

The family home

There are a number of specific considerations to bear in mind when thinking about the matrimonial home on separation and divorce.

The first thing to think about is that whoever leaves the matrimonial home on separation is unlikely, realistically, ever to go back to it. This is not a legal consideration so much as a practical one, but it is an important tactical point.

Solicitors tend to say that a husband who moves out leaving his wife and children in the former matrimonial home is less likely to be able to move a financial settlement forward quickly, whereas someone who stays in the home despite the breakdown of the marriage exerts pressure subtly, due to the difficulty inherent in the situation, and may secure a more advantageous settlement because of it.

However, tactics are just one aspect of this unpleasant situation. It is more important to do whatever you feel you need to do to keep yourself on an even keel after the breakdown of a marriage than to worry too much about the impact of your actions on the financial settlement.

It is not possible to exclude your spouse from the family home without a court order. A court order – called an ‘ouster injunction’ – will only be granted if there is/has been violence or if there is a risk of it. The general rule is that both parties are permitted to occupy the matrimonial home in the absence of an order or an agreement to the contrary.

On divorce, there are many ways that the family home can be dealt with as part of a financial settlement. What happens will depend overwhelmingly on the needs of each party and the children, and on the level of assets involved.

The court has the power to order that the family home should be sold and the equity shared, or used by one party alone, or that it should be transferred into the sole name of either party.

Depending on the circumstances, it may be possible to swap a wife's entitlement to a share in the husband's pension for his entitlement to a share in the family home, although it is essential to take advice from your solicitor and from a financial adviser as to the long-term implications of this kind of agreement.

If there is not enough money to rehouse both parties comfortably, the court can look at more creative solutions such as trust-based orders, which give the children's primary carer the ability to stay in the house until the children reach a certain age (often until the youngest leaves secondary school) and then provide for the house to be sold and the proceeds divided at that point.

Where there is enough money to cover everyone's needs and still have some left over – so-called “big money” cases – the general rule is that the equity in the family home should be shared equally between the spouses upon divorce (as stated by Lord Nicholls in the case of *Miller, McFarlane* (2006)). How far this filters down the asset levels is still an open question in family law circles and there are some who suggest it applies to every case. However, where there is not enough money to go around, the needs of the parties and more pressingly the children are likely to prove determinative.