

A Family Law Department
Client Guide on
The Children Act

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THE CHILDREN ACT

1. General Comments

The following is intended as a brief guide to the applicable law in relation to children matters which arise from separation or divorce, or upon the dissolution of a civil partnership.

For more detailed advice, please contact any of the persons named at the conclusion of this leaflet, who will be happy to assist further.

Currently, the majority of issues concerning children which arise upon divorce/separation are determined by "The Children Act, 1989".

2. General Principles

The Children Act sets out a number of principles to which the court would have regard in determining any matter before it, in relation to children.

Whenever a court decides any issue regarding a child's future upbringing, the child's "welfare" will be the main, or overriding factor in its decision-making.

In other words, the Court will only make an Order, if they feel that it is in the child's best interests to do so.

When considering matters in relation to the children, a court is also supposed to have regard to various matters contained in a "checklist" (often called the "welfare checklist") in deciding upon what is best for a child.

The matters contained within the checklist to which the court should have regard are as follows:

2.1 The court should consider (as far as they are able) **the wishes and feelings of the child concerned.**

The weight which the court will give to this factor will depend upon the child's age and level of understanding and maturity (i.e a court is more likely to have regard to the views expressed by a 14 or 15 year old child, than those expressed by a child who is only 3 or 4 years of age).

2.2 The court will also consider who is best placed to deal with **the child's physical, emotional and educational needs.**

2.3 The court will consider the **likely affect to the child on any change in his or her circumstances.**

2.4 The court will also have regard to any **harm or risk the child has suffered or is at risk of suffering.**

2.5 The court will consider **how capable the child's parents and any other relevant person are in dealing with his/her care, or meeting the child's needs.**

Finally, the court can take into account **any particular characteristics of the child** that the court considers relevant, and can also have regard to **the child's age, sex and background.**

When dealing with children matters in general, it should be stressed that an order will only be made by the court, if it believes that making an order would be better for the child than making no order at all. If arrangements for the children are agreed with the other parent, a court may be reluctant to become involved at all, or make a court order, in these circumstances.

There is also a duty upon both the court and any solicitors involved to avoid any undue delay in all children's cases.

3. Types of Orders Available

There are generally 4 different “types” of order that a court can make under the Children Act (in addition to “parental responsibility orders”, that are discussed elsewhere).

The types of order available are listed below:

3.1. Residence Order.

This order settles the arrangements as to where the child or children are to live in the future and in this respect is similar to the old “custody orders” that were previously made by the court.

A residence order may, however, be made in favour of more than one person, and it is possible for a court to agree a “shared” or “joint” residence order where the circumstances allow, with the order then detailing the normal periods of time that the child will usually spend with each of its parents.

A residence order will usually end upon the child in question attaining the age of 16 years (when the child is normally thought to be of sufficient age and maturity to make their own decision as to where they feel it would be in their best interests to reside in future)

In the event that a residence order is made and a child’s parents later reconcile and live together for a continuous period of more than six months, then the residence order made will cease to have effect, at that point in time

Where a family involves more than one child, a court would normally hold that it would be in the children’s best interests to keep the family together, particularly if this has been the case throughout the childrens’ lives to date.

3.2. Contact Orders.

A contact order requires the person with whom the child is living to make the child available, either to visit or stay with a person named within the order, (usually the other parent). Where a child’s parents are unable to agree upon the extent and level of contact which the non-residential parent should have with the child, then either party can ask the court to decide on the most appropriate contact arrangements.

What would be an appropriate level of contact will vary in each case depending upon the circumstances that exist at the time, although the court’s presumption is that it will *almost always* be in the child’s best interests to have regular contact with the non-residential parent.

A court can make an order for “defined contact” where the days and times of contact visits are incorporated into an order. The advantage of such orders is one of certainty, in that all parties are then fully aware of precisely when the children should be made available for contact. The disadvantage of such orders is that they can often be very inflexible, as there will often be occasions where either parent, or indeed, the child themselves have their own unavoidable commitments that clash with the times of proposed contact visits. Defined contact is not, however, “set in stone” indefinitely, and either parent could apply to have the terms of contact re-defined, or extended (if contact is going well) or even stopped (if one party feels that contact is having a negative/detrimental effect upon the children).

The court can also be asked to resolve particular disputes over contact (such as whether a parent should have contact with the child over the Christmas, or school holiday periods, for example).

It is possible that the court could simply make an order for “reasonable contact”, as opposed to precisely defining the contact’s terms. Whilst the advantage of such an order is that this is far more flexible, the disadvantage is the order’s imprecise nature, and the fact that what may be deemed “reasonable contact” to one party, may not be regarded as “reasonable contact” from the other parent’s perspective.

Although there is a presumption that contact with both parents will always be in a child’s best interests, this presumption can be rebutted in some circumstances (e.g in the case of extreme domestic violence or child abuse, or where the risk of emotional and physical harm to the child if exposed to contact would be such as to make that contact undesirable).

In making a contact order, the court can impose conditions upon contact, specifying the venue where contact is to take place, and whether any persons are to be excluded from the contact, for example.

It is not simply parents who can apply for contact orders under the Children Act. It is possible for any interested person to make an application for contact in respect of the children (such as grandparents, for example), although they may require the leave of the court initially, before being allowed to proceed with their application.

3.3. Prohibited Steps Orders.

In the event that one parent is proposing a specific course of action for the child, to which the other parent objects, it is possible to apply for one of the above orders, asking a Judge to prevent the other party from taking these steps.

Common examples where “prohibited steps orders” are sought relate to situations whereby one parent intends to take a child out of the country, and the other parent wishes to object, or alternatively, one parent wishes to change the surname of a child and, again, the other parent objects to this.

In the event that an amicable solution cannot be reached in these types of dispute, a Judge can be asked to intervene and decide whether the proposed course of action is in the child’s best interests, and whether it should, therefore, be allowed.

3.4. Specific Issue Orders.

As the name suggests, this type of Order can be applied for when the court is asked to decide a specific question about the upbringing of a child where, again, the parents are unable to agree.

There may be differences of opinion as to where a child should go to school, what religion a child should be brought up practising, or whether a child should receive certain medical treatment, or not.

In the event that agreement cannot be reached directly between the parties, a Judge can then make a specific issue order, to resolve this type of dispute.

4. Procedure.

In the event that a dispute concerning children cannot be resolved in the first instance, the parties will normally be offered an opportunity to attend mediation, where they will be able to discuss the issues in the presence of an independent third party, to determine whether there are any prospects of agreement, without involving the court process. If mediation proves inappropriate, and if it proves impossible to resolve the issues directly or via solicitor correspondence, then a court application will need to be issued.

The court will normally then fix a short hearing to decide how the application should proceed. Usually, at Court, there will be an opportunity for both parents to speak with a children and family representative (called “a Cafcass Officer”). Again, the Cafcass Officer will try and speak with all parties, to determine whether the matter can be resolved without a fully contested court hearing.

In the event that matters cannot be resolved, the Judge will then give directions as to any further evidence that will be required in order to resolve the issues. In some cases, the court will order that the local Cafcass office prepares a full and detailed report upon the issues in question, often after they have interviewed all relevant parties, (in most cases, including the children)..The Cafcass officer may also make background checks for police and/or social services involvement with the family, and may also contact the children’s school in some cases

The Judge will also give directions regarding any further evidence required to determine the issues (e.g whether any witness statements are required, from anyone involved in the case).

The court is able to make interim orders whilst the matter is proceeding, and then a final order, once all the evidence has been heard, and the Cafcass Officer has reported and given their opinion on the issues involved.

