

ToLATA and Schedule 1

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ToLATA and Schedule 1

What can a house owner do when they are not married, but have a baby and the relationship breaks down? Occupation Order?
Balance of Harm Test?

- People living together has risen by 1.3 million since 2008 to 5 million (10.4%) in 2018 (ONS)
- In 2018 48.1% of all live births were born to parents outside of marriage or civil partnership
- Of those 67.3% were to parents who lived together

Summary

Occupation Orders

Applications for orders for sale under ToLATA

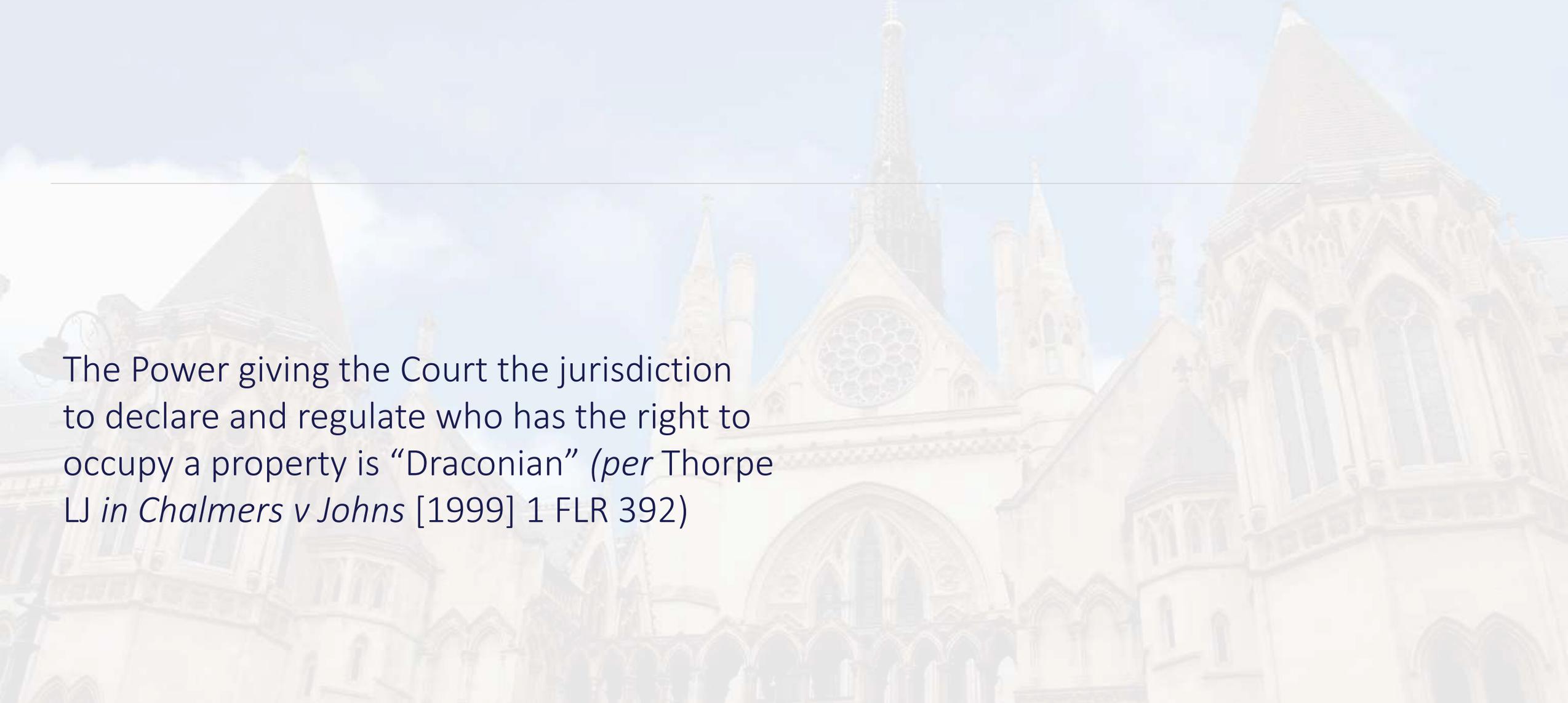
Applications under Schedule 1, Children Act 1989

Occupation Orders

Section 33 FLA 1996: applications where A has a beneficial estate or interest etc or has home rights

The home must be the home of A and another person with whom he is associated.

