

# Domestic violence

The Family Law Act 1996 (FLA1996) provides a civil remedy and protection for people who experience domestic violence within a family relationship. Under the FLA 1996, the court can make either an occupation or non-molestation order or both.

## Occupation orders

An occupation order regulates the occupation of the family home to protect any party or children from domestic violence. The order can exclude an abuser from the property altogether, or divide the property to exclude him or her from part of the accommodation. If the abuser has already left the property, an occupation order can be used to prevent him or her from re-entering and/or coming within a certain area of the property.

There are numerous types of occupation orders, but the most common will say something along the lines “that the respondent must leave the applicant’s property and, having left the property, must not enter or attempt to re-enter it, or come within a specified distance.” The order will also include the length of time the order is to last. Generally, the duration of these orders is between 6 months to 1 year but it can be until further order.

In addition to the standard orders under the FLA the court does have the power to make orders compelling one or both parties to pay the mortgage or rent on the family home until a final order is made. Also, when a final order is made in respect of an occupation order, in the case of a rented property the court can order the transfer of the tenancy from the parties’ joint name to the sole name of the applicant.

In deciding whether or not to make an order the court will have regard to all the circumstances, including:-

- i) the housing needs and housing resources of each of the parties and of any relevant child;
- ii) the financial resources of each of the parties;
- iii) the likely effect of any order, or of any decision by the court not to exercise its powers on the health, safety or well being of the parties and of any relevant child;
- iv) the conduct of the parties to each other.

The court must make an order if it appears that the applicant or any relevant child is likely to suffer significant harm attributable to the conduct of the respondent if an order is not made, unless it appears that the respondent or any relevant child is likely to suffer significant harm if the order is made and the harm likely to be suffered by the respondent or the child in that event 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. This is known as ‘the balance of harm test’.

## Non-molestation orders

A non-molestation order is used to restrain someone from using or threatening violence to the applicant or a relevant child, or from molesting them. The Act does not define molestation but it can include intimidation, pestering, threats and harassment. The actual wording of non-molestation order forbids the “respondent from using or threatening violence against the applicant and instructing, encouraging or in any way suggesting that any other person should do so”. It can also forbid the respondent from intimidating, harassing or pestering the applicant and instructing, encouraging or in any way suggesting that any other person should do so.

## Categories of persons who can apply

The category of persons who are eligible to apply for a non molestation and/or occupation order under the FLA1996 is as follows:-

- Married persons;
- Cohabitants;
- Civil partners;
- Two people who live or have lived in the same household (but not if one is the employee, tenant, lodger or boarder of the other);
- Certain relatives e.g. parent, brother, sister, aunt;
- Two people who have agreed to marry each other (you must apply within 3 years of the agreement to marry ending);
- The applicant and the other person are parents of a child or have parental responsibility for a child;
- The natural parent or grandparent of a child who has been adopted or is freed for adoption.

A relevant child is defined as:-

- Any child who might be expected to live with either of the parties involved;
- Any child who is the subject of adoption or Children Act proceedings;
- Any child whose interest the court considers relevant.

## Making an application

An application can be made for either order in any county court with family jurisdiction or a magistrates court that is also a family proceedings Court (FPC).

If there is also an application for an occupation order which may involve a change in the occupier of a rented or mortgaged property, the applicant must also serve a copy of their application, and any orders made, on the landlord or mortgage lender.

## Ex-parte application

If there are exceptional circumstances an urgent application to the court without giving the respondent notice may be justified. This is called an ex-parte application. If an ex-parte order is made by the judge, they will also give a date for a further hearing for both parties to attend at court. The respondent will be entitled to be present at this hearing so that the judge can listen to both parties before deciding whether or not to make any further orders.

## Power of arrest

If a judge is concerned that the respondent may not obey a court order, they can attach a power of arrest. This allows the police to arrest the respondent if they believe that they have disobeyed the order. The respondent is then brought back before a judge in the county court or magistrates in the Family Proceedings Court. If the judge or magistrate finds that the order has been breached, they can impose various sanctions. In the county court the judge can impose a suspended sentence, commit the respondent to prison for up to 2 years and/or impose an unlimited fine. In the family proceedings court the sanctions are a fine of up to £5,000 or imprisonment for up to 2 months.

## Undertakings

Where appropriate, the necessity of a full hearing can be avoided by the respondent offering to give an undertaking. This is a promise to the court on similar terms to the order sought and will still allow the case to be referred back to the court in the event of breach. It is quite usual for an applicant to accept an undertaking. If it is made voluntarily it is more likely to be complied with. A power of arrest cannot 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.

## Remedies for persons not eligible for protection under the FLA

If a victim does not come within the ambit of the FLA, they may be able to apply for an order under the Protection from Harassment Act 1997 (PHA).

This Act created a statutory tort “where a person pursues a course of action which amounts to harassment of another and which they know or ought to have known amounts to harassment of the other”. Like the FLA, there is no definition of harassment, save that the PHA states it includes ‘alarming the person or causing them distress.’ A course of conduct must include at least two occasions.

Where a statutory tort has been committed, or is apprehended, the applicant may claim damages and/or an injunction. Should the injunction be breached, the applicant can apply for a warrant of arrest in the same way as under the FLA.

Unlike the FLA, the PHA created the offences of criminal harassment and the more serious offence of putting someone in fear of violence. In addition it also gave the criminal courts the power to make restraining orders prohibiting the perpetrator from engaging in further harassment of the applicant.

## G O R V I N S F A M I L Y L A W

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