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INJUNCTION

Domestic abuse / violence

Introduction

If you are suffering from violence, threats or intimidation, it is possible to apply in the family courts for an injunction to help protect you. There are two types of injunction under the Family Law Act 1996:

1. Non-molestation order.
2. Occupation order.

What is a non-molestation order?

A non-molestation order prohibits your partner or spouse from using or threatening violence against you or your children, or intimidating, harassing or pestering you. It can contain very specific provisions depending on the particular type of harassment happening to you.

Who can apply?

To apply for a non-molestation order you must be an associated person, which is defined in the applicable legislation. Former and current spouses, civil partners and cohabitants are included, as well as fiancé(e)s, relatives, people living in the same household, the parents of children in the house and those who have been in intimate personal relationships of significant duration.

What is the procedure?

The person applying to court for the injunction must complete a form and a witness statement setting out in detail what has taken place.

Although usually the other person is told if a court application is made against them, this won't be necessary if your safety or the safety of any children is at risk. The person asking the court to help is the applicant and the other person is the respondent. Usually, the respondent will prepare a witness statement in response to yours.

When the court receives your application, it will fix a hearing to decide what should happen.

How does the court decide?

In deciding whether to make an order, the court considers the health (mental and physical), safety and well-being of the applicant or any relevant child. It must be satisfied that there is evidence of molestation and that the applicant or children need protection from the court.

Molestation involves any form of physical, sexual or psychological molestation or harassment that has a serious impact on the health and well-being of the applicant or any relevant child. Molestation is not only defined as violent behaviour, it may be other forms of behaviour.

Any non-molestation order the court makes will contain a list of things that the respondent is prohibited from doing. The order can last either for a specified period of time or indefinitely.

Breach of a non-molestation order is a criminal offence and the police can arrest someone who is disobeying an order. A person in breach can be sentenced to prison for a period not exceeding 5 years, or a fine, or both.

In the case of a non-molestation order made on an emergency basis, a person can be guilty of an offence only in respect of conduct engaged in at a time when he was aware of the existence of the order.

What is an occupation order?

An occupation order sets out who can live in the family home (or certain parts of it) and can also restrict someone from entering the area surrounding a home. An occupation order does not affect each person's financial interest in the home, simply who can live in it.

Who can apply?

Former or current spouses, civil partners or cohabitants, or people with a legal entitlement to occupy the property, such as an owner or tenant, can make an application to court for an occupation order. The person asking the court to help is called the applicant and the other person is the respondent.

What is the procedure?

The applicant must complete a court form and provide a witness statement setting out in detail the reasons why they are seeking the order. Usually, the papers will be sent to the respondent, who has a chance to reply by preparing his or her own witness statement. The court will list a date and time for a hearing to decide what should happen.

How does the court decide?

The court applies different tests depending on the relationship status of the people involved and whether the applicant has any legal right to occupy the home. For certain categories of applicant, the court will apply a 'balance of harm' test, in which it balances whether any person or child is likely to suffer significant harm if an order is or is not made. In other cases the court must exercise its discretion taking into account all the circumstances.

Applicant has an existing right to occupy the home (s 33)

An applicant will have a right to occupy the home for the purposes of this section if she is entitled to occupy by virtue of a beneficial estate, or interest, or contract or statutory entitlement. The home in question must be, have been or have been intended to be the home of the applicant and the person with whom she is associated (the respondent). Thus any associated person can

apply under s 33 where she has an existing legal right to occupy the home.

Where the above conditions are satisfied, the applicant can apply for an occupation order which may:

- (a) Require the respondent to permit the applicant to enter and remain in the home or part of the home;
- (b) Regulate the occupation of the home by either or both parties;
- (c) Prohibit, suspend or restrict the respondent's exercise of his right to occupy the home;
- (d) Require the respondent to leave the home; or
- (e) Exclude the respondent from a defined area in which the home is situated.