“Associated” person includes a wide variety of relationships including “cohabitants or former cohabitants” (section 62(3)(b))

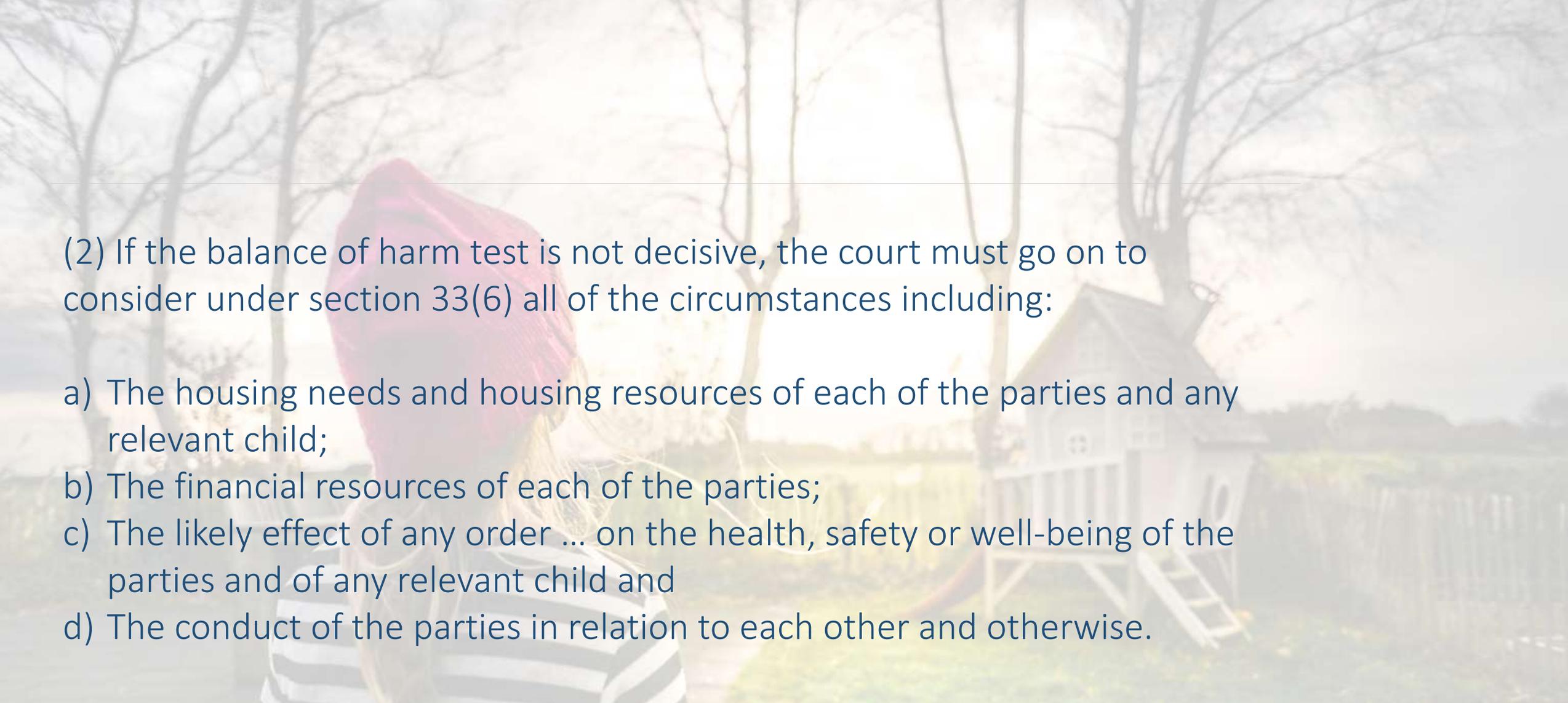


The Power giving the Court the jurisdiction to declare and regulate who has the right to occupy a property is “Draconian” (*per Thorpe LJ in Chalmers v Johns* [1999] 1 FLR 392)

“Balance of Harm” test: 2-fold:

Section 33(7): The court *shall* make an order if A or any relevant child is likely to suffer significant harm attributable to the conduct of R *unless* R or any relevant child would suffer significant harm if the order were to be made and that harm is as great or greater than the harm that the applicant or any relevant child would suffer if the order were not made.

In many cases the order will be made on the basis of this test.

A child wearing a red hat and a striped shirt is seen from behind, looking towards a wooden playhouse in a garden. The background is a soft-focus outdoor scene with trees and a fence.

