

Financial Order drafting checklist

for cases involving allegations of domestic abuse and/or high conflict cases

This checklist has been developed by Resolution's Domestic Abuse and Drafting Committees for use in cases involving allegations of domestic abuse and in high conflict cases.

The template Financial Orders are a useful starting point for ensuring the enforceability of any agreement reached. This checklist is designed to support members when drafting Orders, in cases where there is the possibility of ongoing control being exerted by the domestic abuse perpetrator and/or in high conflict cases, to:

- strengthen the enforceability of the Order, and
- reduce the amount of negotiating between the parties once the Order has been made.

The drafting considerations below will not be appropriate in every case, and the bargaining strength of both parties will have an impact on how the Order is drafted.

Members are reminded that there can be a fine line between trying to pre-empt an issue to protect a domestic abuse survivor and on the other hand leading them into protracted negotiations at a time when they want to move on with their lives. What is appropriate to include in an Order, and how to achieve the right balance, falls on the facts of a particular case.

1. Contents of the family home

- a) Consider itemising the belongings/contents in the property that the individual may want; to reduce the need to negotiate extensively (often this takes place between the parties themselves without solicitors).
- b) Consider building in provision for a third party to accompany the individual when they return to the family home to collect their belongings to ensure the safety of the domestic abuse survivor. Agree on the identity of the person in advance and a mechanism for agreeing the date/time for the contents to be collected.
- c) If the property is to be marketed, consider including an undertaking that the contents/furnishing, etc will not be removed until after exchange of contracts has taken place (or at the very least, until an offer for sale has been accepted). This could avoid a house being almost gutted, thereby reducing the marketing attractiveness.
- d) Include undertakings for both parties not to damage, destroy or interfere with any belongings prior to the contents being split.
- e) Consider whether a lump sum can be held by the solicitor until the issue of contents has been resolved, to safeguard against non-compliance or damage/the loss of items.
- f) Be specific in the recital regarding contents, if the case requires. While there can be a tendency to leave this issue to the parties to discuss, the danger in circumstances involving domestic abuse, is that the domestic abuse survivor is unlikely to return to court if the domestic abuse perpetrator is difficult about the division of contents (particularly with litigation exhaustion).

2. Historic debts of the parties

- a) In addition to including an undertaking to discharge historic liabilities, consider whether it is practical for certain parts of the order (for example the clean break/dismissal of claims) to only come into effect once those liabilities have been discharged. Thus leaving the door open to making a claim against the perpetrator's other assets if joint debts aren't cleared. This could help avoid non-compliance, particularly given the often very valuable clean break clauses.
- b) Consider undertakings for the party paying the debt to provide annual documentation, showing the decreasing debt.
- c) Where possible, assets permitting, priority should be given to securing repayment outright of debts from capital, to prevent the risk that debts are not repaid and that the perpetrator fails to provide adequate (or any) documentation.

- d) If you are acting for the domestic abuse survivor where debts have accrued, consider signposting them to the Surviving Economic Abuse (SEA) website and encouraging them to complete the Economic Abuse Evidence Form. This is a document completed by a trained debt adviser within SEA, leading to faster decision making when it comes to an individual's debts being dealt with when they are suffering economic abuse.
- e) Notify your clients that most banks have a vulnerable customer services team that they can ask to speak to if, for example, they are concerned about a joint debt that has accrued.

3. The payment of various childcare costs over and above child maintenance

- a) Childcare costs tend to be an issue left to the parties to negotiate themselves long after the court/solicitors interventions. Consider including as much detail in the Order as possible, preferably by way of undertakings (or at least recitals) on who will pay for before/after school clubs, school trips, school uniform, school lunches, sports equipment, optician costs, dental costs, etc.
- b) Carefully consider the mechanics of how childcare costs will be paid. For example, will a set amount be placed into a joint account each month based on a rough estimate of the total cost of the expenditure?
- c) If possible, try and avoid a system where the domestic abuse victim/ survivor is only able to claim back money from the perpetrator, for the child-related expenses, on the production of a receipt (which are often scrutinised and leads to regular ongoing ties/control).
- d) In some cases, it may be appropriate for it to be stated in the Order that the only financial contribution will be child maintenance, very rarely however does this cover the larger ad-hoc costs. The more thought that is given to the issue of larger ad-hoc costs when the Order is drafted, the less likely there will be a need for an ongoing negotiation/bargaining between the parties in the future.

4. Maintaining medical insurance/life policies/death-in-service policies for the benefit of an ex-spouse/children

- a) Consider the provision of annual documents, for example an email from the policy provider, confirming that the cover is still in place and that it still provides protection for those intended in the order.
- b) In relation to life policies and death-in-service benefits, consider only dismissing claims under the Inheritance (Provision for Family and Dependants) Act 1975 upon there being ongoing compliance with the

requirement to continue to provide protection for the individual/the children of the family. Make it clear that should these undertakings not be complied with, the individual can claim against the policyholder's estate should they pass away within a certain period (usually while the children are minors).

