

## CHILDREN & DIVORCE

Unfortunately disputes about children are not uncommon when a relationship breaks down although most couples do make perfectly satisfactory arrangements which work very well without any assistance from anyone. Fortunately this is the ideal situation and it is what usually happens in the majority of cases. Sadly, agreement is not always possible and the matter becomes contentious. Sometimes the reasons for this are misguided and one (or both) parties may be using their children to score emotional points at one another. However on other occasions there are very real causes for concern as to the well-being of the child and so court action becomes unavoidable if the parties concerned cannot come to a satisfactory agreement.

It is fair to say that the courts do usually regard imposing a solution in respect of children as a last resort and they will try to encourage the parties to resolve their differences by conciliation if at all possible. If questions of residence and/or contact have to be decided by a court then there is one over-riding principle which comes before all others: the court will make its decision in the light of what it considers to be the best interests of the child.

There are other factors, of course. For instance, if a teenage child is resolutely opposed to contact with one parent then a court is very unlikely to make an order which has little chance of being obeyed. With younger children the wishes of the child are taken into account depending on age but they are not decisive in themselves.

Generally speaking, a court will consider contact with both parents to be in the interests of the child and it is very unusual for, say, a non-custodial parent to be denied contact with the child. There would have to be quite unusual circumstances for such an order to be made.

In practice, although the test of what is in the child's best interests seems simple enough, if one parent seeks to prevent the other having contact at all then legal advice is almost always necessary. Another point which it is probably worth mentioning because it is raised so often is the fact that there is no connection between whether the absent parent pays maintenance and whether contact is allowed.

Contact is decided on the basis of what is in the best interests of the child and that is not necessarily dependent upon whether the absent parent pays maintenance. Many people regard this as unfair but that is the rule. They are two separate and legally distinct issues.

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## PARENTS - DO'S AND DON'TS

### Do

- Do give as much reassurance to your child as possible
- Give repeated advice about what is happening in ways they can understand
- Be receptive to their enquiries and perceptions
- Encourage the child in pursuing a relationship with the other parent
- Reassure the child that you as parents can manage your own affairs: that they need not be responsible for helping you
- Do encourage your child to talk about his or her feelings, particularly about the other parent, in a way that encourages them and overcomes an sense of divided loyalties

### Don't

- Don't be critical of the other parent
- Don't do anything that would undermine the child's relationship with the other parent
- Don't "lean on" older children or ask them for advice
- Don't ignore children's feelings or questions
- Don't assume that children who are quiet or placid on the outside are not suffering - they still need reassurance and tolerance
- Above all else, DON'T involve the children in your own battles

## ORDERS RELATING TO CHILDREN

There are many types of order which the Children Act 1989 make possible. The main ones for parents to consider are set out below. If you click on the type of order, you will get more detail about how these work in practice.

Orders may be made about children under 16:

- Either parent applying to the court
- An application by others (e.g. grand parents) in specific cases
- The court itself without anyone making an application.

The orders which regulate private arrangements for children are:

- | **Residence Order**
- | **Shared Residence Order**
- | **Contact Order**
- | **Prohibited Step Order**
- | **Specific issue order**

These orders are set out in Section 8 of the Children Act 1989, and are sometimes referred to as the "section 8 orders". The court can also make a Parental Responsibility order.

## RESIDENCE ORDER

This order settles with whom the child is to live. In some ways this is similar to the old custody orders which no longer exist.

But there are important differences too, and the courts have made a number of decisions which influence how these cases will be looked at in the future.

## Here are some Frequently Asked Questions about Residence

### Is the mother always in a stronger position?

The application of the Welfare Checklist points towards pragmatism:

- \* Who is best able to meet the child's day to day needs?
- \* What has the domestic routine been in the child's life to date?
- \* Even if there is little to choose between the two parents in terms of their actual parenting skills, are the work commitments of one more conducive to having primary care of the children? This last consideration is often fundamental and traditionally, has often worked in favour of mothers, but increasingly, need not necessarily be the case.
- \* Even where one parent does have a Residence Order in his or her favour, that does not alter the fact that the other parent retains parental responsibility and has an important role to play in the child's life. In theory at least, a Residence Order is not a passport to make important decisions about the child's upbringing on a unilateral basis.
- \* In the case of unmarried parents, the mother has sole parental responsibility until the father acquires it by way of an agreement, or Court Order. He will however be granted parental responsibility automatically if he has a Residence Order in his favour.