(2) If the balance of harm test is not decisive, the court must go on to consider under section 33(6) all of the circumstances including:

- a) The housing needs and housing resources of each of the parties and any relevant child;
- b) The financial resources of each of the parties;
- c) The likely effect of any order ... on the health, safety or well-being of the parties and of any relevant child and
- d) The conduct of the parties in relation to each other and otherwise.

Powers: the Court can:

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- a) Enforce A's entitlement to remain in occupation against the other person.
 - b) Require R to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house.
 - c) Regulate the occupation of the dwelling-house by either or both parties.

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- d) If R is entitled to remain in occupation, prohibit, suspend or restrict the exercise by him of his right to occupy.
 - e) Terminate any home rights R might have.
 - f) Require R to leave the dwelling house or part of the dwelling house
 - g) Exclude R from a defined area in which the dwelling house is included.



Power to:

- Repair and maintain the dwelling house and discharge rent, mortgage payments or other outgoings;
- To make periodical payments in respect of the accommodation;
- To grant possession or use of furniture or other contents;
- To take reasonable care of furniture or other contents;
- To take reasonable steps to keep the dwelling-house and contents secure.
(Section 40)

N.B. no power to enforce: see *Nwogbe v Nwogbe* [2000] 2 FLR 744



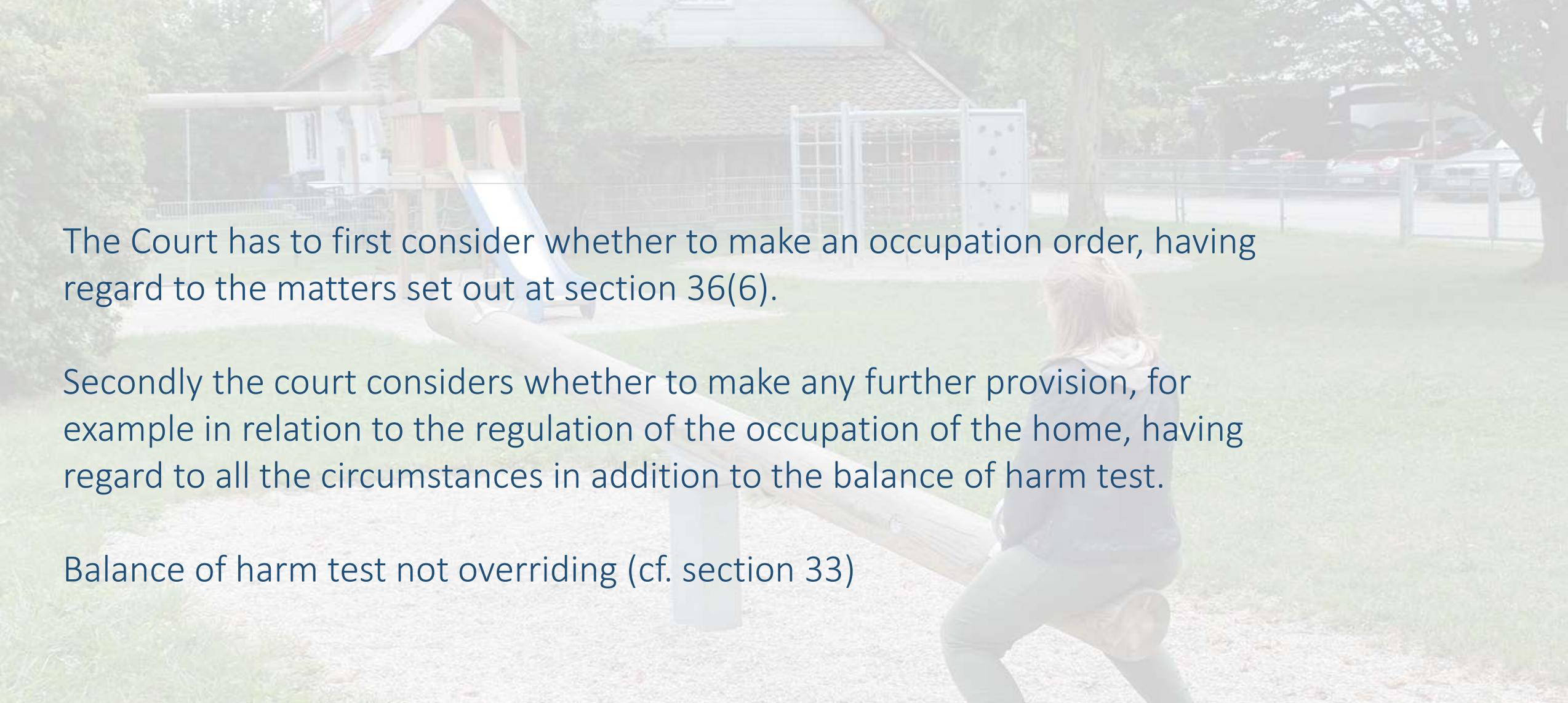
Time limit: For a specified period, until the occurrence of a specified event or until further order (section 33(10)).

