

# Orders the Court can make on a divorce or dissolution



## An overview

This factsheet explains the types of orders that are available to a couple when negotiating their divorce or dissolution settlement.

## Avoidance of Disposition Order

This is an order preventing a party from disposing of property. An injunction may be made where the court is satisfied that one party is about to dispose of property with the intention of defeating the other party's financial claim (called ancillary relief) or frustrating or impeding the enforcement of an order.

If the disposal is not discovered until after it has taken place, the court has the power to grant an injunction to set the disposition aside providing it is a 'reviewable' disposition. A disposition will be reviewable unless it was made for valuable consideration (other than marriage), to a person who at the time of the disposal acted in good faith and without notice of any intention by the respondent to defeat the claim.

## Periodical Payments (Maintenance Order)

This is an order requiring one party to make regular payments (usually monthly or weekly) to the other. The order will confirm the starting date of the payments and how they should be made (usually by standing order). It is important to note that a Periodical Payments Order cannot be made if you have remarried or formed a Civil Partnership, even if the application is made before the remarriage/Civil Partnership.

Once the level of the Periodical Payments has been determined, consideration will need to be given to the length of the order. This can be for a limited period of time or on a 'joint lives' basis. A Periodical Payments Order will however, automatically end upon the death of either party or upon the remarriage or forming of a Civil Partnership by the receiving party. Consideration will also need to be given as to whether or not it is appropriate to prohibit the receiving party from applying for an extension of the term. This is called a section 28 (1A) bar.

A Periodical Payments Order can be varied by either party and therefore an application can be made for an increase or decrease in the amount.

## Secured Periodical Payments

This is an order requiring the paying party to secure the annual amount of the Periodical Payments against a capital asset, e.g. a bank account. As with a Periodical Payments Order, a secured order will end on the death or remarriage or forming of a Civil Partnership by the receiving party. It will not however end on the death of the paying party. In practice these orders are rare. To make an order the court will need to be satisfied that the receiving party will need protection against the paying party going bankrupt, disappearing or dying and that there is an asset against which the payments can be secured.

## Maintenance Pending Suit

This is an interim order for monthly or weekly payments until a final settlement has been negotiated or ordered by the court.

## Periodical Payments for children (Child Maintenance)

Since the coming into force of the Child Support Agency Act 1991, the Child Support Agency will determine the level of maintenance.

The court can however still make an order in the following circumstances:

- Where a Child Support Agency (CSA) calculation has been applied for, and the non resident parent's net weekly income exceeds the current CSA maximum net income limit of £2,000 per week - and the court considers it appropriate for the non resident parent to make an additional payment. This is called a Topping up Order
- Additional educational expenses. This can be applied for if a child is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation. This will most often be used in relation to The payment of school fees
- Disabled or blind children. This can be applied for where a disability allowance is paid to or in respect of a child, or where no such allowance is paid but the child is disabled and the order is made solely for the purposes of requiring the person making payment to meet some or all of the expenses attributable to the child's disability
- Consent Order. The court can make an order if there has not been a CSA assessment and the parties agree the level of maintenance
- If there is a court order or pre-April 1993 written agreement, an application to the CSA cannot be made and therefore the existing order has to be varied by the court unless it has been discharged
- The CSA will only have jurisdiction to deal with an application where a child is under 18 and is the natural or adopted child of the parties and all three are habitually resident in the UK. The court will therefore retain jurisdiction to make a maintenance order for stepchildren, children aged over 18 and/or where any one of the parties or the child are not habitually resident in the UK.

## Orders for the benefit of children

The court has the power to make a financial order for the benefit of a child of the family. A child of the family is defined as a child of both parties to a marriage/Civil Partnership and any other child (not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation) who has been treated by both parties as a child of their family. This will therefore include step children.

The basic principle is that no order will be made in favour of a child who has attained the age of 18. An order can however be made for a child aged over the age of 18, if it appears to the court that the child is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation (whether or not he or she will also be in employment) or if there are special circumstances which justify the making of an order.

