

Chapter 08:

Using the law for protection and making safe arrangements for children

8.1 Introduction

When ending a violent relationship a woman's first priority will usually be to ensure that she and her children are safe. Therefore in this chapter we will firstly look at how a survivor can obtain legal protection from abuse; and secondly, how she can make safe arrangements for the children.

8.2 Domestic violence injunctions

An injunction is a court order to protect someone from abuse. Whether a woman is continuing to live with her partner or wants to move away from him, she can apply for an injunction for personal protection. There is no legal definition of domestic violence, but it is defined by the government as "any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been in a relationship together, or between family members, regardless of gender or sexuality." A woman has the same right of protection in England and Wales regardless of whether she is a British citizen, an overstayer, an asylum seeker or someone with leave to remain in the UK as a spouse, student or worker.

Most victims of domestic violence can get protection via an injunction under the **Family**

Law Act 1996 (FLA 1996) or the **Protection from Harassment Act 1997 (PHA 1997)**.

The two main types of injunctions under the FLA 1996 are:

- non-molestation orders; and
- occupation orders.

Even if the survivor has no legal right to occupy the property she shares with her abuser, she may still be able to get an injunction that allows her to stay in the property and requires the perpetrator to leave.

The person applying for these orders must be associated to the perpetrator; for example, she will be an associated person if she is married to or living with a violent partner; or she used to live with him, or is in an intimate relationship of a significant duration. People can also apply

for injunctions against a range of other family members. For more information, see Rights of Women's **Guide to Domestic Violence Injunctions**.

8.3 Non-molestation orders

A non-molestation order can protect a woman or any relevant child from violence or harassment. There does not need to be any physical violence to secure a non-molestation order. A woman can apply for an order even if she wants or has to continue to live with her partner.

When deciding whether to grant a non-molestation order the court must consider all the circumstances, including the health, safety and wellbeing of the applicant and her children. Therefore, the applicant must show how the perpetrator's behaviour has impacted on her health, safety and wellbeing. She can use evidence, including police reports, a letter from a health professional, a letter from a support

Before making an application for an injunction, we would strongly recommend that the woman take legal advice.

worker, photographs of her injuries, or harassing messages she has received.

- A non-molestation order can:
- forbid the abuser from being violent, threatening violence or harassment;
- forbid the abuser from coming within a certain distance of the home;
- forbid the abuser from damaging or disposing of property.

If the perpetrator breaches the non-molestation order without reasonable excuse, this is a criminal offence and the survivor should call the police.

8.4 Occupation orders

An occupation order deals with who lives in the family home, and can order the abuser to:

- move out, or stay away from the home;
- keep a certain distance from the home;
- stay in certain parts of the home, or to sleep in different bedrooms;
- allow the victim back into the home;
- continue to pay the rent/mortgage and bills.

When deciding whether to grant an occupation order, the court will consider a number of factors, including:

- the housing needs and resources of the applicant, her abuser and any children;
- the financial resources of the applicant and her abuser;

- the likely effect of any order; or of not making an order; on the applicant, her abuser and any children; and
- the applicant and her abuser's behaviour to one another.

The court will also look at the harm **the applicant** and any child might suffer if the order is made; and the harm that **the abuser** and any child might suffer if the order was made.

The type of occupation order a woman should apply for will depend on whether she is legally entitled to occupy the property, and on the type of relationship she has with the abuser; for example, whether or not she is married to or in a civil partnership with him/her.

8.5 Restraining orders under PHA 1997

Under the Protection from Harassment Act 1997 (PHA 1997) a woman can apply for a restraining order against any person responsible for harassing her.

In addition, if a woman's abuser is convicted or acquitted of any criminal offence, and the court believes that the victim has been harassed, the

criminal court can make a restraining order to protect the victim.

Under the PHA 1997, harassment is defined as a "course of conduct" causing alarm and distress. It therefore has wider application than the FLA 1996, and can also apply to a wider range of potential abusers.

8.6 Making arrangements for children: Residence and Contact

Most survivors who have children are likely to take their children with them when they leave their abusers. When deciding on contact between the children and their father, the mother should consider the effect on the child of seeing or hearing domestic violence. In

some cases, she might have serious concerns about the safety of the children during contact; and in a high proportion of cases, children living with domestic violence are themselves directly abused by the same perpetrator⁶⁴.

8.7 Contact orders

After separation, parents need to decide what contact⁶⁵ their child will have, if any, with the parent they do not live with (the non-resident parent). It is important to remember that contact is the child's right – and not the parent's.

Contact can take place in many different ways, and there are no rigid rules about what contact – if any – should take place. In some cases, there might be concerns that direct contact⁶⁶ between a child and the perpetrator of violence could place the survivor or her child at risk of further harm. A woman who has experienced domestic violence might want to propose supervised contact, where contact is supervised by a trusted person, or at a contact centre. Alternatively (or in addition) indirect contact by email or telephone could be arranged. (See further points on arranging contact where there is domestic violence, below 8.10 onwards).

