

Private Law Case Law Update

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This appeal concerned the relationship between an application for an occupation order under the Family Law Act 1996 Section 33 and interim child arrangements. The father appealed an occupation order excluding him from the family home, together with the resulting variation to the interim child arrangements, which stopped the partial “nesting” arrangement that had been in place for approximately 10 months.

Mr Justice Poole held that the court did not need to view the determination of the occupation order application through the ‘prism’ of section 1 of the Children Act 1989 (neither the paramouncy principle nor the welfare checklist applied directly to the determination of an occupation order under section 33 FLA 1996). However, where occupation of the family home is closely linked to child arrangements which would necessarily change following the making of an occupation order, the court must nonetheless consider the impact of the consequential child arrangements upon the health, safety or well-being of the parties and children as part of the section 33 exercise.

[KM V LN \[2026\] EWHC 2123 \(Fam\)](#)

Background

The parties married in 2014 and had two children, A, aged 12, and B, aged 6. Following the acrimonious breakdown of the marriage in 2024, both parents continued to live with the children in the family home, a mortgage-free property in London worth approximately £5 million. There were sufficient liquid resources to fund alternative accommodation for one of the parents.

There were ongoing Children Act and financial remedy proceedings. The parents made mutual allegations of coercion, control and manipulation of the children and there had been a complete breakdown of trust between them. There had been no findings of fact in relation to the allegations. The children were subject to Children in Need plans, and the allocated social worker had prepared a section 7 report and subsequent updating evidence.

In September 2025, an interim child arrangements order was made which involved a “partial nesting arrangement”. The children remained living in the family home and, for most of the week, both parents continued to live there. During defined periods, one parent would leave and stay in a hotel so that the other could spend time alone with the children in the family home. The arrangement was imposed by the court and lasted for approximately ten months.

By March 2026, the social worker's assessment was that the parents' continued cohabitation was harmful to the children. She considered the children to be caught in the middle of the parental conflict and concluded that “a change in circumstance within the family environment is vital” and that the parents should cease living together and parent separately at the earliest opportunity. The social worker considered that “by far the most harmful factor in the children's life at present is the fact that they are caught in the middle of parental conflict.” [5.7]

Decision at First Instance

On 3 July 2026, HHJ Middleton-Roy heard the mother's application for an occupation order. The father opposed the application and proposed instead that the existing arrangement be converted into a full nesting arrangement, where the parents would never reside in the property simultaneously and would move in and out while the children remained at home.

The Judge considered the parties' respective resources, the mother's financial dependence upon the father, the high level of parental conflict and the hostility generated by their continued cohabitation. There had been no findings concerning either parent's conduct and the Judge proceeded under the broad discretionary power contained in section 33(6) FLA 1996 rather than the significant harm test under section 33(7). He considered that the existing arrangements were disruptive for the children and that they required a break from the environment of conflict. The Judge determined that with reference to the harm to the children and mother from continuing any form of nesting arrangement, an occupation order was "necessary and proportionate." [7]

The Judge ordered the father to leave the family home. The existing child arrangements had to change as a consequence. The children were ordered to spend alternate weekends with the father from Friday afternoon until Saturday evening and on Sunday between 10am and 6pm, together with some time mid-week.

The Appeal

The father's appeal was based on 5 grounds [9]. Of particular significance was Ground 1, "the judge's approach to the legal framework, and determination of the issues through the prism of section 33 of the Family Law Act 1996 rather than section 1(3) of the Children Act 1989":

"In proceedings where even M described the child arrangements and occupation of the family home as, "inextricably linked", the learned judge was wrong to determine the issues at this hearing only through the prism of section 33 of the Family Law Act 1996 and not also through the prism of section 1(3) of the Children Act 1989. As a consequence, he denied himself the opportunity to conduct a global, holistic and multi-faceted analysis of the children's needs, taking into account the positives and negatives of the available options, before determining which best met their needs on an interim basis, and prior to the final hearings - in the financial remedy proceedings listed on 20th July 2026 for 3 days and the children proceedings listed for 3 days starting 7th September [2026]."

