



The impact of joint tenancies on victims of domestic abuse

Consultation response by the Garden Court Chambers Housing and Family Teams

About the Garden Court Chambers Housing Team

1. Garden Court Chambers is the largest barristers' chambers in London. Founded in 1974, it has a long-standing commitment to defending human rights, undertaking legal aid work, and upholding the rule of law.
2. The Housing Team at Garden Court Chambers is comprised of 28 barristers with expertise in all areas of housing law, from unlawful evictions and welfare benefits to homelessness and allocations. Books by members of the team include *Housing Allocation and Homelessness* (LexisNexis, 2022) and *The Housing Law Handbook* (Law Society, 2020). Members of the team frequently represent victims of domestic violence in a wide range of cases.
3. The Family Team at Garden Court Chambers is comprised of 41 barristers with expertise in all areas of family law. Members of the team frequently represent survivors of domestic abuse in applications under Schedule 7 of the Family Law Act 1996 where injunctive relief includes an occupation order to remove a perpetrator from a property and/or an order to transfer tenancy on separation/divorce.

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4. This response deals with questions (16) (17) (19) and (21). The other questions relate to individuals and their personal experiences.

Summary of Garden Court's position

5. Survivors of domestic abuse who hold a joint tenancy with their abuser have to deal with three matters when seeking to remain in, or obtain, a safe and secure home. They are:
 - a. Removing the perpetrator from the property and potentially imposing an exclusion zone around the property;
 - b. Preventing the perpetrator from terminating the joint tenancy; and
 - c. Obtaining a safe and secure home, either in their existing property or elsewhere.
6. In general, the first matter attracts reasonable legal protection in the form of occupation orders. However, even if an occupation order is made, the perpetrator will remain a joint tenant of the property and therefore the second and third matters arise. Whilst they remain a joint tenant, the perpetrator retains the ability to commit a relevant breach of the tenancy agreement, and thus put the tenancy at risk of possession proceedings. They also retain the ability, at common law, to terminate the tenancy by way of service of a notice to quit on the landlord, without consulting or even informing the survivor. It is therefore our position that, in contrast to the first matter, there are not adequate and effective legal mechanisms for a survivor to prevent the perpetrator from terminating the tenancy and to obtain a safe and secure home.
7. We suggest possible legal solutions to the second and third matters below in our responses to the consultation questions.

(Q16) Do perpetrators of domestic abuse use the threat of terminating a joint tenancy as a form of abuse?

8. Joint tenant perpetrators have as much control over a tenancy as joint tenant survivors do, even whilst absent from the premises. This means that the threat of terminating a joint tenancy can and is used as a form of abuse and control.

9. It is striking that the common law ability to terminate a joint tenancy, without the consent of the other joint tenant, provides no security for the remaining joint tenant. The common law position is that joint periodic tenancies can be terminated if one joint tenant gives a valid notice to quit to the landlord (see *Hammersmith v Fulham LBC v Monk* [1992] 1 AC 478). A ‘valid’ notice is one that complies with the contractual, common law or statutory requirements (section 5 of the Protection from Eviction Act 1977). There is no requirement that the tenant should consult the other joint tenant (or tenants) before serving the notice to quit. Indeed the remaining joint tenant might be completely unaware that a notice to quit has been served on her landlord thus terminating her tenancy. Once the notice is received by the landlord, the tenancy will automatically terminate upon the expiry of the notice to quit. There is no discretion available to the landlord to accept or refuse the notice.

10. The service of a notice to quit can be easily achieved (it can be hand delivered, emailed or posted) and the nature of the notice itself does not require much for it to be ‘valid’. It is, therefore, often served without any notice to a tenant (even though it may be threatened) and once served it cannot be withdrawn.

11. It has been argued that this rule breaches Article 8 of the European Convention on Human Rights and the prevention of arbitrary interference with property rights (Article 1 of Protocol 1) but these arguments were rejected by the Supreme Court in *Sims v Dacorum BC* [2014] UKSC 63.

12. As a result, the survivor cannot be fully safe within their home whilst the perpetrator retains the power to end the tenancy.
13. Furthermore, whilst a perpetrator remains a joint tenant, a survivor cannot exclude them from the property, or change the locks, without an order from the court (see below). Where a perpetrator has been removed from the property (by court order for example), they remain jointly and severally liable and, are in a position, for example, to allow the rent to fall into arrears – ensuring that economic abuse continues.
14. Given how simple it is for a perpetrator unilaterally to terminate a joint tenancy, it follows that perpetrators can use the threat of termination as a form of abuse.