If contact cannot be agreed, or one parent is not happy with the level or type of contact that has been arranged, he or she can apply to court. In this case, it is a requirement that parties attend a family mediation information and assessment meeting FMIAM (see **Family Mediation Information and Assessment Meeting**), unless one or both parties fall within certain exceptions (which include experience of domestic violence). For more information see Chapter 7, section 7.20.

The court generally believes that it is in the child's interests to have contact with the non-resident parent, unless that would result in a risk of harm to the child. When the court believes contact is in the child's best interests, it can make a **contact order**, requiring the resident parent to allow the child to visit or stay with the non-resident parent, or to have another form of contact specified in the order; (for example by telephone).

⁶⁴ For example, see Mullender et al., 2002; Hester et al., 2007; Humphrey and Stanley, (ed), 2006; Mullender and Morley, 1994.

⁶⁵ This used to be called access.

⁶⁶ This might include either visiting contact or staying contact

8.8 Residence Orders

Residence means where, or more precisely with whom, a child will live after separation⁶⁷. A residence order states which parent (or other person) a child will live with on a permanent basis, and who should be the child's primary carer. If a woman has agreed with her ex-partner that their children should live with her, she does not need to apply for a residence order. For more information see Rights of Women's **Guide to Residence Orders**.

If the parents cannot agree residence, one or other party can make an application to court for residence. Generally they are expected to attend an initial family mediation information and assessment meeting (FMIAM). (See Chapter 7, section 7.20 on Family Mediation Information and Assessment Meetings, which lists those

circumstances in which parties could be exempt from this requirement).

If there is a disagreement over child contact or residence, the client should contact Rights of Women advice line or seek legal advice from a family solicitor. She might be eligible for free legal aid (see Chapter 7, D Legal Aid for more detail on eligibility).

When seeking legal advice it is important that the survivor gives full and frank details of the situation and, if there has been domestic violence or any other particular concerns, how these might have affected the children. In particular, she should tell her legal adviser if the perpetrator has directly abused the children in the past, or if she has any doubts about the children's safety⁶⁸.

8.9 Who can apply for contact and residence?

Anyone with parental responsibility (PR) can make an application to court for a child contact or residence order at the family court. Biological fathers who do not have PR also have the right to make applications

for contact and residence. It is important to check whether the father of a child has PR. For more information on who has PR and what PR means see Rights of Women's **Guide to Parental Responsibility**.

8.10 Factors the court considers when deciding contact and residence

The law relating to child contact and residence is set out in the Children Act 1989. This legislation states that the welfare of the child must be paramount, and it is the child (rather than the parents) who has rights when there are disagreements. When making the decision, the court must also consider all the child's circumstances, and in particular:

- the child's wishes and feelings;
- the child's physical, emotional and educational needs;
- the likely effect on the child of any change in her or his circumstances;
- the child's age, sex, background and any characteristics the court thinks relevant (this could include any cultural or religious needs);
- any harm the child has suffered or is at risk of suffering;
- how capable both parents are of meeting the child's needs;
- the range of powers available to the court.

⁶⁷This used to be called custody.

⁶⁸There is growing evidence that contact with both parents is not always in the child's interests when there has been domestic abuse. See for example, Bell, 2008; Barnett, 2009

8.11 Domestic violence and contact

When making a decision about contact, the court must consider the effect on children of seeing or hearing domestic violence. Survivors of domestic violence, whether or not their children were directly involved, should tell the solicitor or the judge about the abuse at the earliest opportunity.

The Children and Family Court Advisory and Support Service (CAFCASS) recognises that children living with domestic violence are in a situation where their needs cannot be met. CAFCASS should screen for domestic

violence in all cases, and investigate any risks to the safety of the woman and her children.

At the beginning of court proceedings the court might arrange a **conciliation appointment** to assist both parents to reach an agreement about contact. Conciliation is not appropriate if one party has experienced domestic violence and in such cases, her solicitor and CAFCASS should be informed. If a joint meeting is suggested the survivor has the right to be seen on her own, especially if she is afraid of the other parent.

8.12 Child abduction

If you are supporting a woman who has had her child removed by the other parent, or if she is concerned that someone intends to take her child, then she needs to seek urgent legal advice. She can also contact the police and make enquiries about finding her child and

having her or him being returned to her.

It is a criminal offence for a parent to remove a child under the age of 16 from the UK without getting the prior consent of anyone else with parental responsibility.

8.13 Summary

- Before a woman addresses her finances, she needs to make sure she and her children are safe.
- Whether a woman is still living with her abuser or wants to move away from him, she can apply to court for an injunction for her protection; injunctions include a non-molestation, occupation and restraining orders.
- The child's welfare must be the court's paramount consideration when making decisions on where and with whom children should live, and what contact with the non-

resident parent that child should have.

- When there is domestic violence, the impact of this on the children, and their safety should be taken into account when arranging contact and residence.
- CAFCASS, the woman's solicitor and the judge should be informed of the abuse at the earliest opportunity.
- It is unlikely, where a woman has experienced domestic violence that mediation or conciliation will be appropriate.