Grounds 2–4 concerned the Judge's alleged failure to take account of material evidence from F and the Local Authority, including evidence concerning M's alleged conduct and its potential impact upon the children and their relationship with F, together with his failure to stay the occupation proceedings pending determination of the Children Act proceedings. Ground 5 alleged that F's exclusion from the family home, and the consequent reduction in his time with the children, amounted to a disproportionate interference with the Article 8 rights of F and the children.

The Relevant Law

Poole J reviewed section 33 FLA 1996 and the authorities concerning occupation orders. The following principles were identified at [20]:

- Entitlement to apply under s33(1) must be established as a pre-condition to the making of an occupation order.

- An order requiring a respondent to vacate the family home and overriding his or her property rights is a serious order which will only be justified in exceptional circumstances.
- An occupation order requiring a spouse's removal from their family home is always serious but is likely to be most serious when made against a spouse to whom alternative accommodation is not readily available .
- The proper approach is to consider first whether the evidence established that the applicant or a relevant child was likely to suffer significant harm attributable to the conduct of the respondent if an order were not made. If the answer to that question was 'yes', then under s33(7) an order must be made unless the respondent was likely to suffer significant harm if the order were made and that harm would be as great as, or greater than, the harm attributable to the conduct of the respondent which was likely to be suffered by the applicant or relevant child if the order was not made. If the answer was 'no' to the first question, then the court nevertheless has a broad discretion under s33(6).
- In considering for the purposes of s33(7) whether any significant harm likely to be suffered by the applicant or any relevant child was attributable to the conduct of the respondent, the important factor was the effect of the conduct on the applicant or child, rather than the intent of the respondent. Lack of intent might be relevant, but of itself it does not mean that any such harm could not be attributed to the respondent's conduct.
- The discretion under s33(6) is broad and should not be confined within a "straitjacket not consonant with its terminology." It may be exercised in the absence of physical violence and even where there was no reprehensible conduct by the spouse to be excluded. Harm might be attributable to both parents' conduct and their presence together in the home.

Poole J held that neither under section 33(6) nor section 33(7) is the welfare of a relevant child the court's paramount consideration. However:

"where there is a close link between occupation of property, in particular a family home, and child arrangements, the court ought to consider the impact on the health, safety or well-being of the parties and of any relevant child of any revised child arrangements consequent to the making of an occupation order, and the impact on any child arrangements... of not making an order." [21]

The High Court's Decision

The relationship between occupation orders and child arrangements

Turning to Ground 1, Poole J accepted that the application for an occupation order was closely linked to the interim child arrangements. If the father was excluded from the family home, the existing partial nesting arrangement could not continue. However, neither the paramountcy principle nor the welfare checklist applied to the determination of the occupation order itself:

"There was no error of law when the Judge proceeded to make an occupation order without applying the paramountcy principle or the welfare checklist to that decision." [30]

The broader issue was whether the Judge was nevertheless required to take into account the consequential change to the interim child arrangements, and its impact upon the welfare of the children, when determining whether to make the occupation order. Poole J held that he was obliged to do so. [30]

The occupation order would inevitably terminate the partial nesting arrangement and require revision of the interim child arrangements. Any such revision would itself involve the application of

the paramountcy principle and welfare checklist. Accordingly, when determining the occupation application, the Judge was required to consider at least the “shape” of the revised child arrangements which would follow if the father was excluded from the family home and how those arrangements would affect the health, safety or well-being of the parties and children. [31]

Poole J explained that this did not amount to a circular exercise:

“The court can consider what child arrangements would serve the best interests of a child in the event of an occupation order being made and then weigh those in the balance when considering all relevant circumstances under s33(6) or, where relevant, when considering the statutory test under s33(7).” [32]

Poole J accepted that the notes of the first-instance judgment did not demonstrate that the Judge had **expressly** considered the impact of the varied child arrangements before deciding to make the occupation order. To that extent, Ground 1 had a real prospect of success. [33]