Q17: Please provide your views on how effective the current means available to landlords to support victims in joint tenancies, as set out above, are. Please consider details such as:

- ***whether the current means available to landlords, as set out above, provide enough support for victims, and how the guidance could be improved to clarify the support that can be provided;***
- ***any difficulties landlords may face and how to resolve them by strengthening the guidance; and***
- ***any other ideas on how the current means could be improved.***

Existing legal mechanisms

15. There are a number of legal mechanisms by which landlords can support victims in joint tenancies:
 - a. Bringing possession proceedings under Ground 2A, Schedule 2, Housing Act 1985 for secure tenancies (Ground 14A, Schedule 2, Housing Act 1988 for

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assured tenancies) where the perpetrator remains in possession and the victim of domestic abuse has left and is unlikely to return;

- b. Bringing possession proceedings against a perpetrator where the victim of domestic abuse has terminated the tenancy by serving a notice to quit;
- c. The new s.81ZA Housing Act 1985, inserted by s.79 Domestic Abuse Act 2021, whereby the grant of a tenancy to a former secure tenant of a local housing authority who has been a victim of domestic abuse cannot be made a grant of a flexible tenancy and must therefore be offered a secure periodic tenancy or “lifelong” tenancy.

16. None of these methods are effective in supporting a victim of domestic abuse to remain in their own home or to be safely and secured housed elsewhere.

17. It is our experience that landlords very rarely use ground 2A of Schedule 2 of the HA 1985 or Ground 14 ZA to evict a perpetrator. It is also our experience that where a notice to quit has been served by a perpetrator, this is often accepted by the local authority with the survivor being sign posted to the homeless persons unit.

18. It is also our experience that it is very rare for a local authority landlord to enter into an arrangement with a survivor of domestic abuse, who has left the property, whereby she can serve a notice to quit, possession proceedings are then brought against the perpetrator remaining in the property, and arrangements can be made to re-house the survivor, either in the property or elsewhere.

19. Furthermore, the amendments made by the Domestic Abuse Act 2021 (‘DAA’) (introducing ‘life-long’ tenancies for survivors of domestic abuse) are of limited effect:

- (a) S.79 of the DAA (new s.81ZA HA 1985) only applies to tenancies granted by ‘local authorities’. The changes do not apply to tenancies granted by social landlords generally.

- (b) Many local authorities do not own their own housing stock and are not in a position to offer such tenancies. The benefit of s.79 is, therefore, a ‘borough lottery’. Where a local authority owes a full housing duty to a survivor pursuant to s.193 of the Housing Act 1996, there is absolutely no guarantee that they will offer a secure tenancy.
- (c) S.79 of the DAA only applies where the tenancy lost by a survivor, because of domestic abuse, was a ‘life-long’ tenancy.

20. The effect of s.81ZA is to prevent a survivor from being granted a flexible tenancy. This is a benefit, but it is a limited benefit. It does not ensure that a survivor will be able to remain in her own name, without the tenancy being terminated by the perpetrator, or that she has the right to be granted a new tenancy.

Potential solutions

The consultation proposals

21. It is our experience that the ‘guidance’ set out at paragraph 17 of the consultation paper¹ is not usually followed, nor is it practicable. Firstly, a landlord cannot evict one joint tenant without evicting the other. In order to evict the perpetrator, they are required to evict both joint tenants (including the survivor). Secondly, where an eviction does occur, local authorities often then simply signpost the survivor to the homeless persons unit. A local housing authority can only allocate the tenancy of the

¹ a. allowing the victim joint tenant to remain in / return to the property under a new tenancy agreement; or b. securing possession of the property and offering the victim joint tenant suitable alternative accommodation, which is taken from para 40 *Improving access to social housing for victims of domestic abuse*, DLUHC January 2022: <https://www.gov.uk/government/publications/improving-access-to-social-housing-for-victims-of-domestic-abuse/improving-access-to-social-housing-for-victims-of-domestic-abuse>.

existing property to the survivor if provision is expressly made for that scenario in the allocation scheme.

22. In any case, the guidance does not apply to housing associations, which own 60% of social housing stock². The guidance is issued under s.169 Housing Act 1996 to local housing authorities, who must have regard to it when drawing up their allocation scheme.