Factors that the court must consider

In deciding whether to grant the order sought, the court must take into account all circumstances, including:

- (a) The respective housing needs and housing resources of the parties and any child;
- (b) The respective financial resources of the parties;
- (c) 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 any relevant child; and

- (d) The conduct of the parties in relation to each other and otherwise.

However, a 'balance of harm' test is applied.

This provides that if it appears to the court that the applicant or any child is likely to suffer significant harm attributable to the conduct of the respondent if an occupation order is not made, then the court shall make such an order unless it appears to the court that:

- (a) The respondent or any child is likely to suffer significant harm if the order is made; and
- (b) The harm likely to be suffered by the respondent or child is as great as or greater than the harm attributable to the conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made.

Duration

An occupation order made under s 33 may be for a specified period, until the occurrence of a specified event or until further order. Thus, such an order can be for an indefinite period. In practice it is likely, at least initially, to be for a specified period, probably six months.



Applicant has no existing right to occupy the home and respondent has such a right (s 35)

Applicant is former spouse

An applicant under s 35 must be the former spouse of the respondent. The respondent must be entitled to occupy the home (by virtue of a beneficial estate, or interest, or contract or by statute). The home must be, or have been or have been intended to be, the matrimonial home.

Where these conditions are satisfied, the applicant can apply for an occupation order. Any order granted under s 35 must contain a provision (an ‘occupation provision’) stating:

- (a) If the applicant is in occupation, that the applicant has a right not to be excluded from the home or part of it by the respondent for a specified period and prohibiting the respondent from excluding the applicant during that period;
- (b) If the applicant is not in occupation, that the applicant be given a right to enter and occupy the home for a specified period and requiring the respondent to permit the exercise of that right.

In addition, the order may contain one or more provisions (‘exclusion provisions’):

- (a) Regulating the occupation of the home by either party;

- (b) Prohibiting, suspending or restricting the respondent’s right to occupy;
- (c) Requiring the respondent to leave the home or part of it;
- (d) Excluding the respondent from a defined area in which the home is situated.

Factors that the court must consider

Note that the factors are slightly different for occupation provisions and exclusion provisions.

In deciding whether to make an occupation provision, the court must take into account all circumstances, including:

- (a) The respective housing needs and housing resources of the parties and any child;
- (b) The respective financial resources of the parties;
- (c) 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 any relevant child;
- (d) The conduct of the parties in relation to each other and otherwise;
- (e) The length of time that has elapsed since the parties ceased to live together;
- (f) The length of time that has elapsed since the marriage ended; and

- (g) The existence of any pending proceedings between the parties under MCA 1973, CPA 2004, Sch1 to CA 1989 (financial orders relating to children), or relating to the legal or beneficial ownership of the home.

The factors the court must take into account when making an exclusion provision are the same as (a)–(e) above for an occupation provision. However, for an exclusion provision, the exercise of discretion is subject to the balance of harm test mentioned in relation to s 33.

Duration

An occupation order made under s 35 must be made for a specified period not exceeding six months. The order can be extended any number of times, but any extension must be for a further specified period not exceeding six months. In addition, any order shall cease to have effect on the death of either party.



Applicant has no existing right to occupy the home and respondent has such a right (s 36)

Applicant is cohabitant or former cohabitant

An applicant under s 36 must be the cohabitant or former cohabitant of the respondent. Thus, other associated persons may not apply under this section. For example, a niece may not apply for an occupation order against her uncle under s36. The respondent must be entitled to occupy the home (by virtue of a beneficial estate, or interest, or contract or by statute). The home must be, or have been or have been intended to be, the couple's home.

Where these conditions are satisfied, the applicant can apply for an occupation order. Any order granted must contain the same occupation provision as an order under s 35. In addition, it may contain any of the same exclusion provisions as an order under s 35.

