



# LAW ANSWERED

## SAMPLE CHAPTER FROM OUR FAMILY LAW & CHILD PROTECTION ELECTIVE GUIDE

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# DOMESTIC VIOLENCE

## OCCUPATION ORDERS

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### STEP 1: State which order(s) your client will be seeking

Will your client be seeking an NMO (s.42 FLA) (see above), an OO (s.33 FLA) or both?

### STEP 2: Briefly define an occupation order?

An OO is an order “*conferring, declaring, restricting or regulating*” who occupies the family home. It can also place conditions on a party’s occupation and set out who is required to pay for the home’s upkeep.

### STEP 3: Who can apply for an occupation order? Under what section will the order be sought?

An application for an OO (defined in s. 39 (1)) can be brought under ss. 33-38 FLA. The appropriate section is determined by the circumstances of the case, including the rights held by the applicant to the home in question. An applicant will be able to apply for an OO in one of the following situations:

s. 33

- a) the applicant has a beneficial interest in the property or home rights; and
- b) the property is, has been or was intended to be the home of the applicant.

s. 35

- a) the parties are former spouses or former civil partners;
- b) one party has a beneficial interest in or a right to occupy the home, whilst the other does not; and
- c) the house is the parties’ former matrimonial or civil partnership home or at some time was intended to be so.

s. 36

- a) the parties are or have been cohabitants;
- b) one party has a beneficial interest in or a right to occupy the home, whilst the other does not; and
- c) the home in question is, was or was intended to be the home in which the parties cohabited.

s. 37	<p>a) the parties are <u>spouses or former spouses</u> who are both occupying the current or former matrimonial home; and</p> <p>b) <u>neither</u> of them has a beneficial interest in the home or a right to remain in occupation.</p>
s. 38	<p>a) the parties are or have been <u>cohabitants</u> who are both occupying the home in which they are or have previously cohabited;</p> <p>b) <u>neither</u> of them has a beneficial interest in the home or a right to remain in occupation.</p>

## STEP 4:

**Apply the relevant tests, including the balance of harm test. How likely is it that the order will be granted?**

Only the tests under s. 33 are considered below; you are probably most likely to be examined on this.

**NOTE:** whilst s. 37 uses an identical test (see s. 37(4)), the tests under the other sections differ subtly. Always refer to the statute and be sure to apply the correct test.

The test in s. 33 consists of two elements: the “balance of harm” test under s. 33(7) and a list of factors under s. 33(6). The balance of harm test should be considered first, and only if this test is not met should you go on to consider the factors in s. 33(6) (*Chalmers v Johns*).

**The balance of harm test (s. 33(7)):** if the court believes that the applicant or a relevant child is likely to suffer significant harm **attributable to the conduct of the respondent** if an order is not made, the court shall make an order, unless:

- a) the respondent or any relevant 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 or greater than the harm attributable to the respondent if the order is not made.

The **effect of the conduct** on the applicant is relevant rather than the **intention** of the respondent (*G v G*).

<b>“HARM”</b>	<p>“Harm” is defined in s. 63(1) as:</p> <ul style="list-style-type: none"> <li>• For an <u>adult</u>, ‘ill-treatment or the impairment of health’; <ul style="list-style-type: none"> <li>○ “Health” is defined in s. 63(1) as including physical and mental health.</li> <li>○ “Ill-treatment” is defined in s. 63(1) as including ‘forms of ill-treatment which are not physical’.</li> </ul> </li> </ul> <p><i>Continued overleaf.</i></p>
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**"HARM"**

- For a child, 'ill-treatment or the impairment of health or development'.
  - "**Development**" is defined in **s. 63(1)** as '*physical, intellectual, emotional, social or behavioural development*'.
  - For a child, "ill-treatment" also includes sexual abuse.

**NOTE:** the definition of "**relevant child**" is the same as for an NMO (see *STEP 3 of NMOs above*).

If, after applying the balance of harm test, the court decides that the test is satisfied, the court must make an occupation order **unless** it concludes that the harm which will be caused if an order is made will be as great or greater as the harm caused if the order is not made (**s.33(7)**).