- c) Consider only having the dismissal clauses/clean break come into effect upon the provision of (for example) an irrevocable Deed of Covenant by the domestic abuse perpetrator to provide for the domestic abuse survivor on their death. Often in the aftermath of litigation, the ancillary documents (such as Deed of Covenants) are forgotten, with the domestic abuse survivor having little appetite to continue chasing.

5. Closing/transferring bank accounts

- a) Before the Order is negotiated, suggest that the domestic abuse survivor speaks to their bank and obtains the relevant forms needed to transfer/close the account, and to ensure that these forms are signed prior to the Order being sent to the court for approval (with an undertaking for the domestic abuse survivor will not submit these to the bank until a certain period after the Order has been approved).
- b) Consider asking your client to contact the bank to find out the exact figure for what is owed if there is an overdraft on the account. Debt can accrue on joint accounts without the domestic abuse survivor being aware. If debt has arisen, payment of this debt can be built into the negotiations.
- c) Consider including undertakings not to withdraw funds from the joint accounts and incur further debt and perhaps request that the bank freezes the account while negotiations are ongoing (where this is possible - i.e., only if the account is not being used to fund outgoings related to the family home).
- d) Consider giving an indemnity in the event that there are any withdrawals or debts incurred on a joint account, or having a contingent lump sum provision compensating for any withdrawals made up until a joint account is closed.

6. Applying for the Final Order

- a) The financially stronger party is often keen to press ahead with the Final Order in the divorce. Consider making undertakings for a domestic abuse perpetrator not to apply for the Final Order in the divorce until certain conditions have been met within the Order. This can often be a tactical way to make sure adequate protection is in place for the domestic abuse survivor before the perpetrator obtains what can matter to them most.

7. Removal of home rights/restrictions on Title

- a) Consider preparing the relevant Land Registry paperwork in advance and obtain the domestic abuse perpetrator's signature, with an undertaking by the domestic abuse survivor not to file the documents at Land Registry until the Order is approved.
- b) Consider who is going to pay for the solicitor's fees associated with removing the restriction so that this is not a bargaining tool down the line.
- c) Consider including undertakings to reply to any requisitions to Land Registry within a stated period so that this is not used as a mechanism to delay down the line.

8. Lump sum orders

- a) Consider requesting that the lump sum is transferred to the domestic abuse perpetrator's solicitor, with an undertaking by the solicitor to hold funds until release is required by the court Order, as often enforcement proceedings are not an option for domestic abuse survivors for financial and psychological reasons.
- b) Although default provisions apply, it is often worthwhile specifically including reference to the interest arising on late payments.
- c) Where lump sums are not being paid immediately but over a period of time, consideration should be given to what security might be available to the receiving party since a perpetrator might use delay as a means of continuation of abuse.

9. Transfer of Property

- a) Consider annexing a signed TR1 to the Order, with an undertaking not to complete until the stated date envisaged in the Order.
- b) Consider including undertakings for the domestic abuse perpetrator to provide the relevant ID, signed T&Cs and other information required by the conveyancing solicitors for the transfer to progress.
- c) Consider obtaining confirmation of the identity of the conveyancing solicitor and their fees in advance and specifically mentioning in the Order that the fees are agreed (to avoid this becoming a reason for the perpetrator refusing to proceed).
- d) Where a re-mortgage is required for a transfer to take place, consider specifically stating in the order that the jointly appointed conveyancing solicitor will hold the signed (undated) mortgage deed and TR1 until such time as the transfer is ready to complete, at which point they will transfer the lump sum required

to the transferor. While this is basic knowledge for conveyancing solicitors, the simultaneous nature of a transfer and re-mortgage/lump sum payment often causes confusion and anxiety for clients, and it is helpful to spell it out to individuals on the face of the Order. This is particularly beneficial for both parties to know that delaying one element (e.g., the other's release from the mortgage) will have a knock-on impact on them receiving the property.