### What happens if there is more than one child - are they kept together?

It is important to look at each child as an individual and to apply the Welfare Checklist in respect of each of them.

It will however normally be in their best interests to keep siblings together if that is what has happened thus far in their lives.

### How long does a Residence Order last?

Until the child is 16 years old unless there are very exceptional circumstances which justify the order extending beyond the child's 16th birthday.

### At what age can a child make his or her own mind up?

In the vast majority of cases, a Residence Order, and most other orders available under the Children Act, will expire when the child reaches the age of 16.

The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding) are one part of the criteria which the Court is specifically asked to address under the Welfare Checklist.

There is no set age from which any significant weight is attached to a child's views; they are taken into account in the light of his age and understanding.

In practical terms, this will usually mean that a Court Welfare Officer will spend time with the child and then report back to the parents and the Court on how clearly the child's views were expressed and the basis upon which they are formed.

The Court Welfare Officer will also raise any concerns there may be about a child's views being expressed under the unreasonable influence of one or other of the parents.

## CO-PARENTING -SHARED OR JOINT RESIDENCE ORDERS

### What is residence?

Residence means where, or more precisely, with whom a child will live after the divorce.

S8(1) Children Act 1989 defines a residence order as one "...settling the arrangements to be made as to the person with whom a child is to live".

After separation, parents need to decide where their child or children should live.

Shared residency, or joint residency, refers to the situation where the child(ren) of parents who have divorced or separated reside(s) with each parent at different times, and each parent has equal status in law.

A joint or shared order allows the child(ren) to alternate periods of residence between the homes of both parents.

If you have participated in the upbringing of your children from birth you might hope and expect that this responsibility could continue after separation by allowing them to live with both you and your former partner.

The attitude of the courts to shared residence orders has changed in recent years and the circumstances the courts now consider favourably such an application are:-

- where a child with a strong attachment to both parents
- who is happy and confident in both homes;
- a real proximity of the two homes;
- a real proximity of the homes to the child's school;
- a real familiarity of the child with both homes;
- a sense of belonging in each;
- a clear perception by the child that he had two homes;
- a relatively fluid passage of the child between the two homes;
- a fluid passage of the child to and from each home;
- a post-separation history of the child's care being shared equally

## A SHARED RESIDENCE ORDER

(A residence order made in favour of two or more persons) is not necessarily an order requiring equal sharing, of the child spending equal amounts of time with each parent.

If a parent is considered a fit parent when they are married or living together, why should that assumption suddenly change just because they separate or divorce.

### Parental Responsibility

The biological mother of a child automatically has parental responsibility (or PR).

A married father (no matter if the marriage occurs before or after the birth of the child), also automatically obtains parental responsibility for the child, but if you do not fall into one of these categories then you need to take some action in order to acquire PR. Today, the view is very much that father's should be encouraged to play an active role in a child's life.

Parental Responsibility (PR) In England and Wales is defined in the Children Act 1989 as:

"all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his property".

It is the starting point for recognition as a parent under the law. Having parental responsibility for a child

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means that you can take decisions about matters such as education and religion and that you can consent to medical treatment for the child.

A child's biological father may get PR by entering into an agreement with the mother. This has to be on a particular form and must be filed with the court to have effect. Alternatively, a father could apply to the court for a parental responsibility order under section 4 of the Children Act. Since 1st December 2003 any father who is registered on the child's birth certificate will also automatically have parental responsibility.

Henley Law can help you to draft and register a Parental Responsibility Agreement or make an application to the court.

Other people who take on the role of parent for a child do not get PR in the same way. The usual practical route being by obtaining a residence order in respect of the child.