However, reading the judgment as a whole, Poole J was satisfied that the Judge had been fully aware of the consequences for the interim child arrangements of excluding the father. The Judge knew that the children would no longer be living with the father and had in mind that the amount of time they spent with him would reduce pending the final hearing. Although it would have been preferable expressly to consider the likely post-exclusion arrangements before determining the occupation application, the Judge had the likely “shape” of those arrangements in contemplation. [34]

Poole J separately considered the revised interim child arrangements themselves. Unlike the determination of the occupation order, this was a welfare determination. The Judge had applied his mind to the welfare of the children, considered and rejected an equal division of time between the parents and concluded that the children required “breathing space from parental conflict and disruption.” Although there had not been a line-by-line analysis of the welfare checklist, Poole J would not have expected this in an ex-tempore judgment concerning short-lived interim arrangements. He was satisfied that the Judge had made “an entirely proper welfare determination” and was entitled to conclude that the arrangements ordered were in the children's best interests. [45]

The exercise of the section 33(6) discretion

In relation to the remaining grounds, Poole J was satisfied that there was ample evidence supporting the decision to terminate the nesting arrangement. The social worker considered continued cohabitation harmful to the children and had recommended that the parents cease living together. There was no subsequent evidence that the situation within the family home had improved. Although the final child arrangements hearing was only two months away, allowing the damaging situation to continue until then was likely to cause the children further harm. The Judge was therefore entitled to conclude that the nesting arrangement should end. [36]–[38]

The imminence of the final child arrangements and financial remedy hearings did not necessitate a different decision. Although their timing was a relevant circumstance under section 33(6), it did not preclude the making of an occupation order or require the application to be stayed.

The Judge had also been entitled to take account of the significant disparity in the parties' financial resources. The father could readily obtain alternative accommodation, whereas the mother was financially dependent upon him. [40]

The decision also did not depend upon a finding of significant harm attributable to the father's conduct. The allegations and counter-allegations remained disputed, there had been no fact-finding exercise or admissions, and the first-instance Judge had treated conduct as neutral. The occupation order was instead justified under the broader section 33(6) discretion by reference to all the circumstances and, in particular, the adverse consequences for the mother and children of continuing the partial nesting arrangement. [41]–[43]

Poole J summarised that “In this case, the power could properly be exercised to terminate the interim nesting arrangement by excluding F from the family home and varying the interim child arrangements, even in the absence of a finding that he was guilty of any reprehensible conduct.” [44]

Ground 1 was dismissed. Poole J concluded that Grounds 2–5 had no real prospect of success and there was no other compelling reason for those grounds to be heard. Permission to appeal the interim child arrangements order was also refused. [49]

Conclusion

KM v LN provides guidance on the interaction between occupation orders and child arrangements where the two are closely connected. The judgment makes clear that the statutory exercises remain distinct. When determining an occupation order under section 33 FLA 1996, the welfare of a relevant child is not paramount, and the section 1(3) Children Act 1989 welfare checklist does not apply. However, that does not permit the court to determine occupation in isolation from its consequences for the children.

Where making an occupation order will necessarily alter existing child arrangements, the court should consider what those revised arrangements are likely to look like if determined in accordance with the children's best interests. Their impact upon the health, safety or well-being of the children and parties then forms part of the section 33 assessment.

The Judge outlines the considerations when the Court deals with occupation orders and interim child arrangements:

- a. ‘If it appeared to the court that the applicant or any relevant child would be likely to suffer significant harm attributable to the conduct of the respondent if an order under s33(7) were not made, the balance of significant harm under s33(7)(a) and (b); or,
- b. If it is found that s33(7) was not applicable, how the revised child arrangements would affect the health, safety or well-being of the parties and of any relevant child and any other relevant circumstances under ss33(6) including s33(6)(c).’ [31].

The judgment is also a reminder of the breadth of the discretion under section 33(6). An occupation order does not depend upon findings of violence, abuse or other reprehensible conduct by the person excluded. In an appropriate case, the damaging effect upon children of intense parental conflict and continued cohabitation can justify exclusion even where allegations of conduct remain unresolved and there has been no finding of reprehensible conduct against the parent to be excluded.



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