10. Orders for sale

- a) Consider specifically mentioning the name of the estate agents and conveyancing solicitors to be used in advance, to avoid the need for future negotiation on these points.
- b) If appropriate, consider giving the domestic abuse survivor sole conduct of the sale, particularly where they are receiving 100% of the proceeds of sale. This can avoid the perpetrator thwarting the process.
- c) Consider obtaining confirmation of the conveyancing fees in advance and specifically mentioning in the Order that the fees are agreed to avoid this becoming a reason for the perpetrator refusing to proceed.
- d) Before an Order is drafted, consider speaking to colleagues in a residential conveyancing department to obtain a checklist of what initial information and documentation is required for a sale to progress. Consider building in a requirement to provide the following, perhaps annexing the documents to the Order:
 - i) Signed estate agent terms and conditions.
 - ii) Signed conveyancing solicitor terms and conditions.
 - iii) The required ID for identity checks to be undertaken.
 - iv) A signed TR1.
 - v) Completed property information form and/or contents and fittings form.
- e) Consider including an agreed price for the marketing and for the sale of the property, and a mechanism for reducing that price if required (for example a 10% reduction after 3 or 6 months). This can limit the need for ongoing negotiation.
- f) If a price cannot be agreed, it may be sensible to include wording such as:

"...the parties will each accept such offers for sale for the property as is recommended for acceptance by the Agent within 2 working days of such recommendation in writing unless (a) the parties have agreed in writing

or an alternative; or (b) either of them has issued an application to court for the determination of the price at which the property will be sold..."

- g) Consider obtaining a capital gains tax report prior to the order being submitted, with an estimate of the liability being included in the Order itself and an undertaking for both parties to agree for this sum to be paid to the party who will have a liability to account to HMRC.
- h) Consider including an itemised list of the works that may be required before the property can be sold, with confirmation of who will pay for this and by when, so that these details do not need to be negotiated between the parties down the line. The converse can often be helpful to include if applicable, i.e.: if the property should be marketed immediately then it may be helpful to specify that, so that the perpetrator is unable to hold up the sale.
- i) If the property being sold is a buy-to-let property, in addition to the above, consider setting out in the following in the Order:
 - i) who is responsible for the management of the property;
 - ii) who receives the income and who is responsible for preparing tax returns, by when;
 - iii) who is responsible for the outgoings; and
 - iv) whether, when and which party should give notice to any occupying tenants to vacate the property.

11. Living in a rental property

- a) If a tenancy agreement is going to be assigned to one person, consider whether any guarantor arrangements or advance rent payments will need to be put in place and build that into the Order.
- b) Consider including a requirement for one of the parties (usually the parent that spends less time with the children) to set aside an amount each month. This money could be placed into a joint account and be saved as a deposit fund, should the other parent have to move out of their current accommodation before a certain date. This avoids a domestic abuse survivor having to start negotiating when they are in a vulnerable position, for example if their landlord served notice while they are still caring for minor children.
- c) Consider who will receive the deposit at the end of any rental period. Also consider who will be responsible for negotiating with the landlord/deposit protection scheme should the landlord unreasonably withhold some or all of the deposit. Drafting these elements

into the Order can avoid the arguments arising down the line, sometimes years later, when solicitors are no longer available.

- d) Consider outlining exactly who will be responsible for cleaning and repairing rooms in the rental accommodation. If a rental property is left in a poor state by one party, this is likely to have a negative impact on the other party's ability to secure a positive rental reference for any onward accommodation.

12. Trusts of Land / Mesher

- a) Great caution must be taken when creating any trust of land or Mesher arrangement in a case involving domestic abuse, given the risks involved with the parties remaining connected together by way of an ongoing property. Carefully consider how much of the domestic abuse survivor's freedom will be curtailed by the terms of any Mesher Order. For example, consider entering into a general Power of Attorney in which the domestic abuse perpetrator gives authority to the survivor to act with almost sole authority in relation to all matters pertaining to the property (such as a remortgage, with the usual undertakings not to increase borrowing).
- b) When including a Mesher Order/ongoing trust consider the following:
 - i) the trigger mechanisms for the charge/order for sale;
 - ii) who is responsible for ongoing costs of (in particular) structural repairs; and
 - iii) whether the charge / trust can be 'ported' to a new property.
- c) When it comes to removing the charge at the end of the trust period, consider undertakings to reply to any requisitions within a stated period. Ideally obtain a signed Land Registry release form before any lump sum is paid to the domestic abuse perpetrator, to prevent them delaying in the removal of the charge.

13. Payment of mortgage/outgoings at the family home

- a) Consider a nominal spousal maintenance order alongside any order to pay the outgoings at the property. This will allow the domestic abuse survivor to return to court should there be non-payment of the outgoings, and to at that stage seek substantive maintenance so that they themselves can continue paying the outgoings without relying on the domestic abuse perpetrator having to pay.
- b) In some cases, it may be better to instead have an order giving the domestic abuse survivor greater

maintenance, so they can pay any outgoings directly. However, the risk is that if maintenance is stopped without consent, yet the survivor is still liable to pay certain outgoings, they will simply accrue debt.

- c) Ensure that all accounts (if possible, the mortgage, as well as utilities etc) are placed into the parties' joint names, so that the domestic abuse survivor can easily contact the provider to ascertain if payment is being made on an ongoing basis.
- d) Ensure that account numbers, passwords and any security questions are provided in advance, so that the domestic abuse survivor can contact the companies to obtain information.