No maximum duration.

Section 36: one cohabitant or former cohabitant with no existing right to occupy.

Powers to regulate occupation of the home broadly the same as under section 33 (section 36 (3), (4)(5)).



A child with long blonde hair, wearing a dark hoodie and green pants, is sitting on a wooden seesaw in a park. The seesaw is tilted upwards on the right side. In the background, there is a playground with a slide and a building with a gabled roof. A fence and parked cars are visible further back. The scene is outdoors with green grass and trees.

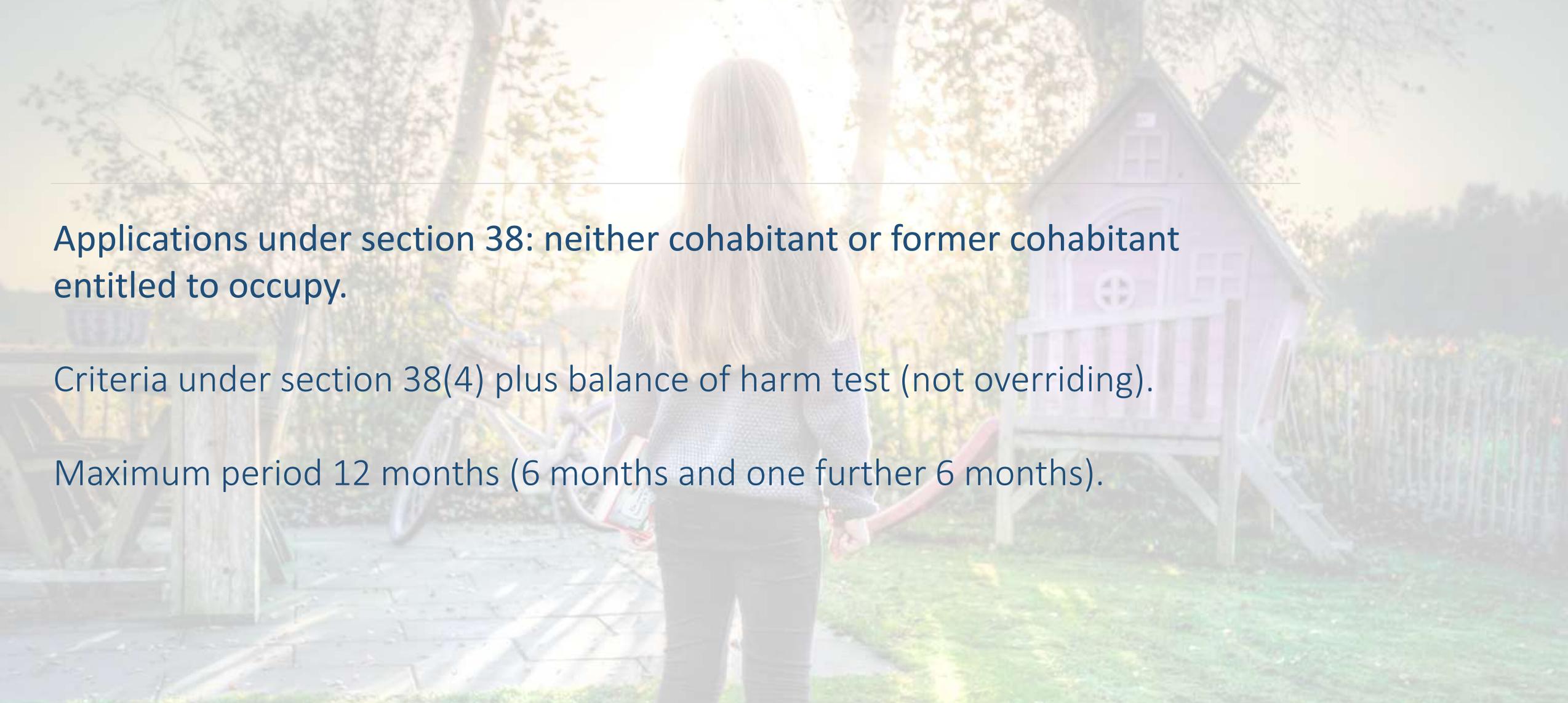
The Court has to first consider whether to make an occupation order, having regard to the matters set out at section 36(6).

