

PF v CF (2016)

[2016] EWHC 3117 (Fam)

07/12/2016

Barristers

Mark Johnstone

Court

Family Division

Practice Areas

Financial Remedies

Application by husband for permission to appeal a non-molestation order and occupation order.
Application refused.

H is 67, his wife (W) in her late 70's. Theirs is a 30 year marriage with prior cohabitation of 20 years. They have two adult sons aged 41 and 38. The parties enjoy a comfortable lifestyle with assets valued at several million pounds derived from H's business activities. The matrimonial home (MH) is a substantial seven bedroom property in Essex in H's sole name.

At the beginning of the year, H became seriously ill, and was admitted to hospital for over three months. While he was in hospital, W decided that the marriage had broken down. In April she arranged service of a solicitor's letter on H in hospital informing him of her intention to file for divorce. She then changed the locks and the code for the security gates at the MH.

On his discharge from hospital in or around May, there were a number of incidents at the MH as H attempted first to gain entry and later to retrieve his Rolls Royce. The sons became involved; one sided with W and the other with H.

In early June, W filed applications for non-molestation and occupation orders as well as a petition for divorce. W alleged that she was genuinely frightened of H, that she had sought advice to petition for divorce in 2007 but had been too frightened to do so. She made numerous allegations of historic physical violence but was not specific on dates or details. In 2011 the police had been called in relation to an incident at the MH and H had accepted a caution. There were no allegations of violence after that date. H cross-applied but at the start of the trial, indicated that he did not seek an occupation order against W on the basis that the home was big enough to accommodate them both.

The judge preferred W's evidence. She found H neither credible nor honest. She found that W was likely to suffer significant harm and that the making of an order was mandatory in the circumstances. She made an occupation order under s 33(7) FLA 1996 and required H to vacate the property (under s 33(3)(f)) to last until completion of the AR proceedings. She found that it was unlikely that H would

adhere to any division of living space within the home. She also made a non-molestation order to last for six months.

An application for permission to appeal was made on the following grounds:

It was plainly wrong to make an order under s 33(7) because no finding of significant harm was made and there was no evidential basis to justify such a finding. Had it appeared to the judge that H had used or threatened violence, she would have been bound to add a power of arrest to the non-molestation order under s 47(2) FLA 1996 which she did not do.

There were no grounds for finding physical harm or threats of physical harm. A finding of significant emotional harm was inconsistent with the evidence that W had been visiting H daily in hospital up to April, and the couple had been on holiday together on many occasions in the preceding 12 months. There was no medical evidence in support of W assertions about her state of mind.

In the alternative, if an order under s 33 was required, it was wrong to make an order under s 33(7) – the court should make the least interventionist order necessary to protect the applicant.

In any event, the duration of the order (which might continue for two years while AR proceedings run their course) was too long.

Upon making such an occupation order, the judge was plainly wrong to make a non-molestation order as well. The judgment did not explain why such an order was needed in addition to the occupation order. Permission to appeal was refused. The judge was entitled to make the orders she made. Her decision was based substantially on the assessment of the parties' evidence. She had ample opportunity to assess their credibility and her conclusions were clear. Although the judge did not make findings of the use or threat of violence, she was correct in observing that the Act does not require violence to be proved to justify the making of an occupation order under s 33(7). Although it was correct that usually such orders were made for periods measured in months, s 33(10) provides that the order may be made until the occurrence of a specified event or further order. This gave the judge complete discretion to determine the appropriate duration, having regard to the specific facts in the case. Given that the judge had accepted the evidence that H continued to drive past and loiter in the vicinity of the property, she was entitled to make a decision that the non-molestation order was necessary and she gave a lucid explanation for that decision in her reasons for refusal of permission to appeal.

Permission

 **Family Law Week**