14. Spousal maintenance

- a) Consider recitals regarding not varying spousal maintenance downwards and consider including as recitals, the parties' income and working status so that it is clear, on the face of the Order, the circumstances that existed at the time the Order was made. This can help avoid future variations, particularly if the order recites that it is anticipated that the domestic abuse survivor will eventually return to work and that the order is made with this in contemplation. This may be relevant if your client is entering into an order, where they are to receive spousal maintenance, and they are confident that their income will increase over time. It may be best to acknowledge an earning potential on the face of the order, to avoid a disagreement that a return to work is a new/unforeseen circumstance that arises in future. However, this does not apply in all circumstances. Earning capacity is a grey area, so a party might be under pressure to agree a recital which ultimately does not bear fruition.
- b) On the other hand, consider whether there is any risk of the party paying spousal maintenance reducing their income in future, in which event a recital stating their income (at the time the order was made) may assist them in arguing a reduction further down the line. What is best to include will fall on the facts of the case.
- c) Consider only dismissing claims under the Inheritance (Provision for Family and Dependants) Act 1975 when not only the maintenance requirements have been complied with, but also other elements of the order.
- d) If, for example, maintenance is secured against an asset, consider entering into restrictions to protect the receiving party's payments, with undertakings to remove the restriction once the provision comes to an end.
- e) Where there is any international element, consider whether there should be any recital as to monies being paid as maintenance pursuant to, for

example, the 2007 Hague Convention to aid future enforcement. Also, for enforcement purposes, consider including undertakings to provide the spousal maintenance recipient with the paying party's address if they move abroad.

- f) Given the difficulties that often arise when a client is trying to work out their annual maintenance increases in line with CPI, consider instead including a requirement for the amount to increase by a fixed percentage every year, i.e. a flat rate increase that can actually be set out in the Order. There are risks that in years to come this flat rate increase does not reflect CPI, but if the inclusion of a set amount in the order itself means the increased figure is paid (given CPI increases are often forgotten) then it is perhaps the lesser of two evils.
- g) Alternatively, if you are going to include a paragraph requiring annual CPI increases, include a worked example in the order itself, and a link to the Office of National Statistics website where the required data can be annually obtained. Often it is a lot easier to find the Order years down the line than a solicitor's covering letter, where information on CPI increases is usually provided (albeit to one client only).
- h) Think about whether there are any options to claw back increases in maintenance if they are not paid year on year, for example the arrears to be deducted from the paying party's share of sale proceeds of a property when the youngest child turns 18. This may be particularly helpful given the court will only enforce 12 months' worth of arrears, unless permission has been granted otherwise, and it can be re-traumatising for a domestic abuse survivor to have to return to court every year to enforce (and, given the legal fees, it is often not cost effective to do so).

15. Child maintenance

- a) Consider nominal spousal maintenance sitting alongside the child maintenance agreement, so that the domestic abuse survivor can return to court to increase the nominal amount should the child maintenance amount reduce (for example if the perpetrator has a new child). If pursuing this option, it will be important to record the child maintenance amount within the order itself.
- b) Consider making it clear what is and is not intended to be covered by the child maintenance (as mentioned above at para 3 (d)).

- c) As far as is possible, consider including undertakings to obtain a mirror order in any jurisdiction the paying parent may move to in future, for the payment of child maintenance.
- d) Consider recitals/undertakings if they can be agreed to, providing for the paying party not to approach the Child Maintenance Service (CMS) to reduce their child maintenance liability, for example, on the birth of new children.
- e) If an Order is made for the payment of child maintenance while a child is in tertiary education, consider explicitly stating that payments must continue to be paid directly to the receiving parent, rather than the child.
- f) Consider where possible global maintenance, to prevent the reduction in child maintenance.
- g) Consider including undertakings to provide evidence of the paying parent's income on an annual basis, perhaps with a set percentage increase each year if such documentation fails to be provided, as an incentive to share this information annually.

16. Pension sharing

- a) Consider including undertakings to provide the sealed Pension Sharing Order/Pension Sharing Annex/Final Order in divorce to the pension company within a set period, with financial consequences if this is not adhered to.
- b) Consider including undertakings to provide information/evidence to the pension trustees as required, within a set period of time.
- c) Consider including undertakings to provide documentary evidence to the person receiving the pension share, confirming that all elements of the order have been complied with.

17. Miscellaneous

- a) When including bank details in an Order (for the payment of child or spousal maintenance) for a domestic abuse survivor whose location needs to remain confidential, highlight to your client that they can ask their bank for a masked sort code. This means that they cannot be tracked (from the sort code) to a certain part of the country if they set up a new bank account where they have moved to.