

Chapter 34: Protection under the Family Law Act 1996: Occupation Orders

Question 1: Louise and Imran are married and live at 25 Acacia Avenue with Amy, Louise's daughter from her first marriage. Louise has a very poorly paid part-time job and is Amy's full-time mum. Imran works as a highly paid accountant and owns a number of rental properties. It is a very large house and Louise and Imran own it jointly. In order to help to pay the mortgage, they take in lodgers and Martin moves into one room. Martin invites his girlfriend, Susi, to live with him but Louise and Imran do not realize this and think that she just comes to see Martin a great deal.

Imran and Louise begin to experience difficulties in their marriage and Imran assaults Louise seriously on a number of occasions and also threatens to assault Amy.

(a) Louise wishes to apply for an occupation order. Advise Louise which section she should use to apply and whether she is likely to be successful.

As Louise and Imran are married, Louise will have 'home rights' as well as a right to occupy the property as a joint owner. Louise and Imran are associated persons and the property is their home. Louise will be able to apply under s33 Family Law Act 1996.

The court will consider all of the circumstances of the case. In particular, the housing resources of the parties and in this case Imran has a number of properties in which he could potentially live whereas Louise appears to have no alternative accommodation as well as a child to house. The financial resources of the parties are considered and Imran has a good income whereas Louise is poorly paid. If an order is not granted, Louise's health, safety and well-being is likely to be adversely affected if Louise remains living with Imran. Finally the conduct of the parties is considered by the court and as Imran has assaulted Louise.

The court will consider the balance of harm test. It appears that Louise will suffer significant harm if she remains if an order is not granted as she may suffer further assaults and has no alternative accommodation and little money. Imran has assaulted Louise and appears to have financial and housing resources should he have to find alternative accommodation. It appears that the balance of harm test has been met and so the court would grant an order.

(b) If Louise is successful, how long can any order last?

Orders made under s33 FLA 1996 can be made for a specified period, until the occurrence of a specific event or until further order (s33(10) FLA 1996).

(c) Would your answer be any different if Louise and Imran were not married?

Louise would still be able to apply under s33 Family Law Act 1996 as she is a joint legal owner, although she would not have home rights.

(d) If Imran owned the property in his sole name and Louise and Amy had moved in with him six months ago, would your advice be any different?

Louise would not be able to apply under s33 Family Law Act 1996 as she has no right to occupy the property. Louise would have to apply under s36 Family Law Act 1996 as a cohabitant with no right to occupy the property.

(e) Susi is also experiencing violence and threats from Martin. Would she be entitled to apply for an occupation order?

Suzi would have to use s36 or s38 Family Law Act 1996 as she is (possibly) a cohabitant but the section used will depend on whether Martin has a right to occupy the property. If Martin has a right to occupy the property Suzi would use s36 but if Martin had no right to occupy the property, Suzi will have to use s38 Family Law Act 1996.