## CONTACT ORDER

A contact order requires the person the child lives with to allow that child to visit or stay with the person named in the order - usually the other parent. These used to be called orders for access.

For example, if the children are living with their mother, the father can ask the court to order that the children stay with him at particular times.

The court can also order that contact takes place by telephone or letter. Sometimes the court will make detailed orders about pick-up times or places if needed - or about any other area that needs its attention.

## PROHIBITED STEPS ORDER

A Prohibited steps order is used to prevent a specified course of action from taking place.

The most common examples are to stop a child being taken out of the country, or prevent a child from having a change of name.

## SPECIFIC ISSUE ORDER

This type of order is to decide a specific question about the upbringing of a child.

The most common examples are when the court is asked which school the child should go to, or where there is a dispute between parents about whether a child should undergo medical treatment.

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Here are some Frequently Asked Questions:

## **What is usual for contact- once a week, once a fortnight?**

Generally speaking, there is a presumption in favour of a child having regular contact with the parent with whom he or she does not live. Having said that, there are no hard and fast rules about how frequent that contact should be. The yard stick is the child's best interest and the Court will apply the Welfare Checklist ( [click here for the welfare check list](#) ) to determine that.

Much will depend upon practical matters such as:

- How close do the parents live to each other (i.e. geographically, is it practical for the children to see the parent with whom they do not live other than at weekends?)
- How old are the children, (often, babies and very young children will not want to be away from their primary carer overnight or for prolonged periods of time)

## **What is the best way of sorting out these problems without legal expenses?**

The Court will only seek to intervene between divorcing parents and their arrangements for contact with their children where there is a disagreement between them. That is where the potential for costly argument comes in.

If the parents are unable to agree between themselves what the pattern of contact for their children should be, the obvious alternative to instructing a solicitor to issue an application to the Court is to try to mediate an agreement.

## **I don't want the children to meet his /her new partner - do they have to?**

It is not surprising that many parents feel anxious about the prospect of their children meeting the new partner of the other parent. There is often a fear that the new partner will somehow usurp the mothers/fathers role in the child's lives. Particularly where one parent has left the marriage to be with the new partner the prospect of that new partner having a role to play in the lives of his or her children can be emotionally very difficult to come to terms with.

There is no law dealing with this point specifically, but again, the Welfare Checklist applies in the event of there being a dispute. Common sense dictates that where a child is just coming to terms with the break up of its immediate family unit it is rarely going to be in the best interests of that child to introduce a third party into the equation until such time as it is clear what, if any, role that person is to have in the child's future. Where a parent has formed a stable relationship with a new partner however, it is only natural that they should be introduced to the children.

In circumstances where there are genuine concerns about a child's welfare if he or she is introduced to a new partner, then it is possible for the Court to impose conditions upon the parent exercising the contact which may include not bringing the child into contact with a new partner.

## **What happens if I am stopped from seeing the children?**

See a solicitor. Unless the parent who is denying contact can demonstrate that it is not in the children's best interest that contact should take place, then there is a presumption in favour of contact and your solicitor will advise you of how to go about making an application to the Court. Your solicitor will, in the first instance, normally make contact with the other parent in writing to see whether a solution can be found.

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## **Can I take my child out of the Country?**

This rather depends on whether it is for a holiday or permanently. If for a holiday then either parent if the both have parental responsibility, may remove a child from the jurisdiction of England and Wales without the specific consent of the other parent and any other person with parental responsibility but as a matter of practice it is a good idea to get their consent. If a parent has a residence order in their favour then that parent is limited to a maximum of 4 weeks holiday and the parent without the residence order would need either their permission of the parent with residence or the court.

However whatever the situation it would be better to get the written permission of the other parent regardless should be obtained and that written permission should be kept with the child's passport in the event of the immigration authorities question whether the child should be taken abroad.

Neither parent can remove a child permanently from England and Wales without the permission of the other parent or the court if written permission of the other parent is unreasonably withheld, then an application may be made to the Court for permission. Emigrating with a child and leaving one parent behind can be a distressing and complicated process where the early advice of a solicitor could help offset future difficulties and emotional bitterness.

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