Factors that the court must consider

In deciding whether to make an occupation provision, the relevant factors are in many ways similar to those under s 35. The court must take into account all circumstances, including:

- (a) The respective housing needs and housing resources of the parties and any child;
- (b) The respective financial resources of the parties;

- (c) 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 any relevant child;
- (d) The conduct of the parties in relation to each other and otherwise;
- (e) The nature of the parties' relationship ('and in particular the level of commitment involved in it' is added by the Domestic Violence, Crime and Victims Act 2004);
- (f) The length of time that they have lived together as husband and wife;
- (g) Whether there are or have been any children who are children of both parties, or for whom both parties have or have had parental responsibility;
- (h) The length of time that has elapsed since the parties ceased to live together; and
- (i) The existence of any pending proceedings between the parties under Sch 1 to CA 1989 (financial orders relating to children), or relating to the legal or beneficial ownership of the home.

In deciding whether to make an exclusion provision, the court must take into account all circumstances, including the factors (a)–(d) above in relation to an occupation provision and, in addition, the court must consider the following balance of harm questions:

- (a) Whether the applicant or any relevant child is likely to suffer significant harm attributable to the conduct of the respondent if the exclusion provision is not made; and
- (b) Whether the harm likely to be suffered by the respondent or child if the provision is included is as great or greater than the harm attributable to the conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included.

This is similar to the balance of harm test in s 33 and 35. However, there is no duty on the court to make an order where the greater harm to the applicant or child is established, it is just one question to be considered.

Once an order has been made and for so long as it is in force, s 36(13) provides that the applicant will be afforded the same protection as a spouse under s 30(3)–(6). This means that a mortgagee or landlord must accept payments towards the mortgage or rent made by the applicant.

Duration

An occupation order made under s 36 must be for a specified period not exceeding six months. The order can be extended only once, for a further specified period not exceeding six months. Thus the longest period for which a cohabitant or former cohabitant can obtain an occupation order is one year. In addition, any order shall cease to have effect on the death of either party.

Neither party has a right to occupy the home (ss 37 and 38)

These sections enable one spouse, a former spouse, cohabitant or former cohabitant to obtain an occupation order against the other in relation to a home in which they both live or lived together but which neither of them has a right to occupy. These sections could be used, for example, to give the applicant a licence to occupy a home which is owned by the respondent's parents. Section 37 applies to spouses or former spouses; s 38 to cohabitants or former cohabitants.

As with ss 33, 35 and 36, such an order may, amongst other things, exclude the respondent from the home or an area in which the home is situated.

Factors that the court must consider

In deciding whether to grant an order under this section, the court must take into account similar factors to those under s 33 (where a spouse or former spouse is applying) or s 36 (where a cohabitant or former cohabitant is applying).

Duration

Any order granted will last for a specified period not exceeding six months. Where the applicant is a spouse or former spouse, the order can be extended on one or more occasions, each time for a specified period not exceeding six months. Where the applicant is a cohabitant or former cohabitant, the order can be extended once only

for a further specified period not exceeding six months.

Section 40 enables the court, when making an occupation order under s 33, s 35 or s 36, to make an ancillary order dealing with such matters as the payment of the mortgage or other outgoings, and payment for repair and maintenance of the home. The court can also order the occupying party to pay the excluded party rent where the excluded party would (but for the occupation order) have a right to occupy the home. In addition, the court can grant either party use of the furniture or other contents of the home and order either party to take reasonable care of the furniture or other contents. In deciding whether to make such an ancillary order and in what terms, the court shall have regard to all circumstances of the case, including the financial needs, resources and obligations of the parties. Any ancillary order made will last for the same length of time as the occupation order itself.

Breach of an occupation order is not a criminal offence, but a power of arrest can be attached to the order, allowing the police to arrest the person in breach.

Emergency applications

In urgent cases, it may be possible for the solicitor to protect an applicant or child on the same day that she comes to see him, or at least on the next day. The court can make both non-molestation

and occupation orders without notice to the respondent (or 'ex parte') where it considers that it is 'just and convenient' to do so.

In deciding whether to allow an application to proceed without notice, the court will take into account all circumstances, including:

- (a) Any risk of significant harm to the applicant or child if the order is not made immediately;
- (b) Whether it is likely that the applicant will be deterred or prevented from pursuing the application if the order is not made immediately; and
- (c) Whether there is reason to believe that the respondent is evading service and delay in effecting service will seriously prejudice the applicant or child.

