



JUDICIAL STUDIES
BOARD

Family Court Bench Book

Please find enclosed the third update to your copy of the JSB's *Family Court Bench Book*. This update replaces a couple of sections of your Bench Books as listed in the table below.

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Section 11 FLA – Domestic Violence Orders	
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SECTION 11 FAMILY LAW ACT – DOMESTIC VIOLENCE ORDERS**JURISDICTION**

1. Magistrates sitting in the family proceedings court share this jurisdiction with the High Court and county court.
2. The court has the power to make two types of order: a non-molestation order and/or an occupation order. A non-molestation order can be made on the court's own motion in family proceedings where the respondent is a party if the court considers such an order should be made for the benefit of any party to the proceedings or any relevant child, but the parties should always be given notice that the court is minded to do so. From 1st July 2007, the court cannot attach a power of arrest to a non-molestation order although it may be attached to an occupation order; the venue for proceedings for breach of the non-molestation order will depend on the date of the order – persons arrested on a power of arrest for orders made before 1st July 2007 will be taken before the “relevant judicial authority” (meaning a Family Proceedings Court where the order was made at that level) within 24 hours of arrest; persons who have breached a non-molestation order made after 1st July 2007 will be liable to arrest and charge to appear before an adult criminal court. The legal adviser should always be asked to advise before such a step is taken.
3. Where an emergency protection order has been made which includes an exclusion requirement the court also has power to make a non-molestation order.

NON-MOLESTATION ORDER

4. A non-molestation order prohibits a person from molesting an associated person and/or a relevant child. ‘Molestation’ is not specifically defined but it has been held that the word implies some quite deliberate conduct aimed at a high degree of harassment of the other party so as to justify the intervention of the court.

5. A person who is 'associated' with the respondent can apply but the court can make an order of its own volition in any family proceedings if the court considers that the order should be made for the benefit of any other person or any relevant child.
6. A person is associated with another person if they:
 - a. are or have been married (or are civil partners);
 - b. live or have lived in the same household other than by reason of one of them being the other's employee, tenant, lodger or boarder;
 - c. are relatives;
 - d. have agreed to marry one another;
 - e. are parents of, or have or have had parental responsibility for, the child;
 - f. are parties to the same family proceedings;
 - g. have or have had an intimate personal relationship which is or was of significant duration.
7. Associated persons are the parties to the proceedings and are generally entitled to notice of the proceedings but the court may, in any case where it considers that it is just and convenient to do so, make an order even though the respondent has not been given notice, i.e. an 'ex parte order'.
8. In deciding whether to make an ex parte order the court is required to have regard to all the circumstances including any risk of significant harm to the applicant or a child, whether the applicant is likely to be deterred or prevented from pursuing the application if the order is not made and whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service of the application.
9. In deciding whether to make an order and, if so, in what manner, the court is required to have regard to all the circumstances including the need to secure the health, safety and well-being of the applicant and any relevant child.

10. The order may be expressed so as to refer to molestation in general, to particular acts of molestation or both.
11. In a case where the court has power to make an order the court may accept an undertaking from any party to the proceedings except in any case where the respondent has used or threatened violence against the applicant or a relevant child and for the protection of the applicant or child it is necessary to make a non-molestation order so that the breach may be punishable in the criminal courts. Where an undertaking is given to the court it is enforceable as if it were an order of the court. It is not a criminal offence and must be dealt with by the “relevant judicial authority”.
12. Although the order may be for a specified period or until further order it has been held that orders should be for a specified period of time unless there are exceptional or unusual circumstances.
13. Either party to the proceedings may apply for variation or revocation.
14. In some circumstances the court may, of its own volition, vary or discharge the order.

OCCUPATION ORDER

15. An occupation order regulates the occupation of a dwelling-house and may extend to a defined area in which the dwelling-house is included.
16. A family proceedings court is not competent to entertain any application, or make any order, involving any disputed question as to a party’s entitlement to occupy any property unless it is unnecessary to determine that question in order to deal with the application or make the order.

17. There are various categories of occupation orders. The appropriate category in a particular case is determined by reference to whether either party is entitled to occupy the property. In practice, most applications are by an applicant who is entitled to occupy a home with the respondent who is an 'associated' person.
18. The parties to the proceedings are generally entitled to notice but the court may, in any case where it considers that it is just and convenient to do so, make an order even though the respondent has not been given notice.
19. In deciding whether to make an order without notice the court is required to have regard to all the circumstances including any risk of significant harm to the applicant or a child, whether the applicant is likely to be deterred or prevented from pursuing the application if the order is not made and whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service of the application. In practice the court should be slow to deprive a party of a roof over their head on a without-notice basis and should be satisfied that it is necessary in order to carry out its duty. The court should have in mind that it has only heard one side and should be on its guard against 'tactical' applications.
20. The category of occupation order determines the nature and extent of its scope. Where the court makes an order it may, depending on the relevant category:
 - a. enforce the applicant's entitlement to remain in occupation as against the other person;
 - b. require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;
 - c. regulate the occupation of the dwelling-house by either or both parties;
 - d. if the respondent is entitled to occupy the dwelling-house the order may prohibit, suspend or restrict the exercise of that right;
 - e. if the respondent has matrimonial home rights in relation to the dwelling-house and the applicant is the other spouse, restrict or terminate those rights;

- f. require the respondent to leave the dwelling-house or part of the dwelling-house;
- g. exclude the respondent from a defined area in which the dwelling-house is included.

21. Additional provisions relating to the repair and maintenance of the dwelling-house or the payment of rent, mortgage or other outgoings can be included in the order. However, as a result of a gap in the legislative scheme, such orders cannot be effectively enforced and the financially vulnerable party would do better to seek other forms of financial relief if available.

