties have a drawdown mortgage on the property, even if a restriction/second charge is placed on the property register it may be possible that sums can still be drawn down by either spouse since the first charge will not be

need to be advised that the right of survivorship applies and the survivor, in the event of one party's death, will inherit the entire property.

Since the relationship has broken down, clients may wish their share of the property to form part of their own estate rather than going to their spouse. Clients therefore should be advised that they can sever the joint tenancy by serving the other party with a notice of severance, then sending this to the Land Registry with a Form SEV or Form RX1 for a restriction in Form A so as to ensure the notice is entered as a restriction on the title to the property. Not all clients will want to do this however, many will be content to maintain the status quo in respect of the right to survivorship, particularly if there are children.

If the client is not the proprietor either as a joint tenant or a tenant in common, they should be advised that they have the option of registering a charge on the property at the Land Registry so as to secure their position in relation to the property. What this means in practice is that the property cannot be sold or transferred or remortgaged before any financial settlement is reached between the parties. This is a very useful alternative where for example the property is a

second home, which has not been the main family home.

**Mortgages**

Where one party has home rights under s30 FLA 1996, a lender must accept payments from a spouse even if they do not own the property, as per s30(3) FLA 1996. Therefore clients

to the proceedings and the court will not allow an order for possession if the client shows that he or she can pay the mortgage and the arrears themselves.

**Capital gains tax**

Clients should be advised that if they intend to transfer a second home or other chargeable assets to the other

able in relation to outgoings on the family home, and for parties to reach agreement where possible. Where this is not possible and where the court makes occupation orders under s33, it can, under s40, direct that either party should be responsible for the repair and maintenance to the family home, paying the rent, mortgage, or other outgoings affecting the house, and can order a party occupying the house or any part of it to make periodical payments to the other party in respect of the accommodation, if the other party would (but for the order) be entitled to occupy the house by virtue of a beneficial estate or interest or contract.

The court can also go so far as to grant either party possession or use of furniture or other contents of the house, and can make directions to ensure that either party takes reasonable care of any furniture or other contents of the house, and/or takes reasonable steps to keep the house and any furniture or other contents secure.

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should be advised that they can remain in the family home under an occupation order even if they are not the registered owner, and can continue to make mortgage payments. In the event that the other spouse does not pay the mortgage and possession proceedings are brought, the client can make an application to be joined

spouse on final settlement, they should do so in the tax year of separation so as to defer any capital gains tax liability they may have in relation to the transfer.

**Outgoings**

Courts expect parties to maintain the status quo as far as they are

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However, any order under s40 that orders the payment of outgoings in respect of the property, shall cease to have effect when the occupation order to which it attaches ceases to have effect.

It should be noted that any non-compliance by the respondent cannot be enforced by imprisonment for contempt of court. In *Nwogbe v Nwogbe* [2000] the Court of Appeal held that an order under s40 requiring one party to make payments in respect of rent and other outgoings relating to the property could not be enforced. The order had been made at the same time as an occupation order. The respondent had failed to make the required payments and the applicant sought to have him committed to prison for contempt. The application failed, highlighting that the power given by s40 is effectively redundant in the face of non-compliance. Section 4 of the Debtors Act 1869 abolished imprisonment for debt, except in specified circumstances, and there was nothing in s40 that was sufficient to effect an implied repeal of s4 of the 1869 Act. Accordingly, there is no power to impose imprisonment for non-compliance with a money order under s40. The Court of Appeal regarded the case as exposing a lacuna of considerable practical significance requiring the urgent consideration of the legislature.

#### Maintenance

Where one party cannot afford outgoings on the family home, or the rent or mortgage, they can apply for maintenance pending suit (MPS) and/or child support. Maintenance in this way can help one spouse until the divorce is determined. An application for MPS can be made any time after the petition has been filed and will terminate on the grant of the divorce. The court will usually only award modest sums however, based on the principle of 'reasonableness', to provide adequate interim provision, and clients should be aware that there may be a risk that an application could jeopardise negotiations with the other spouse in the financial proceedings.

Clients may also be entitled to tax credits regardless of the level of maintenance they receive.

Child Tax Credit can be paid if the client is responsible for at least one child or young person who normally lives with them. Working Tax Credits can also be awarded based on the hours the client works and gets paid for, whether employed or

can use funds to the detriment of the other. In the interests of constructive settlement however, it is also important for the client to notify his or her spouse in writing of any such action. This may also help to prevent the expense and distress of resisting any potential

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self-employed. Any change in circumstances should be notified to the HM Revenue & Customs in order to avoid sums being claimed back.

#### Council tax

If one spouse does opt to or is required to leave the family home, the other should also notify the local authority so that they are entitled to a reduction in council tax, since council tax is based on the assumption that the property is occupied by two adults. This can be done by writing to the local authority and notifying them that they are now the only adult in the property and ask for the 25% reduction. Clients on low incomes with savings of less than £16,000 may also be entitled to council tax benefit as a single person.

#### Joint accounts

Where a client feels that they cannot continue to work amicably with their spouse pending final financial settlement, and where there is a joint bank account, they may wish to close or place a stop on this account. Clients should consider what standing orders and direct debits come from this account including the mortgage, and how these will be paid in future. In the event that the bank does not accept instructions from one party to close the account, a letter to the bank is usually sufficient to cause the bank to take note, if the letter states for example that the client will not be jointly and severally liable for any overspends or missed payments, on that account. This is also important where the parties have a mortgage account that enables either party to draw down funds immediately, or offset accounts where one party

applications for an injunction by the other spouse. Second cards on credit card accounts, and joint credit or debit cards should also be stopped where applicable.

Further, if the client uses internet or telephone banking, care should be taken to change passwords if the other spouse knows what they are.

#### Emails and correspondence

Clients should also be advised to secure their private papers and to secure or establish a new email account, if their spouse knows their password or has access to their emails. This is particularly important for receiving legal correspondence from their solicitor, and setting up a dedicated email account for this sole purpose can be a good idea.

#### Conclusion

There are a lot of issues to consider in relation to the family home pending decree absolute. Whilst there is clearly no hard and fast rule as to whether a client should remain in occupation of the home, or to leave, all these factors – and potential pitfalls – should be considered in detail when advising the client on this issue. Practitioners would do well to compile a checklist of all these points, and to advise on the same as soon as the issue of the interim occupation of the family home is raised. All of them combined will ultimately feed into the client's decision whether to remain or not, and what should be done to safeguard their position in either case. ■

*Nwogbe v Nwogbe*  
[2000] 3 FCR 345