Secondly the court considers whether to make any further provision, for example in relation to the regulation of the occupation of the home, having regard to all the circumstances in addition to the balance of harm test.

Balance of harm test not overriding (cf. section 33)

Court can make additional provisions pursuant to section 40

Order cannot last longer than 6 months in first instance; renew on one occasion for a period not exceeding 6 months.



Applications under section 38: neither cohabitant or former cohabitant entitled to occupy.

Criteria under section 38(4) plus balance of harm test (not overriding).

Maximum period 12 months (6 months and one further 6 months).

Applications under ToLATA Deferred Order for Sale

Longer term provision for those with an interest in the property.

Governed by sections 12 -15 ToLATA

Section 14:

“(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order-

- a) Relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or
- b) Declaring the nature or extent of a person’s interest in property subject to the trust.”

Section 15 sets out the matters that are relevant in determining applications:

“(1) The matters to which the court is to have regard in determining an application for an order under section 14 include:-

- a) The intentions of the person or persons (if any) who created the trust,
- b) The Purposes for which the property subject to the trust is held;
- c) The welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- d) The interests of any secured creditor of the beneficiary.

Not prioritised.

Orders for Sale/transfer of property

The court cannot order one beneficiary to sell or transfer his or her interest to the other.

It can, though, order that a property be sold and provide that one of the beneficiaries be given the opportunity to purchase the property at a price to be determined by the court.

In default, the property to be sold on the open market with liberty for all beneficial owners to bid. See *Bagum v Hafiz and Hai* [2015] EWCA Civ 801.

Applications under ToLATA

Exclusion from the property and compensation

Section 12: a beneficiary is entitled to occupy land if at that time the purposes of the trust include making the land available for his occupation

Section 13(1) and 14 the Court has power to exclude one co-owner on terms which include making payments. Under section 13 the power must be exercised reasonably.



Stack v Dowden: Mr Stack had to fund alternative accommodation but:

- had nothing to pay in respect of up-keep of the family home.
- had agreed to go in the course of proceedings under FLA 1996
- the property was to be sold as soon as possible so he would not be kept out of his money for long.

Schedule 1 Children Act 1989

Welfare of the child is neither the paramount nor the first consideration, but is one of relevant circumstances to be taken into account: *J v C (Child: Financial Provision)* [1999] 1 FLR 152 and *Re P* [2003] 2 FLR 865

Orders that the court can make under Schedule 1:

1) Provision for Legal Costs N.B. not available in ToLATA proceedings

CF v. KM (Financial Provision for Child: Costs of Legal Proceedings) [2011] 1 FLR 208:
order for lump sum to meet on-going legal costs made

Dickson v Rennie [2014] EWHC 4306: £10,000 awarded to the mother towards her costs of £14,700 in pursuing an appeal to the First Tier Tribunal expressly for the purpose of funding her lawyers