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Although special circumstances are not defined by statute they are likely to cover cases where the child is unable to be self sufficient because of some mental or physical disability.

## Lump sum

This is an order requiring one party to pay the other a sum of money. The order can provide for an immediate payment, a payment by instalments or a deferred payment. The order can also provide for the payment of interest. An immediate lump sum order cannot be varied. An order by instalments or a deferred lump sum can be.

An interim lump sum order cannot be made. The court does however have limited power to provide for payment of sums of money on an interim basis for immediate needs. Therefore where a party has a pressing need to make a payment, for example for school fees, car repairs etc and this need cannot be met out of income, an order can be made.

## Capitalising Maintenance

This is a lump sum order instead of making periodical payments.

## Transfer of property (Property Adjustment Order)

This is an order providing for one party to transfer their property to the other party or to the child of the family. In most cases the order relates to the family home, however orders can also be made in respect of personal property such as shares or possessions. There is no provision for an interim order and a transfer of property order cannot be varied. There are several types of transfer orders that can be made and these are each explained below.

**1. Outright Transfer** - When the transfer involves a mortgaged property the order will have to provide for either the simultaneous redemption of the mortgage (by a separate order for a lump sum), or for the transfer to be subject to the existing mortgage. Where a transfer is made subject to the existing mortgage the person transferring their interest will still remain liable under the terms of the mortgage. If this is the case the order should include an undertaking (promise to the court which can be enforced) by the person to whom the property is being transferred, to perform the mortgage obligations and to indemnify the transferring party against future payments.

**2. Transfer Subject to Charge** - This is an order providing for the transfer of a property subject to a charge in favour of the transferring party for payment of a lump sum. The lump sum can be expressed as a fixed amount or as is more common on the basis of a percentage of the gross or net proceeds of sale. Payment is triggered at either a fixed date or upon the occurrence of a certain event. The trigger event is usually the first to occur of the transferring party's death, remarriage, cohabitation or the youngest child of the family attaining the age of 18 or finishing full time secondary education. If there are dependant children, a proviso may be included that any enforcement on the ground of the transferring party's remarriage or cohabitation can only take place with the permission of the court.

**3. Mesher Order** - This is an order postponing the sale of the property until certain trigger events. Unlike the above order there is no transfer to one party. The property will continue to be held in the joint names of both parties.

**4. Martin Order** - This is an order providing for one party to occupy the property until certain trigger events, for example remarriage, cohabitation or voluntary vacation. This order is appropriate where it is

necessary to house one party but it is not intended to deprive the other party of his or her capital entitlement forever.

**5. Transfer of Tenancy** - This is an order transferring the tenancy into one party's name. Most of the tenancies which will be the subject of an application will be local authority or social housing tenancies. This is because most tenancies in the private sector are shorthold tenancies which are likely to contain prohibitions against a transfer or to be of so short a period as to not be worth transferring.

## Order for Sale

If the court makes a secured Periodical Payments Order, a lump sum or a Property Adjustment Order the court may also make an order for the sale of a property.

## Pension Orders

The court is able to make one or more of the following orders:

- > Pension Sharing
- > Pension Attachment
- > Offsetting (lump sum payment instead of pension)
- > Deferred lump sum (lump sum payment from commutation).

For a full explanation of each of these orders please refer to the factsheet *Pensions on divorce or dissolution*.

## Clean Break

This is an order dismissing future claims for financial relief. There are three elements to a Clean Break. There is a Clean Break on income (dismissing claims to each other's income), a Clean Break on capital and a Clean Break on death (dismissing a claim against each other's estate on death). Where a Periodical Payments Order is made for a set term, the court will generally order a Clean Break at the end of the term provided it is satisfied that the receiving party will be self sufficient at the end of the term. If there are children under the age of 18 then the court is likely to consider it appropriate to delay the Clean Break on income and on death for the primary carer until the youngest child reaches the age of 18 or finishes full time secondary education.



## Contact us

Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:

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