

# Your guide to occupation of the family home on cohabitation breakdown

## Overview

This guide provides you with an overview of the law in relation to occupation of the family home on cohabitation breakdown. For an overview of how to determine your shares in the family home please refer to our guide to determining shares in the family home and personal property on cohabitation breakdown.

## Occupation of the family home if the property is jointly owned

If property is jointly owned both parties will be entitled to occupy the property unless their occupation has been prohibited, suspended or restricted by an occupation order under Part IV of the Family Law Act 1996 (FLA 1996) or by the court's powers under section 13 of the Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996).

## Occupation order under the FLA 1996

An occupation order is an order conferring, declaring, restricting or regulating rights of occupation in the family home between parties who are in, or who have been in certain categories of relationship. An application may be made under FLA 1996 section 33 by an applicant who has an estate, interest or home rights in the property. To apply the applicant must satisfy three conditions; namely that the applicant is entitled to occupy a property termed 'a dwelling-house', the respondent is 'associated' and the property must be, have been, or have been intended to be the home of the applicant and respondent.

In deciding whether to make an occupation order, the court will consider all the circumstances of the case, including:

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

## Occupation order under section 13 of TLATA 1996

If joint owners cannot agree who will occupy the family home or their shares in the property an application can be made under section 14 of TLATA 1996. Under section 14 the court can declare the nature and extent of a person's interest in property as well as make an order for sale.

Under section 13 of TLATA 1996 the court can give directions as to the right to occupy the property. The matters to which the court are to have regard when exercising powers under section 13(4):

- the intentions of the person or persons (if any) who created the trust;
- the purpose for which the land is held; and
- the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land.

Under section 13(5) conditions may be imposed such as requiring one party to pay outgoings or expenses in relation to the property or to assume any other obligation in relation to the land or to any activity which is or proposed to be conducted there.

Under section 13(6) where one party's entitlement to occupy has been excluded or restricted conditions which may be imposed on the other party may include orders requiring them to make payments by way of compensation or to forego any payment or other benefit to which they would otherwise be entitled.

## **Occupation of the family home if solely owned by one cohabitant**

If a property is solely owned by one cohabitant the non-owning cohabitant will usually only have the status of a bare licensee and entitled to remain in the property for as long as the legal owner gives permission. All that is required is for the legal owner to give reasonable notice to leave. Once the notice expires the non-owning cohabitant will become a trespasser. A non-owning cohabitant may however have a right to occupy the family home if they can show that they have a beneficial interest, rights by proprietary estoppel, a contractual or irrevocable licence or apply for an occupation order under the FLA 1996.

## **How does a cohabitant establish a beneficial interest in the family home?**

A cohabitant who is not the legal owner of a property may be able to claim a beneficial interest in the family home (the right to receive the profits or income from the property or the right to live in it) if they can show that there was an agreement that they should have a beneficial interest, which may be expressed or inferred from conduct. If an agreement can be shown to have been made, then absent agreement about the extent of the interest the court may under section 14 TLATA 1996 either infer the parties' shared intentions in relation to the family home by reference to their whole course of conduct in relation to it or impute an intention that the claimant is to have a fair beneficial share in the property.

Establishing a beneficial interest may also give the non-owning cohabitant a defence to any action taken by the legal owner to evict them. Where a cohabitant is alleging a beneficial interest in the property it is likely that any possession proceedings would be stayed pending determination of that claim, or if the possession proceedings are issued first there will be a counterclaim by the non-owning cohabitant for a declaration that they have a beneficial interest.

Establishing a beneficial interest may also give the non-owning cohabitant the right to apply for occupation orders under the FLA 1996 and section 13 TLATA 1996.

## **How does a cohabitant establish a right to occupy the family home by proprietary estoppel?**

Proprietary estoppel arises from the courts' equitable jurisdiction to 'adjust' rights over property if the assertion of strict legal rights is found to be unconscionable. It arises most commonly where a property owner encourages another to act to their detriment in the belief that they will obtain an interest in the property.

A claimant seeking to rely on proprietary estoppel must establish:

- A representation made or assurance which encourages or allows the claimant to believe that they have or will have some right or benefit over the property;
- Reliance by the claimant on the representation or assurance;
- Some detriment incurred by the claimant as a consequence of that reliance;
- It would be unconscionable for the property owner to go back on their representation or assurance.

Detriment is not confined to pure financial detriment. Detriment could for example be pleaded if the claimant gives up a job or their own property or rental accommodation upon reliance of the respondent's assurance. If a cohabitant can establish that they have rights by estoppel, the courts may decide on the appropriate remedy, for example by granting them a licence, a tenancy or a beneficial interest in the property.

## **How does a cohabitant establish a right to occupy the family home under a contractual or irrevocable licence?**

A contractual or irrevocable licence may arise if the non-owning cohabitant can show that there is a form of contract or agreement between the parties. If a contractual or irrevocable licence is established, then the non-owning cohabitant can stay in the property until the event agreed upon occurs.

A licence to occupy may also arise where the legal owning cohabitant leads the non-owning cohabitant to believe that they will not enforce their right of exclusive possession and the non-owning cohabitant acts to their detriment in reliance on that belief, akin to proprietary estoppel.

## **How does a non-owning cohabitant apply for an occupation order under the Family Law Act 1996?**

If a non-owning cohabitant cannot establish a beneficial interest in the property and their former cohabitant is entitled to occupy the property, they can apply for an occupation order under section 36 of the FLA 1996.

Unlike occupation orders under section 33 above, an order under section 36 may only be made for a period of six months, with the prospect of an extension for a further six month period but no longer (FLA 1996, s 36(10)).

When deciding whether to make an order under section 36 the court must take account of a wider range of factors to the circumstances, they are required to consider on an application under section 33 and including:

- the housing needs and housing resources of the parties and any relevant child;
- the financial resources of the parties;
- the likely effect of any order or any decision by the court not to exercise its powers on the health, safety or wellbeing of the parties and any relevant child; and
- the conduct of the parties to each other;
- the nature of the relationship and in particular the level of commitment involved in it;
- the length of time the parties have cohabited;
- whether there are or have been any children who are children of both parties or for whom the parties have or have had parental responsibility;
- the length of time that has elapsed since the parties ceased to live together; and
- the existence of any pending proceedings for an order for financial relief against parents under Schedule 1 of the Children Act 1989, or proceedings relating to the legal or beneficial ownership of the dwelling house.

This guide is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more information about the issues referred to in this guide, please seek formal advice.