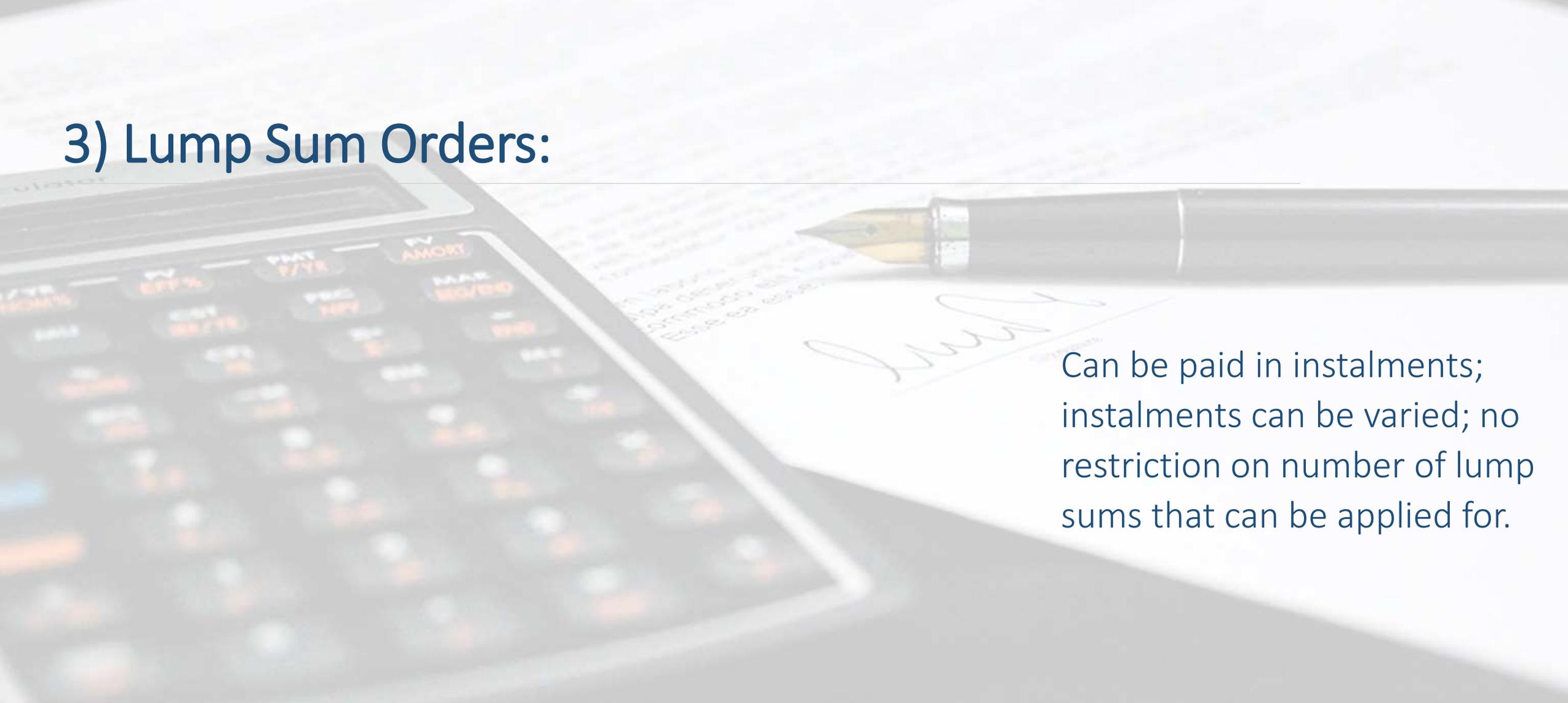
2) Settlement of Property/Transfer of Property order (one only)

Re P still the leading case [2003] 2 FLR 865.

Housing fund £1 million; £100,000 for internal decoration and payments £70,000pa

See also *Re N (Payments for Benefit of Child)* [2009] EWHC 11 (Fam): £20,000 lump sum; £220,000 for a home for the benefit of the child until he was 21 or the end of tertiary education, whichever the later. Munby J: special or exceptional cases apart, e.g. disability, dependency ceased at 18.

3) Lump Sum Orders:



Can be paid in instalments; instalments can be varied; no restriction on number of lump sums that can be applied for.

E.g.s

- Replacement property where a property had previously been purchased under a trust (*MT v OT* [2018] EWHC 868)
- £25,000 for the purchase of a family car (*H v C* [2009] 2 FLR 1540)
- £25,000 for moving costs and £25,000 for improvements to the property at a later date (*MT v OT supra*)
- £44,000 reimbursing an applicant for mortgage payments and general running costs incurred in providing the child with a home resulting from the father under-paying a flawed CSA assessment (*DE v AB* [2011] EWHC 3729)
- Lump sum order for a deposit for a property??

4) Maintenance top-up

Only where the CMS does not have jurisdiction: typically where the non-resident parent's income exceeds a defined threshold (currently £3,000 per week gross).

5) Carer's Allowance

See *Re P*

PG v TW [2014] 1 FLR 923

Procedure

W v W (Joinder of Trusts of Land Act and Children Act applications)[2004] 2 FLR 321 per Thorpe LJ:

Conjoined applications
Schedule 1 has lead status

Conclusion

Occupation Orders: for regulation of the family home in the short term.

ToLATA/Schedule 1: for regulation of the family home in the medium/long term.

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