If the balance of harm test is not satisfied it is still open to the court to make an order under **s. 33(6)**. The court must consider:

- a) the housing needs of each of the parties and of any relevant child;
- b) the financial resources of each party;
- c) the likely effect of any order (or absence of an order) on the health, safety and well-being of the parties and any relevant child; and
- d) the conduct of the parties in relation to each other and otherwise.

**NOTE:** an OO is a relatively draconian order and the court should only grant one under **s. 33(6)** where the case is exceptional (**G v G**).

**STEP 5:**

**Will the application be made on notice or ex parte?**

The court may make an *ex parte* order where it considers it 'just and convenient' to do so (**s. 45(1)**).

In making their decision, the court will have regard to all the circumstances, including:

- a) any risk of significant harm to the applicant or a relevant child, attributable to the conduct of the respondent, 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 an order is not made **immediately**; and
- c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved in effecting service.

If an *ex parte* order is made the court must give the respondent the chance to make representations at a full hearing as soon as is just and convenient (**s. 45(3)**).

**NOTE:** a full hearing must therefore be held as soon as is just and convenient; it is not sufficient merely to give the respondent the opportunity to apply for a hearing (**JM v CZ**).

**STEP 6:****What is the type, effect and duration of the order?**

What **type** of order will be granted? What will be the **effect** of the order on the people in the scenario? **How long** will the order last?

The terms of the order the court has the power to grant will depend upon the section under which the order has been applied for. The most common orders are to “**remove and exclude**” i.e. an order requiring the respondent to leave the family home and excluding them from a defined area around the house.

Depending upon the section under which the application has been made, **other potential orders** include those:

- enforcing a right to stay in the family home;
- enforcing a right to return to the family home (e.g. where the applicant has been unlawfully excluded);
- giving a right to stay in the family home for a specified period and preventing eviction during that period (e.g. if the applicant does not have an automatic right to stay after their relationship breaks down);
- setting out which parts of a home can be used by whom, typically where both parties are having to live in different parts of the same home; and
- providing that home rights are not brought to an end by the death of a spouse or civil partner or by ending the marriage or civil partnership.

Ancillary orders can also be made, setting out, for example, who has to pay the rent or mortgage, and to fund repairs and maintenance of the home. The **maximum length** of any order will depend upon the section under which the order was applied for:

<b>s. 33</b>	For applications under <b>s. 33</b> , the length of the order is at the <u>discretion of the court</u> . Per <b>s. 33(10)</b> , it may be: <ul style="list-style-type: none"> <li>• For a specified period;</li> <li>• <u>Open ended</u> i.e. until a further order is made; or</li> <li>• Until the occurrence of a <u>specified event</u>.</li> </ul>
<b>ss. 35 or 37</b>	An order under <b>ss. 35</b> or <b>37</b> can only be made for up to <u>six months</u> but can then be <u>extended</u> upon application for further periods of up to six months ( <b>ss. 35(10) &amp; 37(5)</b> ).
<b>ss. 36 or 38</b>	An order under <b>ss. 36</b> or <b>38</b> can initially be made for up to <u>six months</u> but can then be <u>extended</u> upon application for <u>one</u> further period of up to six months ( <b>ss. 36(10) &amp; 38(6)</b> ).

The court can attach a power of arrest to an OO, enabling a police officer to arrest a person without warrant if there is reasonable cause to suspect a breach of the order (**s. 47**).

If the court has granted an OO in circumstances where the respondent has used or threatened violence against the applicant or relevant child, the court **must** attach a power of arrest to the order, unless they believe the applicant and child would be adequately protected without it (**s. 47(2)**).

**NOTE:** the court can choose to accept an undertaking from the respondent to stop the abusive behaviour instead of making an order (**s. 46(1)**). It cannot do so if the behaviour is such that, if an order were made, a power of arrest would be attached to it (**s. 46(3)**).

**STEP 7:****What are the consequences of breaching an occupation order?**

The way that an OO can be enforced will depend upon whether or not a power of arrest was attached to the order under **s. 47**.

- If such a power was attached, the police may arrest the respondent for breach of the order without having to go back to the court.
- If the OO does not include a power of arrest, the applicant must apply to the court for the respondent to be committed for breaching the order.