Alternative proposals

23. We consider that there are additional solutions that could be explored by government.
24. First, the government will be aware of a draft clause proposed by way of amendment to the then Domestic Abuse Bill during its consideration by Parliament headed “joint to sole tenancies”. We reproduce its text in an appendix. This amendment would, if passed, have permitted the survivor to apply to the Court for an order that the perpetrator be removed as a joint tenant. It would also have provided that any notice to quit served by the perpetrator would have no effect if the application is successful. We understand that the government did not support the amendment but we ask that this opposition is reconsidered and thought is given to enacting it in different primary legislation.
25. Second, legislation could be enacted to provide that a notice to quit, served by one joint tenant on the landlord, would have no effect where the tenant serving the notice has committed domestic abuse against another joint tenant, or against a person who might be reasonably be expected to reside with another joint tenant.
26. Third, local housing authorities could be advised by the Secretary of State in statutory guidance issued under s.169 HA 1996 that where a tenancy is terminated by service of

² <https://www.insidehousing.co.uk/news/news/social-housing-owned-by-for-profit-providers-increases-by-75-69680>



a notice to quit, consideration should be given to granting a new tenancy to the survivor and former joint tenant if she wishes to remain in the property. Local housing authorities should be advised that this should be the first consideration and, if a new tenancy is not granted, local housing authorities should record substantive reasons for that decision. In order to facilitate this process, the grant of a new tenancy in these circumstances must be expressly provided for in the allocation scheme (alternatively s.160 HA 1996 could be amended so as to enable grants of tenancies in these circumstances to be made outside of the allocation scheme).

27. Fourth, local housing authorities could be advised by the Secretary of State in statutory guidance issued under s.169 HA 1996, that the survivor joint tenant could herself terminate the joint tenancy and, where she does so as a result of domestic abuse, the local housing authority should then immediately grant her a new tenancy in her sole name.
28. The third and fourth proposed solutions are limited in that they would assist tenants of local housing authorities, but not tenants of private registered providers. Furthermore, to be effective, provision would have to be made for tenants granted new tenancies in these circumstances to retain existing rights that they had under their previous tenancies, such as succession rights, length of occupation for the purpose of right to buy etc.

Q19: Please provide your views on how successfully the law on joint tenancies functions to enable victims to transfer such tenancies into their own name. Please provide reasons.

If you have views on multiple different legal mechanisms, please separate your reasoning for each.

You could also consider whether and how the law on joint tenancies could / should be changed to support victims of domestic abuse.

29. When addressing question 19, it is perhaps helpful to address three separate issues:

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Removing the perpetrator from the premises

30. There are a number of remedies available to survivors to remove perpetrators from the premises under s33 of the Family Law Act 1996 whereby an application can be made for an occupation order. These orders are considered particularly draconian and the evidential bar to obtain an injunction for the removal of a perpetrator is high. There are two tests, the mandatory test under s33(7) and the discretionary test under s33(6).
31. To satisfy the mandatory test the applicant must demonstrate that the applicant or a relevant child are likely to suffer significant harm attributable to the conduct of the respondent if the order is not made. This harm must be greater than any harm that may be caused to the respondent by ordering them to vacate the property. In practice it is extremely difficult to obtain an occupation order on an interim, urgent or without notice basis unless the evidence of domestic abuse is significant. Where there is factual dispute about the veracity of allegations made the court will more often adjourn the application leading to protracted proceedings where a decision is made at final hearing. Orders may be made to regulate the use of the property or the respondent may be invited to vacate the property voluntarily.
32. This can be a distressing and extremely unsatisfactory outcome for a domestic abuse survivor who has made the already difficult step to attempt to protect themselves and remove a perpetrator from a property. In cases with joint tenancies where the voluntary vacation of the property by either party without a court order may make them ‘intentionally homeless’, this can lead to parties remaining living in the same property for long periods of time until the court is able to reach a final decision and impose an occupation order and a transfer of tenancy.
33. Moreover, even if an occupation order is obtained, it may be time limited , allowing perpetrators to return to the premises after the orders have expired. Orders can be sought ensuring that contributions to rent continue to be made by the removed party to prevent

ongoing financial abuse but these require a further application for enforcement if breached.

34. Furthermore, obtaining such orders and finding legal representation to assist can often take time, thereby giving ample opportunity to perpetrators to terminate the tenancy. The service of a notice to quit act often takes only minutes. Therefore where proceedings are ongoing over many months (or even longer) the constant threat of notice to quit being served is a further form of abuse and control and may be used to pressure the applicant to withdraw the application.

Preventing the perpetrator from terminating the joint tenancy

35. A tenant's only option is to prevent a notice to quit from being served at all. They will have to obtain a without notice injunction preventing the perpetrator from serving a notice to quit. It can be sought under the MCA 1973 section 37 or, where there are children in the family, the Children Act 1989 Sch 1. Alternatively, prohibiting the service of a notice to quit can be a term within the non-molestation order obtained under the Family Law Act 1996. All of these applications require an adequately pleaded evidential basis and the experience of practitioners is that courts are extremely reluctant to use these powers on a without notice or urgent basis.

