

Occupation Orders and Balancing Harm

One area of law which is often difficult to get to grips with is which section of the Family Law Act 1996 should be used when applying for occupation orders. The point of confusion often arises when deciding how your client is entitled to occupy the family home.

To start; when is an occupation order used?

Occupation orders are used when a person is suffering domestic violence and either needs to re-enter a property they have left or require a person to leave a property. An occupation order is regarded by the courts as draconian as they often require a person to leave a property which they own or rent, and is an interference with property rights.

The first thing to understand is that a person can only be excluded from their home by a court order. A person can agree to leave a property voluntarily but this often does not provide protection as that person can return at any time. The relevant legislation is the Family Law Act 1996, and sections 33-38 in particular.

One thing not to overlook is that for an applicant to have a right to apply for an occupation order under any of them she must satisfy two conditions.

- Firstly, she and the respondent must be associated persons.

Whether a person is associated is dealt with by s62 of the Family Law Act 1996 – this is a straightforward concept. Associated persons encompass a wide set of family relationships as well as spouses, civil partners, cohabitants, people in an intimate relationship of significant duration, and those who are engaged, for example.

- Secondly, the property must be a dwelling-house and must be or have been or (save for s37 and s38 of the Family Law Act 1996) have been intended to be the home of the applicant and the respondent.

The only difficulty this requirement brings in practice is when an application is proposed for a property which was not intended to be home of the applicant and respondent. A good example of this is a holiday home.

One of the key challenges is to correctly identify the section of the Family Law Act 1996 which matches your client's situation. This is crucial to answering a question successfully as the test in each section is used by the court to decide if an order should be granted, and so choosing the correct section identifies the correct test to apply to the client's facts.

The first step is to identify whether the applicant has a right to occupy the property in question. This is important as this will indicate whether the applicant can apply under s33 Family Law Act 1996.

Section 33 states that, where the applicant is entitled to occupy the property, he or she can apply for an occupation order against anyone who is an associated person. If the applicant is entitled to occupy, he or she will always apply under s33.

The applicant may be entitled to occupy if he or she is:

- the sole owner or the joint owner of the property. This can be found by checking the title deeds.
- the tenant or joint tenant – a tenancy is a legal right giving a right to occupy
- entitled to occupy by virtue of possessing “home rights”.

Home rights means that married couples or civil partners can always use s33 in respect of the family home, since, even if the applicant is not the legal owner of the property, he will have home rights by virtue of being married to, or in a civil partnership with, the owner. This ONLY applies to married couples or civil partners – it is important to remember this.

- In addition, an applicant may have a beneficial interest. This is the trickiest of all. The applicant may have a resulting or constructive trust arising from contributions made to the purchase price of the house or if there is a common intention to share the property and a detrimental reliance. Don't forget about this possibility!

People without any entitlement to occupy must use a different section.

While applications under s33 are usually made against spouses, former spouses, civil partners or former civil partners, cohabitants and former cohabitants, it should be noted that they can be made against anyone who is an associated person with the applicant, if they have a right to occupy the property.

Example

Jenny and Millie are sisters. They bought a house in Durham together some time ago because they could not afford to buy houses individually. Millie has been very unwell and her moods have become very unpredictable. Millie has also started to drink heavily. On a few occasions, Millie has assaulted Jenny. Jenny wishes to sell the house and she has told Millie to leave in the meantime. Both are entitled to occupy the property by reason of their joint ownership: their relationship (sisters) is included in the list of associated persons. Jenny may apply for an occupation order under s33.

S35 Family Law Act 1996 permits applications by former spouses or former civil partners with no existing right to occupy against the respondent (former spouse or civil partner) who does have a

right to occupy. A former spouse or civil partner will have no existing right to occupy where they have no legal interest in the property. Applications by such persons are not common.

S36 of the Family Law Act 1996 allows an applicant who is a cohabitant or former cohabitant with no existing right to occupy to apply for an occupation order. As a result of a change in the law, a cohabitant can be of the same sex as well as heterosexual couples. The effect of this change is to include those living together in a same-sex relationship equivalent to that of marriage. This will be particularly useful for those living in their partner's home, who currently do not have a right to occupy.

Cohabitants with no existing right to occupy should apply under s36. The respondent will be the other cohabitant who has the right to occupy the property.

Example

Sarah and Alan live together in Alan's flat. They are not married. Alan is the sole owner of the property. Alan attacks Sarah, causing her serious injuries. She wishes to apply for an order that he leaves the home and that she can remain there with their two children.

Sarah cannot apply under s33 because she has no entitlement to occupy the flat. She does not have home rights as she is not married. Alan is the sole owner, so she has no legal right to occupy. Sarah must apply for an order under s36.

This leaves us with sections 37 and 38 of the Family Law Act 1996.

These sections would be used where neither party had a right to occupy (e.g. both were living in a squat). This is in contrast to the provisions above where one or both parties, depending on the section, do have such a right. S37 deals with the situation where the applicant is a spouse or former spouse or civil partner or former civil partner and s38 refers to where the applicant is a cohabitant or former cohabitant. These sections will not be considered further as they are extremely rare in practice.