

# AN INTRODUCTION TO COHABITEE PROPERTY DISPUTES

## PART I – OCCUPATION OF THE PROPERTY

### 1. No Children

#### 1.1 The General Rule:

##### 1.1.1 Owned Solely by One Party

Where the property is owned solely by one party then the non-owning party will be a mere licensee, and can therefore be required to vacate the property by the owning party by simple possession proceedings. As it is not a 'family procedure' (and would therefore in most firms be dealt with by a separate department from the family department), possession proceedings are beyond the scope of this article.

##### 1.1.2 Owned Jointly

In the absence of domestic violence, neither cohabitee will normally be allowed to occupy their home to the exclusion of the other, unless there are children involved. An exception to this might be when one party has been gone from the property for some time – in these circumstances, the other party may be allowed to retain exclusive occupation, until the property is sold.

### 2. Children - Schedule 1 Children Act

#### 2.1 Residence

Obviously, what follows assumes that it has already been determined with which party the children will primarily reside. If this has been agreed, then the 'no-order' principle means that there will usually be no residence order. If it has not been agreed then one party or the other (or both) will need to apply for a residence order, and that application will often be consolidated with the Schedule 1 Children Act application, and heard together with that application.

#### 2.2 Orders available

The court can either make an order 'requiring a settlement<sup>1</sup> to be made for the benefit of the child ... of property to which either parent is entitled', or to transfer<sup>2</sup> that property to

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<sup>1</sup> Children Act 1989, Schedule 1 paragraph 1(2)(d).

<sup>2</sup> Children Act 1989, Schedule 1 paragraph 1(2)(e).

the applicant for the benefit of the child, or to the child himself. In practice, the most common type of order is one allowing the residential parent and child to occupy the property exclusively, until such time as the child grows up or ceases full-time education. Such orders do not have any bearing upon the ownership of the property. Accordingly, if the property belongs solely to the non-residential parent, then it will revert to that party when the order has run its term.

(The court can, of course, also make periodical payments orders<sup>3</sup> (where it has jurisdiction) and lump sum orders<sup>4</sup> requiring, for example, that a lump sum be paid to be used to purchase housing for the child, but these will not be considered for the purposes of this article, save for illustrating the application of the matters to which the court should have regard, below.)

### 2.3 Factors taken into account

The factors that the court takes into account when deciding whether to make one of the above orders are set out in paragraph 4(1) of the Schedule. The court must have regard to all the circumstances, including the following:

- (a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) [essentially the parents] has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;
- (c) the financial needs of the child;
- (d) the income, earning capacity (if any), property and other financial resources of the child;
- (e) any physical or mental disability of the child;
- (f) the manner in which the child was being, or was expected to be, educated or trained.

I do not propose to go through each of these matters in detail. The determining factor is the needs of the individual child, in the light of the available resources. So, for example, in *Re P (Child: Financial Provision)*<sup>5</sup> the father was extremely wealthy and the court awarded £1 million for a home to be purchased in central London. Similarly, comparability of living standards may be relevant, so that the residential parent (and child, of course) may be raised to the level of the non-residential parent<sup>6</sup>. This article, however, is considering the

<sup>3</sup> Children Act 1989, Schedule 1 paragraph 1(2)(a).

<sup>4</sup> Children Act 1989, Schedule 1 paragraph 1(2)(c).

<sup>5</sup> [2003] 2 FLR 865.

<sup>6</sup> *F v G (Child: Financial Provision)* [2005] 1 FLR 261.

issue of the occupation of an existing property, i.e. the property in which the parties formerly cohabited. Accordingly, such considerations as standard of living are less relevant – in many cases it simply boils down to a question of whether there are resources available for suitable alternate accommodation to be obtained for the child and, if not, whether there are sufficient resources available to enable the residential parent and child to continue to reside in the existing property. Thus, if the non-residential parent can show that if the property were sold and the net proceeds divided then the residential parent would still have sufficient resources to enable them to purchase suitable alternative accommodation for themselves and the child, the court may make an order for sale. Even if there were not sufficient resources to purchase suitable alternative accommodation, an order for sale may still be made if the non-residential parent can demonstrate that the parties cannot afford to keep the existing property – the order for sale would make the residential parent unintentionally homeless, and thus eligible for immediate re-housing by the local authority.

However, in most ordinary cases (I would submit) there are no other resources available to purchase suitable alternative accommodation and it is possible for the residential parent to remain in the property. In such cases, the likelihood is that the court will make an order allowing the residential parent and child to occupy the property exclusively, until such time as the child reaches eighteen or ceases full-time education, whichever is the later, as I mentioned above.

Most of the reported cases involve non-resident parents (usually the father) of very high means, but a case that involved somewhat more modest means was *N v D*<sup>7</sup>, and this serves as a useful example of some of the principles involved in more ‘ordinary’ cases. Here, the parties had lived together for 17 years and had a 14 year old daughter. It had already been agreed that the mother and daughter would continue to reside in the former family home until the daughter grew up, with the father retaining a 20% deferred interest. However, the mother also sought a lump sum and periodical payments for the child (for which the court had jurisdiction, as the father now lived abroad). Awarding a lump sum of £45,000 (for refurbishment of the property, white goods and a car) and maintenance of £4,000 per month, the district judge held that the court had to consider the reasonableness of the amount claimed for the child’s benefit, and having determined what was a reasonable amount, had to consider whether it was reasonable for the father to pay that amount, guarding against unreasonable claims made on behalf of the child, but with the disguised aim of providing for the mother, rather than the child. On the other hand, the residential parent’s financial needs could be taken into account, as well as the manner in which the child had been brought up. Here, the sums ordered were considered to be reasonable, and were well within the father’s means to pay.

## 2.4 Procedure

Application is made to the High Court or a county court on form C1 (the application) and supplemental form C10, supported by a Statement of Means, in form C10A. The applicant must lodge one set of forms for the court, together with an additional set for each respondent. The fee payable is currently £175. The court will then issue the application and

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<sup>7</sup> [2008] 1 FLR 1629.

provide the applicant with a set of forms, including a form C6 notice to parties and a form C7 acknowledgement. The applicant must then serve all documents with the respondent, and file a statement of service with the court. The respondent should complete the acknowledgement within 14 days of service, file it with the court and serve a copy upon the applicant.

The court will fix an initial directions appointment. However, the exact procedure thereafter is likely to differ from court to court, and from one case to the next (for example, depending upon whether there is also a residence application pending – see above). Note that applications are not governed by the same rules as ancillary relief applications. However, the Court of Appeal has indicated the desirability of the parties agreeing to exchange Form Es, and that questionnaires should be exchanged, and an FDR-style hearing encouraged<sup>8</sup>.

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<sup>8</sup> See *Morgan v Hill* [2007] 1 FLR 1480.