Occupation orders are more rarely granted without notice, especially where they would involve removing the respondent from his home.

It must be stressed that any order obtained without notice will be temporary only (an interim order) until the Respondent has been served with the application and has had the opportunity to take legal advice. There will then be a further hearing to allow the Respondent to attend and state objections, if any, to the order continuing.

If the Respondent does object to the order then the court will usually list the matter for a final hearing for a further judge to decide whether or not the order should continue.

Undertakings

In the past, the necessity for a full hearing was often avoided by the respondent offering to give an undertaking, ie a promise to the court on similar terms to the proposed order.

An undertaking is not an admission of guilt but merely a promise to do or not to do a specified action.

The court may still accept an undertaking however, no power of arrest can be attached to an undertaking, and the court will not accept an undertaking in a case where it would otherwise attach a power of arrest to the order.

The court shall not accept an undertaking in any case where a power of arrest would be attached to the order and the court shall not accept an undertaking instead of making a non-molestation order in any case where it appears to the court that:

- (a) The respondent has used or threatened violence against the applicant or a relevant child; and
- (b) For the protection of the applicant or child it is necessary to make a non-molestation order so that any breach may be punishable by arrest.

Service of any order made

It must be stressed that any order granted by the court, whether ex-parte or on notice, is not generally in force until it has been personally served upon the Respondent. Therefore any order made must be personally served upon the Respondent by a process server who will then complete a document, for the benefit of the Court, confirming when and where the Respondent was served and what documents were served upon him

Similarly, any Power of arrest granted by the Court must be personally served upon the Police so that they have a record of the order and can then act if the order is breached.

Enforcement for breach of an order

The Domestic Violence, Crime and Victims Act 2004 makes breach of a non molestation order a criminal offence punishable by up to five years' imprisonment. This is an arrestable offence. A power of arrest is no longer necessary for non-molestation orders, but remains for occupation orders. Under the Act the police will be able to prosecute for breach of a non-molestation order without the victim's agreement.

If a non-molestation order has been breached then you must immediately notify the police of the terms of breach and request that the Respondent

be arrested. Similarly, you should notify the police if an occupation order, with a power of arrest attached, has been breached.

Committal Proceedings

Where the court has not attached a power of arrest, or the respondent's breach is not covered by the power of arrest, or the police decide not to exercise their power of arrest, or an undertaking is breached, the applicant may apply for the Respondent's committal to prison. The applicant will need to give evidence on oath to satisfy the judge, district judge or magistrate that there are reasonable grounds for believing that the respondent has breached the order. The judge, district judge or magistrate can then issue a hearing date to decide whether the Respondent should be committed to prison for alleged breach of the order. The application to commit must be personally served upon the Respondent before the court can exercise its powers.



Protection from harassment act 1997

In the past, when an applicant did not come within the ambit of the relevant domestic abuse legislation, for example if she was the partner of the abuser but they had not cohabited, she would have to bring an action for an appropriate tort, for example, assault.

The Protection from Harassment Act (PHA) 1997 plugged this gap in the law. There is no definition of harassment, save that PHA 1997 states that this includes 'a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other.

A person is deemed to know that such conduct amounts to harassment if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

There are six criminal offences and a civil tort under PHA 1997:

1. S2 – Harassment – the maximum sentence is six months' imprisonment and/or a fine not exceeding level five.
2. S4 – Fear of violence – the maximum sentence is ten years' imprisonment and/or a fine on indictment.

3. S2A – Stalking – the maximum sentence is 51 weeks imprisonment and/or a fine not exceeding level five.
4. S4A – Stalking involving fear of violence or serious alarm or distress – the maximum sentence is ten years imprisonment and/or a fine on indictment.
5. Breach of civil injunction – the maximum sentence is five years' imprisonment and/or a fine on indictment.
6. Breach of restraining order – the maximum sentence is five years' imprisonment and/or a fine on indictment.
7. A civil tort of harassment – the maximum sentence is five years' imprisonment and/or a fine on indictment.



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