22. In a case where the court has power to make an order the court may accept an undertaking from any party to the proceedings. However, a power of arrest cannot be attached to an undertaking and therefore the court should not accept an undertaking in cases where a power of arrest should be attached to the order. Where an undertaking is given to the court it is enforceable as if it were an order of the court.

23. Where the court makes an order and it appears that the respondent has used or threatened violence against the applicant or a relevant child then the court is required to attach a power of arrest to the order unless it is satisfied in all the circumstances of the case that there will be adequate protection without such a power. Where the order is made without notice the court may attach a power of arrest if the respondent has used or threatened violence and there is a risk of significant harm if a power of arrest is not attached.

24. An order may be made for a specified period, until the occurrence of a specified event or until further order.

25. Either party to the proceedings may apply for variation or revocation.

SECTION 12 ENFORCEMENT POWERS

(This section also applies to failure to comply with an exclusion requirement)

POWER OF ARREST

1. On the making of an occupation order the court can attach a power of arrest in the circumstances outlined in *Section 11: Family Law Act –Domestic violence orders*, paragraph 23. The court can attach a power of arrest to an exclusion requirement included in an emergency protection order or an interim care order. For details see *Section 6*, paragraphs 28–30 and 52-54.
2. A power of arrest is a sanction designed to encourage compliance with an occupation order and protection for the applicant and/or any relevant child. It is a direction contained within one of those orders which enables constables to arrest without warrant a person whom they have reasonable cause for suspecting to be in breach of any provision of the order to which the power of arrest has been attached.
3. If the court has not attached a power of arrest to the order the applicant can apply for the issue of a warrant for the arrest of the respondent. The applicant must give evidence on oath about the alleged breach of the order. A warrant can only be issued if the court has reasonable grounds for believing that the respondent has failed to comply with the order.
4. If the respondent is arrested they must be brought before the relevant court within 24 hours. There are special provisions for Sundays and some Bank Holidays. Failure to produce the arrested person before a court within the time limits means that the court cannot deal with them on that arrest and they must be released. However, fresh process can be initiated and a warrant sought in respect of the same breach. *(Note: Any family proceedings court may deal with the arrest provided the original order was made at that level.)*

5. When a respondent is brought before the court following arrest under a power of arrest or a warrant of arrest, the court may either proceed to deal with the respondent immediately or, if appropriate, adjourn the proceedings and remand them on bail or in custody to appear before the court on a later date. If the court is considering a remand in custody the respondent must be given the opportunity to be legally represented.
6. The court is required to deal with the respondent within 14 days of their arrest. The attendance at court of the arresting officer is not necessary and a written statement from the arresting officer as to the circumstances of the arrest should normally be sufficient.
7. Any remand may be in custody or on bail. Bail may be unconditional or subject to whatever conditions the court considers to be appropriate to ensure that they do not interfere with witnesses or otherwise obstruct the course of justice.
8. In appropriate circumstances a remand may be requested in order to enable a medical examination and report to be made on the respondent's mental or physical condition.

PROVING THE BREACH

9. The court must be satisfied that the respondent was aware of the terms of the order. In certain limited circumstances the court may proceed to deal with a breach even if there has not been formal service, provided it is satisfied that the respondent was aware of the order and knew what they were doing was a breach. The legal adviser's guidance should always be sought before doing so.
10. Evidence of the arrest may usually be in written form, as may evidence of the breach, but if the respondent is challenging the breach they are entitled to have all

relevant witnesses attend for cross-examination. That can frequently lead to an adjournment.

11. The standard of proof is the criminal standard and *not* the civil standard. The burden of proof is on the applicant.

ENFORCEMENT POWERS OPEN TO THE COURT

Breach of a non-molestation order made on or after 1st July 2007 is a criminal offence triable either-way and punishable in the magistrates court to a sentence of imprisonment of up to 6 months and/or a fine not exceeding the statutory maximum. In the Crown Court the maximum penalty is 5 years. The Court will be assisted by the Sentencing Guideline Council publication of December 2006 “Breach of a Protective Order – Definitive Guideline”.

Note that the powers in this section also apply to a non-molestation order in the event that any breach is not being prosecuted as a criminal offence.

12. Where the court is satisfied that the respondent has breached a non-molestation order made on or before the 30th June 2007 or an occupation order the court may either:

- a. order the respondent to pay a fine not exceeding £5,000; or
- b. commit them to custody for a period not exceeding two months.

13. The court has power to suspend any committal to prison on whatever terms and conditions the court considers appropriate. If considering a committal to prison or a suspended committal the respondent must be offered the opportunity to be legally represented. In enforcement proceedings the focus of the court is more on ensuring future compliance with the court’s orders than punishment. Protection of the

vulnerable is the court's aim but, particularly on a first breach, immediate imprisonment should be avoided if possible.

14. If the court is satisfied that the respondent is suffering from mental illness or severe mental impairment and the justices are satisfied that they have breached an occupation order, non-molestation order or an exclusion requirement there may be power to make a hospital order or guardianship order under the Mental Health Act 1983. If considering one of these orders seek the advice of a legal adviser.
15. As an alternative to proceeding to enforce the order it may be appropriate for the court to consider the variation or discharge of an occupation or non-molestation order.
16. Such an application may be made by the respondent or the person on whose application the order was originally made.
17. The court has power to vary or discharge a non-molestation order of its own motion without application, provided that the order was made by the court, in the same manner of its own motion without application.
18. The power to vary or discharge the order includes power to vary or discharge any power of arrest attached to the occupation order.