Transferring the tenancy into the survivor's sole name

36. The current means available to protect survivors against a perpetrator serving a notice to quit are arduous. In the family jurisdiction under the Family Law Act 1996, the Matrimonial Causes Act 1973 and the Children Act 1989 any injunctive relief requires a formal court application with properly pleaded evidence, the payment of an application fee and an attended court hearing. There are delays in-built in this process and, as already highlighted, a reluctance by judges to impose orders on an urgent or without notice basis because of the evidential test the court is required to apply. These protections are

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designed to be pre-emptive which does not address the situation where a perpetrator is imminently threatening to serve a notice to quit.

37. In respect of secure tenancies, there are limited ways in which a tenancy can be ‘assigned’ pursuant to s.91 (3)(b) the Housing Act 1985.

Q21: Please provide your views on how successfully temporary injunctions work to enable victims to prevent perpetrators from serving a notice to quit. Please provide reasons.

38. See above.

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APPENDIX

Joint to sole tenancies

New clause (after section 46?)

Insert

“(1) This section applies where there are two or more joint tenants under a secure or assured tenancy and the landlord is a local housing authority or a private registered provider of social housing.

(2) If one joint tenant (“A”) has experienced domestic abuse from another joint tenant (“B”) then A may apply to the county court for an order B is removed as a joint tenant.

(3) For the purposes of subsection (2) it sufficient that the domestic abuse was directed at A or to anyone who might reasonably be expected to reside with A

(4) On such an application, the court must take the following approach:

(a) the court must be satisfied that the tenancy is affordable for A, or will be so within a reasonable period of time;

(b) If the court is so satisfied, then:

(i) if B has been convicted of an offence related to domestic abuse as against A or anyone who might reasonably be expected to reside with A, the court must make an order under this section;

(ii) if B has been given a domestic abuse protection notice under section 19, or a domestic abuse protection order has been made against B under section 25, or B is currently subject to an injunction or restraining order in relation to A, or a person who might be reasonably expected to reside with A, the court may make an order under this section.

(c) for the purposes of subsection 4(b)(ii), the court must adopt the following approach

(i) If B does not oppose the making of such an order, then the court must make it.

(ii) If B does oppose the making of such an order then it is for B to satisfy the court that – as at the date of the hearing - there are exceptional circumstances which mean that the only way to do justice between A and B is for the order to be refused.

(d) if the application does not fall within subsection (b), then the court may make such an order if it thinks it fit to do so

(5) Where A has made such an application to the court, any notice to quit served by B shall be of no effect until determination of A's application or any subsequent appeal.

(6) Notwithstanding any rule of common law to the contrary, the effect of an order under this section is that the tenancy continues for all purposes as if B had never been a joint tenant.

(7) For the purposes of this section, an offence related to domestic abuse includes as against A or anyone who might be reasonably expected to reside with A, an offence of violence, threats of violence, criminal damage to property, rape, other offences of sexual violence, harassment, coercive control, breach of injunction, breach of restraining order, or breach of Domestic abuse Protection order.

(8) At section 88(2) Housing Act 1985, after "section 17(1) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce, &c.)" insert ", or section [this section] Domestic Abuse Act,".

(9) At section 91(3)(b) Housing Act 1985, after subsection (iv), add "(v) section [this section] Domestic Abuse Act

(10) At section 99B(2) of the Housing Act 1985 (persons qualifying for compensation for improvements) paragraph (e), after subsection (iii) add "(iv) section [this section] Domestic Abuse Act

Explanatory Note

This amendment would facilitate occupiers of social housing removing one joint tenant from the tenancy agreement where there has been domestic or other violence. It would mean that the tenancy would continue (so preserving existing rights, *e.g.* the right to buy, any benefits under a local authority allocation scheme, and succession rights). In order for an order to be made, the court must be satisfied that the applicant can or will be able to afford the tenancy. Following that there are a set of presumptions that a tenancy will be transferred to a sole tenancy where the other joint tenant has committed offences involving domestic abuse, or is subject to a domestic abuse protection notice, or injunction against the other joint tenant is in place, which presumption can be rebutted in exceptional circumstances

Presently, the law requires one joint tenant to serve notice to quit and end the tenancy and then an allocation of that property back into the name of the sole tenant. There is, however, no right for a victim of domestic violence to require that the property be re-granted to them (or, indeed, to require that any offer of alternative accommodation is provided). This amendment addresses that problem.

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